IN THE SUPREME COURT OF FLORIDA

DEBORAH KITCHEN,

Petitioner,

Case No. : 86,012

v.

K-MART CORPORATION,

Respondent.

BRIEF OF AMICI CURIAE INTERNATIONAL MASS RETAIL ASSOCIATION, NATIONAL SPORTING GOODS ASSOCIATION, AND THE FLORIDA RETAIL FEDERATION

On a Certified Question From the District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

In this brief, the parties will be referred to by name, Petitioner Deborah Kitchen as "Kitchen" and Respondent K-Mart Corporation as "K-Mart." We assume, for purposes of this brief, that all issues have been properly preserved for review.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Amici Curiae accept the facts and procedural posture of the case as set forth in the opinion of the Fourth District Court of Appeal. For purposes of this brief, the facts are relatively simple.

Beginning on the morning of December 14, 1987, Thomas Knapp began a day-long drinking spree with his ex-girlfriend. During the course of the day he consumed a fifth of whiskey and a case of beer (apparently, Knapp frequently drank enormous amounts of alcohol). Around 8:30 p.m., after becoming angry with his ex-girlfriend, Knapp drove to a local K-Mart, where he purchased a .22 caliber bolt action rifle and a box of bullets at approximately 9:45 p.m.

Knapp said that he had no recollection of what occurred in the K-Mart. The clerk who sold Knapp the rifle and bullets testified that Knapp's handwriting on the required federal form was not legible, and that he filled out another form for Knapp and had Knapp initial each of the "yes/no" answers and sign his name at the end. The clerk testified that Knapp did not appear to be intoxicated, and that K-Mart has an internal policy against selling firearms to intoxicated persons. There was no other direct

evidence regarding Knapp's behavior in the K-Mart. Plaintiff presented testimony that, if Knapp had consumed as much alcohol during the day as he testified he had, he would have been visibly intoxicated.

After purchasing the rifle and bullets, Knapp drove back to the bar and, after observing his ex-girlfriend leave in a car with friends, followed them in his truck. He rammed them from behind when they were stopped at a light. He then forced them off the road and shot the ex-girlfriend, rendering her a permanent quadriplegic. Knapp subsequently pled guilty to attempted murder and is serving a fifty-five year sentence.

The complaint alleged both common-law negligence and violations of Section 790.17, Florida Statutes, and 18 U.S.C. §922. The trial court directed a verdict for K-Mart on the statutory claims and submitted the case to the jury on the theory of common-law negligence. Having permitted the introduction of evidence of K-Mart's internal policy against selling firearms to intoxicated persons, the court instructed the jury that K-Mart's violation of its own internal policy was evidence of negligence. The jury returned a verdict finding K-Mart guilty of negligence and assessed damages in the amount of $12,580,768.

On appeal, the Fourth District Court of Appeal, noting that there was no evidence of any type of erratic behavior by Knapp while at K-Mart, but only that he had consumed a substantial amount of alcohol, reversed and remanded for entry of a judgment in favor of K-Mart. The court observed that the Legislature had entered the

field of regulating the sale of firearms, just as it had entered the field of regulating the sale of alcohol, but that the Legislature has never gone so far as to prohibit the sale of a firearm to a person known to be intoxicated, as some other states have. Since the Legislature had not created vendor liability for the sale of a firearm under the circumstances of this case, the court held, imposition of liability on K-Mart would be taking a step which this Court had declined to take in the analogous area of alcohol vendors' liability in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). The district court accordingly concluded that the trial court should have directed a verdict in favor of K-Mart.

The district court further held that the trial court had erred in instructing the jury that a violation of K-Mart's internal policy was evidence of negligence. Rather, the district court held, the trial court should have instructed the jury that an internal rule does not itself fix the standard of care.

The district court certified that its decision passed on a question of great public importance, to wit: can a seller of a firearm to a purchaser known to the seller to be intoxicated be held liable to a third person injured by the purchase? We submit that the true question should be: Can a retailer be held civilly liable, based on the lawful sale of a firearm to an intoxicated customer, to a third party intentionally assaulted with that weapon by the customer? We suggest that this question should be answered in the negative.

SUMMARY OF ARGUMENT

Florida jurisprudence has been loath to impose liability on one party for failing to control the conduct of another, and will not due so in the absence of a "special relation" through which the defendant has the right or ability to control the other party's conduct. The relationship of vendor and purchaser is not such a relationship.

Negligence in selling a non-defective product to a "defective customer" is different from negligent entrustment. In an entrustment situation, the parties normally know each other and the entrusting party can demand the property back at any time, thus terminating the risk. In a sales transaction, the parties are normally strangers, and the seller has no right to demand return of the product once the sale has been consummated.

A firearm seller can be held liable when an unlawful sale has resulted in injury to a third party. Absent such a statutory violation, the Florida courts have generally found no such liability. In the one case in which the seller was held liable, there was no claim that there was no duty, the defendant arguing solely the doctrine of intervening cause: the court was thus not faced with the issue before the Court in this case.

Just as this Court has held that there is no civil liability for selling an automobile to a licensed, but incompetent, driver who soon injures another, and no liability for accidents caused by a drunken driver against a social host who served liquor to a minor, or alcohol in closed containers to an adult, this Court

should hold that there is no civil liability for third-party conduct here. The Legislature has determined who is fit to drive, who is fit to consume alcohol, and who is fit to purchase firearms. This Court should not require retailers to second-guess the Legislature and impose higher standards in determining who is a "worthy" customer.

The Legislature has established a comprehensive statutory scheme for regulating firearms, and has expressly pre-empted all political subdivisions of the state from entering the field. The Legislature, which is far better equipped than the courts to obtain wide public input, has expressly noted the competing public policy considerations involved in this area. The Court should defer to the Legislature in this area.

Imposing vendor liability based on the lawful sale of firearms will inevitably lead to vendor liability for sales of any number of potentially-dangerous products (hunting knives, chain saws, barbed wire, pool-cleaning acid, kerosene, matches, etc.) to anyone who can be branded a "defective customer." The flow of commerce will slow to a drip, and it will become increasingly difficult to purchase such products for perfectly innocuous uses. Retailers would be forced into a paternalistic duty to screen their customers as carefully as they screen their products, in order to protect total strangers from dangers the customer may or may not pose.

Imposing liability on a seller because his customer is "dangerous" rests on the false assumption that it is possible to accurately predict violence by the customer. Even trained

psychiatrists cannot accurately predict violence by their patients, despite lengthy and intimate discussions. That fact is well documented in psychiatric and legal literature, and is one reason our courts have refused to hold mental health professionals liable for not preventing those violent outbursts. How, then, in all fairness, can retailers be held liable for not predicting and preventing violence on the part of a customer?

The district court should be upheld in its ruling that no common-law duty existed here. It should also be upheld in its ruling that the jury should have been instructed that K-Mart's internal policy did not fix the standard of care, rather than being instructed that violation of the policy was non-conclusive evidence of negligence.

The standard of care is set by what the ordinary, reasonable, prudent person would do. Industry standards, as a collective recognition of what is appropriate, are some evidence of the standard. A single entity's own internal policies, however, often represent a higher standard than the minimum required by law. courts should encourage parties to set their sights higher and have greater aspirations for protection of their customers, not discourage them by instructing juries that a failure to meet those goals shows negligence.

If a company's internal rules in fact impose a higher standard than the minimum required by law, their violation does not evince negligence -- failure to exceed the common-law standard is not evidence of failure to meet that standard. Thus, the trial court's

jury instruction was erroneous, and could easily mislead the jury into thinking that the internal rule set the standard. The instruction the district court suggested correctly advises the jury to the contrary.

The district court was correct in both of its holdings, and its decision should be approved. The certified question should be answered in the negative under the facts of this case.

ARGUMENT

I. FLORIDA DOES NOT, AND SHOULD NOT, RECOGNIZE A CAUSE OF ACTION AGAINST THE SELLER OF A FIREARM AND IN FAVOR OF A STRANGER TO THE SALES TRANSACTION WHO IS LATER INJURED BY THE PURCHASER'S USE OF THAT FIREARM, SO LONG AS THE SALE DID NOT VIOLATE ANY STATE OR FEDERAL LAW.

So far as we are aware, there is absolutely nothing in the Record to indicate that Knapp did or said anything at K-Mart to indicate his intentions, and Kitchen's negligence claim rests wholly on Knapp's having been intoxicated when he purchased the rifle.' Thus, the question before this Court is whether to recognize a cause of action for common-law negligence against K-Mart for selling a .22-caliber rifle and ammunition to an intoxicated person at 9:45 p.m. when the customer, later the same evening, intentionally shoots his ex-girlfriend with that rifle.

'There is a factual dispute as to whether Knapp's intoxication was visible to the sales clerk.

Whether a defendant has a legal duty to the plaintiff is a question of law. Paddock v. Chacko, 522 So.2d 410, 411-412 (Fla. 5th DCA 1988), rev. den., 553 So.2d 168 (Fla. 1989). Florida's courts have been loath to impose liability based on a defendant's failure to control the conduct of a third party. See, for instance Dowel1 v. Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990) (social host not liable for serving alcohol to known alcoholic who, while intoxicated, became involved in an auto accident with plaintiff); Arencibia v. Aqra, 559 So.2d 1226 (Fla. 3d DCA 1990) (affirming dismissal of complaint against homeowner by estate of social guest killed during an attempt by others to rob defendant's house); Blocker v. WJA Realty, Limited Partnership, 559 So.2d 291 (Fla. 2d DCA 1990) (affirming dismissal of complaint against jai alai fronton operator who operated valet parking service, based on defendant's having returned car to obviously intoxicated owner whose negligent driving caused plaintiff's injury); Vic Potamkin Chevrolet, Inc. v. Horne, 505 So.2d 560 (Fla. 3d DCA 1987), approved, 533 So.2d 261 (Fla. 1988) (seller of automobile not liable to passenger where a driver, who was incompetent behind the wheel, lost control of vehicle after leaving lot and hit tree, causing passenger's injury).

Thus, Florida law is in accord with the principle, set forth in the Restatement, 2d, Torts, Sections 314 and 315, that a party is under no duty to control the acts of another unless there is a

"special relation."[2] A "special relation" requires that one party have the right or ability to control the conduct of another. Garrison Retirement Home Corp. v. Hancock, 484 So.2d 1257 (Fla 4th DCA 1985).

Thus, for instance, an institution with custody and control over emotionally troubled and sometimes violent persons has a duty to exercise reasonable care in relinquishing that pre-existing control, and that duty may encompass a duty to maintain the pre-existing control or to warn reasonably foreseeable victims of potential danger when that custody and control is relaxed or relinquished. Nova University v. Wagner, 491 So.2d 1116 (Fla. 1976) (liability for beatings inflicted by emotionally-troubled children who escaped from custody of an institution for the care of such children): Nesbitt v. Community Health of South Dade, Inc., 467 So.2d 711 (Fla. 3d DCA 1985) (liability for injuries to patient discharged from institution notwithstanding knowledge that he suffered from severe mental disturbance which rendered him helpless to care for himself); Department of Health and Rehabilitative Services v. McDougall, 359 So.2d 528 (Fla. 1st DCA 1978), cert. den., 365 So.2d 711 (Fla. 1978) (liability for wrongful death caused by escaped dangerous mental patient).

In the instant case, no such "special relation" existed. K-Mart had no right or ability to control Knapp's conduct. K-Mart

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[2]In Bennet v. Cincinnati Checker Cab Co., Inc., 353 F.Supp. 1206 (E.D. Ky. 1973), the court relied on the absence of a "special relation" in holding that a firearms dealer was not liable for injuries the purchaser caused with the weapon.

was, purely and simply, a vendor, and Knapp was, purely and simply, a customer who happened to be intoxicated. K-Mart had no custody or control of him. At most, K-Mart could have asked him to leave the store. That simply is insufficient to establish a "special relation."

In Boynton v. Burslass, 590 So.2d 446 (Fla. 3d DCA 1991), the district court held that the relationship between a psychiatrist and his outpatient did not include sufficient ability or right to control the patient's behavior so as to qualify as a "special relation." In Santa Cruz v. Northwest Dade Community Health Center, Inc., 590 So.2d 444 (Fla. 3d DCA 1991), rev. den., 599 So.2d 1278 (Fla. 1992), the district court held that the relationship between a community health center and its outpatient likewise did not include sufficient ability or right to control the outpatient so as to constitute a "special relation." In both cases, it might be noted, the outpatient subsequently committed acts of violence against third parties, who thereafter brought suit against the health care provider who had failed to prevent the violence or warn victims.

Patently, a patient's relationship to his psychiatrist or health care provider is far closer than the relationship between an individual and a store he goes into to purchase something. If the psychiatrist-outpatient relationship and the health care center-outpatient relationship do not qualify as "special relations," it seems obvious that the vendor-purchaser relationship would not qualify either. In the absence of such a

"special relation," this Court should maintain consistency with a long line of Florida jurisprudence and not impose liability on one party for its failure to control the conduct of another.

In cases such as this one, where there has been no violation of any federal, state or local statutory prohibition, Florida has historically not recognized a cause of action for selling a firearm to someone who then uses it to harm himself or others.

A gun owner may be held liable for negligently entrusting it to another, in appropriate circumstances. See, for instance, Williams v. Bumpass, 568 So.2d 979 (Fla. 5th DCA 1990); Foster v. Arthur, 519 So.2d 1092 (Fla. 1st DCA 1988); Wyatt v. McMullen, 350 So.2d 1115 (Fla. 1st DCA 1977); Horn v. I.B.I. Security Service of Florida, Inc., 317 So.2d 444 (Fla. 4th DCA 1975), cert.den., 333 So.2d 463 (Fla. 1976); Langill v. Columbia, 289 So.2d 460 (Fla. 3d DCA 1974); Seabrook v. Taylor, 199 So.2d 315 (Fla. 4th DCA 1967), cert.den., 204 So.2d 331 (Fla. 1967): Bass v. Flowers, 177 So.2d 239 (Fla. 1st DCA 1965). But the case law has declined to extend the law of negligent entrustment to include negligent sales. Vic Potamkin Chevrolet, Inc. v. Horne, supra.

Negligent entrustment is different from negligent sale (as we will refer to Kitchen's theory). In a negligent entrustment situation, the parties generally know each other, and thus the entrusting party has an adequate basis for judging whether the other party can safely be loaned the weapon -- and the entrusting party has the ability to terminate the risk at any time by demanding the return of his or her property. In a sales

situation, in contrast, the parties are normally strangers and the seller has little or no knowledge of the purchaser's intents or capabilities -- and no way to reclaim the weapon once a sale has been made. Negligent entrustment cases have no bearing on the viability, or lack thereof, of Kitchen's theory of recovery.

A firearm seller can be held civilly liable where the sale is in violation of state or federal firearms laws. Tamiami Gun Shop v. Klein, 116 So.2d 421 (Fla. 1959); Coker v. Wal-Mart Stores, Inc., 642 So.2d 774 (Fla. 1st DCA 1994) (unlawful sale to minor), rev. den., 651 So.2d 1197 (Fla. 1995); Soqo v. Garcia's National Gun, Inc., 615 So.2d 184 (Fla. 3d DCA 1993) (violation of statutory 3-day waiting period for sale of handgun); Everett v. Carter, 490 So.2d 193 (Fla. 2d DCA 1986) (unlawful sale to minor), rev. den., 501 So.2d 1281 (Fla. 1986); Heist v. Lock & Gunsmith, Inc., 417 So.2d 1041 (Fla. 1st DCA 1982) (failure to require identification from buyer of weapon), rev. den., 427 So.2d 736 (Fla. 1983).[3]

Absent a statutory violation, however, the courts of this state (with a single exception discussed below) have declined to hold a firearms seller liable for the subsequent acts of the purchaser. Thus, for instance, in Tresnalacios v. Valor Corp. of

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[3]Courts in other jurisdictions have likewise held that there is a cause of action when the sale is in violation of state or federal firearms regulatory statutes. See, for instance, Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977), cert. den., 434 U.S. 835, 98 S.Ct. 123, 54 L.Ed.2d 96 (1977); West v. Mache of Cochran, Inc., 187 Ga.App. 365, 370 S.E.2d 169 (1988); Neff Lumber co. v. First National Bank of St. Clairsville, 122 Ohio St. 302, 171 N.E. 327 (1930).

Florida, 486 So.2d 649 (Fla. 3d DCA 1986), plaintiff's decedent (along with seven other people) had been shot and killed by Brown, who used a "riot and combat" shotgun he had recently purchased. Suit was brought against the manufacturer, distributor, and seller of the weapon on theories of negligence and strict liability. The trial court dismissed the case as to the manufacturer and distributor, and the district court affirmed. Noting that the weapon was not defective and that neither appellee had violated any state or federal firearm statute, the court held that neither appellee had any duty to prevent the sale of weapons to persons who are likely to cause harm to the public.

In Jimenez v. Zayre Corp., 374 So.2d 28 (Fla. 3d DCA 1979), plaintiff was injured by a shot from a BB gun, and sued the retailer and manufacturer. The trial court granted summary judgment for the defense, and the district court affirmed, finding no statutory violation and observing (at 29, n.3) that there was no common-law liability attaching to the sale.

So far as we are aware, the only Florida decision to the contrary is Angell v. F. Avanzini Lumber Company, 363 So.2d 571 (Fla. 2d DCA 1978). In Angell, defendant lumber company, which was also a firearms dealer, sold a .30-caliber rifle to a woman who shortly thereafter used it to shoot and kill someone. A wrongful death action was filed against the lumber company, with one count asserting common-law negligence and the other asserting negligence based on a breach of Section 790.17, Florida Statutes, which forbids the sale of weapons to minors and persons of unsound

mind. The district court upheld the dismissal of the second count on the basis that the facts alleged were insufficient to state a cause of action for violation of that section. It held, however, that a cause of action had been stated for common-law negligence.

In Angell, the court was not confronted with the question of whether there was any duty owed by the firearms dealer. As the district court pointed out (at 572), the defendants did not argue that there was not a duty and a breach of the duty, but instead argued solely that the intervening criminal act of the customer relieved them of liability. In short, the Angell court did not have to decide the question before this Court in this case.

Moreover, the facts in Angell are significantly different from the facts in the present case. In this case, there is no evidence that Knapp acted in any unusual manner, only that he was intoxicated. In Angell, in stark contrast, the customer's eyes were glazed and she was laughing and giggling as she hugged and kissed an employee who was a total stranger to her. After being handed a .30-caliber rifle to look at, she repeatedly aimed it at an employee's head, pulling the trigger. After one such episode, she stated that since she had shot the employee, she would have to bury him. She then demanded ammunition and, despite numerous admonitions by the employee, repeatedly attempted to load the rifle. The employee then called the sheriff's department, and was advised that he did not have to sell the rifle to her. Nonetheless, he sold the rifle and ammunition to her. Thus, the

facts of Angell are far different from the facts of the present case.

There is ample justification for holding a retailer liable for selling a defective product to a customer. However, there is no justification for holding a retailer liable for selling a (non-defective) product to a "defective customer,"[4] so long as no statute is violated in doing so. In Vic Potamkin Chevrolet, Inc. v. Horne, supra, the court held that a car dealership could not be held liable for selling a vehicle to someone who had, shortly prior thereto, demonstrated her inability to drive the vehicle safely, and who then injured her passenger as she left the lot with the newly purchased vehicle. The district court refused to impose on the vendors any liability for selling a car to a "defective customer," so long as no law was violated in doing so. This Court approved that decision. Similarly, this Court should hold, consistent with the district court's opinion, that a vendor who sells a firearm and ammunition to a "defective customer" should not be held liable for the subsequent conduct of the purchaser with the product, so long as no laws have been violated in making the sale.

Unlike the characteristics which the Legislature has deemed make one unfit to purchase a firearm (youth, felony convictions, drug addiction, etc.), intoxication is a transient condition. To paraphrase Winston Churchill, you'll be sober in the morning --

[4] Vic Potamkin Chevrolet, Inc. v. Horne, supra, at 562.

and, presumably, a careful and competent user of any firearm. By like token, one who was perfectly sober but in a cold rage could purchase a rifle, then get drunk and commit an act of violence. A purchaser's sobriety does not guarantee lawful use of the weapon, and a purchaser's inebriation does not guarantee that someone will come to harm. Evidence of intoxication is not evidence of dangerousness.

Just as the Legislature has determined what group of people are not competent to drive automobiles (those who are too young, or cannot pass licensing tests, or have had their driving privileges suspended for various reasons), the Legislature has determined what group of people are not competent to operate firearms (those who are too young, or have been convicted of a felony, or are drug addicts, etc.). Just as this Court in Horne v. Vic Potamkin Chevrolet, Inc., 533 So.2d 261 (Fla. 1988), held that there was no liability for selling a car to someone the state permitted to drive, it should hold in the present case that there is no liability for selling a rifle to someone the state permits to own firearms.

Petitioner seeks to distinguish Horne, claiming that it was bottomed on a statute (Section 319.22(2), Florida Statutes) addressing civil liability. That statute, however, only provides that a bona fide seller who has delivered possession of the car shall not be civilly liable as the owner or co-owner of the car -- in other words, that the retention of bare legal title as security for the unpaid balance of the purchase price would not

serve as a basis for invoking the dangerous instrumentality doctrine. That was not the basis the plaintiff in Horne relied on. Rather, the Horne plaintiff, like Kitchen in the present case, sought to impose a duty not to sell. Like the Court in Horne, this Court should refuse to recognize such a duty.

As the district court pointed out in its opinion, the Legislature has entered the field of regulating the sale of firearms. Indeed, Chapter 790, Florida Statutes, which deals with weapons and firearms, covers 21 pages of the Florida Statutes. (This is in addition to the federal firearm regulatory statutes found in Title 18 of the United States Code.) In Chapter 790, Florida Statutes, the Legislature has addressed at some length the sale, possession, transfer, etc., of firearms and other weapons, and has established a comprehensive statutory scheme for regulating their sale and delivery.

Section 790.17, Florida Statutes, for instance, makes it a first degree misdemeanor to sell firearms to minors under the age of 18 or persons of unsound mind. Short-barrelled rifles and shotguns are forbidden (Section 790.221, Florida Statutes), as are self-propelled knives (Section 790.225, Florida Statutes). Possession of firearms by felons, delinquents, and violent career criminals is declared unlawful in Sections 790.23 and 790.235, Florida Statutes. Armor-piercing ammunition and certain other types of ammunition are prohibited by Section 790.31, Florida Statutes. A 3-day waiting period for the purchase and delivery of handguns is imposed by Section 790.0655, Florida Statutes.

Firearms are prohibited in national forests and in schools by Sections 790.11 and 790.115, Florida Statutes. Possession of a concealed firearm at a pharmacy is proscribed by Section 790.145, Florida Statutes. Subsequent to the events at issue in this case, the Legislature enacted Section 790.151, Florida Statutes, making it a second degree misdemeanor to use a firearm in this state while under the influence of alcoholic beverages to the extent that normal faculties are impaired.[5]

The list could be extended further, but the point is clear. The Legislature has enacted a comprehensive plan for regulation of firearms. In doing so, the Legislature has had to balance the competing rights of those who lawfully possess firearms for such innocuous reasons as self-defense, hunting, and the like, against the dangers that firearms present when they fall into the wrong hands. Legislative recognition of that balancing process is demonstrated by Section 790.25(1), Florida Statutes, which provides:

> The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the

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'Since Sections 790.151(1) and (2), Florida Statutes, prohibit intoxicated persons from having a loaded firearm in hand, a dealer who sold a rifle and ammunition to an intoxicated customer after the statute's effective date, and allowed the customer to load the weapon, would appear to be aiding and abetting a statutory violation. If so, we believe that civil liability could be imposed on the vendor in that situation.

> right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

Indeed, the Legislature had expressly preempted the field of regulation of firearms and ammunition as to all other political subdivisions of the state, thereby demonstrating its intent to provide uniformity. Section 790.33(1), Florida Statutes. Indeed, Section 790.33(1), Florida Statutes, contains an express statement that

> the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto.

In subsection (3) of the same section, the Legislature states that "[i]t is the intent of this section to provide uniform firearms laws in the state . . . ."

That legislative intent to preempt the entire field of regulating the sale of firearms and ammunition should be respected by this Court (especially since, as discussed below, the regulation of sales of firearms and ammunition involves significant and competing public policy considerations which are best addressed by a legislative body capable of obtaining input from a wide spectrum of competing interests, as compared to the far more limited availability to the courts of widespread public input). The Legislature has clearly expressed its intent to preempt the field

of regulating the sale, transfer, and possession of firearms and ammunition, and to maintain uniformity throughout the state, and has clearly recognized the competing public policy considerations involved in determining the parameters of that regulation. The Court should be very reluctant to enter that field on a case-by-case basis by imposing civil liability in situations where the Legislature has not proscribed the particular conduct involved.

In Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), this Court declined to impose vendor liability on a social host who served alcohol to a minor, reasoning that the Legislature had pre-empted the field of regulating alcoholic beverages. The Legislature has similarly pre-empted the field of regulating firearms, and this Court should defer to the legislative judgment and decline to impose liability on K-Mart for lawfully selling a rifle to Knapp.

As the Legislature has recognized in Chapter 790, Florida Statutes, there are significant and competing public policy considerations involved in this entire area. On the one hand, the increasing availability of firearms, especially handguns and automatic weapons, has lead to a populace which is often fearful for its own safety from random acts of violence by total strangers. On the other hand, the right to keep and bear arms is guaranteed not only by the Second Amendment to the United States Constitution, but also by Article I, Section 8, Florida Constitution (which, it might be noted, includes a constitutional requirement of a mandatory 3-day waiting period for the purchase of handguns).

Moreover, imposing liability on the vendor of a firearm for his purchaser's subsequent use of that weapon, where the vendor has not violated any federal or state statutory prohibition in making the sale, raises additional significant public policy concerns. Is such liability to be confined to personal injury cases? If a merchant sold a rifle to an intoxicated customer who then committed an armed robbery, there seems to be no apparent reason for permitting recovery if he shot the victim, but denying recovery if he merely stole money. Likewise, if an intoxicated purchaser of a shotgun used it to blow out the rear window of someone's car, there is no apparent reason for permitting recovery for personal injuries if someone was in the car, but denying recovery for property damages if the car was vacant.

The impact of a holding by this Court that a vendor could be liable in negligence for the purchaser's subsequent use of the product to harm others could not be easily confined to the field of firearms. Should a sporting goods store be held liable for selling a hunting knife to an intoxicated customer who thereafter uses it to stab someone? Should a department store be held liable for selling the acid used to clean pools to an intoxicated customer who then throws the acid into someone's eyes? Should a service station be held liable for selling gasoline to an intoxicated patron who then gets into an accident because of his drunkenness?[6]

"Indeed, since the voluntary act of driving while intoxicated in itself evinces sufficient recklessness to warrant submitting punitive damages to a jury (Ingram v. Pettit, 340 So.2d 922 (Fla, 1976)), it could be argued, under Kitchen's theory, that the voluntary act of selling gasoline to a visibly intoxicated driver

Is it truly fair and reasonable to hold the seller of the rifle, the knife, the acid, or the gasoline liable for the acts of their intoxicated patron -- especially where the person who provided the alcohol to the patron in the first place may not be liable to that same plaintiff?[7]

Nor could liability under this theory be easily limited to the circumstance of the intoxicated patron. Under such a theory, a jury might well hold liable a sporting goods store which sold a knife to someone the store clerk knew had been convicted of assault and who then used the knife to assault another. A department store could be held liable for selling pool-cleaning acid to a known assailant who used the acid to assault another. The service station could be held liable for selling gasoline to one who was sober at the time but who was known to drive while drunk. Car dealers could be held liable for selling cars to those who seemed incompetent to handle the vehicle on a test drive.

If a business can be held liable for lawfully selling a product to someone who subsequently used it to harm someone else,

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likewise warrants a punitive damage claim.

[7]As this Court explained in Ellis v. N.G.N. of Tampa, Inc., 586 So.2d 1042 (Fla. 1991), a vendor of alcohol was not liable at common law for injuries caused by his patron's intoxication; the courts enlarged the scope of the vendor's liability, and the Legislature responded by codifying the common law rule (with a few stated exceptions). Under current law, a social host who serves alcohol to a minor cannot be held liable to one injured by the minor's subsequent intoxicated driving (Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987)), nor can a retail seller who sells alcohol in closed containers to an adult be held liable to one injured by the patron's subsequent intoxicated driving (Persen v. Southland Corp., 656 So.2d 453 (Fla. 1995).

that business will understandably be reluctant to sell any potentially dangerous product. The flow of commerce will be disrupted, and it will become increasingly difficult for persons who want to acquire firearms for such legitimate purposes as hunting and self-defense to exercise their constitutional right to keep and bear arms and for consumers of other potentially dangerous (if misused) products to obtain them for perfectly legitimate purposes. As a consequence, sellers would sell fewer products, or sell them at a higher cost. Vendors will be forced to become "Big Brother" and make significant infringements into the customer's privacy (a right constitutionally guaranteed against intrusion by the State under Article I, Section 23, Florida Constitution) in order to try to ascertain whether a particular customer is "worthy" of purchasing a firearm or other potentially dangerous product or whether that individual might be a "defective customer."

As this Court noted in rejecting vendor liability for selling a car to an incompetent driver in Horne v. Vic Potamkin Chevrolet, Inc., 533 So.2d 261, 262 (Fla. 1988): "Sellers would find it necessary to protect themselves from liability by inquiring into and verifying the competency of the purchaser to operate the [product]." Such a holding would promote commercial uncertainty, even though one of the basic goals of our jurisprudence is to increase certainty in commercial transactions. Horne v. Vic Potamkin Chevrolet, Inc., supra; Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. 2d DCA 1983).

The extent of vendor liability which could be imposed under Kitchen's theory is truly staggering. If this Court lets that genie out of the bottle, vendors throughout the state will have to assess not only the quality of their products, but also the quality of their customers. They will have to take precautions to ensure that each and every customer who purchases something which could be misused to harm someone else (and the list of such products is probably inexhaustible) was not likely to use the product in such a manner. Retailers would have to screen their customers as carefully as they screen their products -- and without the luxury of time and resources to do so carefully and thoroughly. If selling a potentially dangerous product to an intoxicated person can result in liability for the customer's subsequent acts, retailers who sell such products might have to consider administering field sobriety tests to their customers.

In order to be sure that a jury, looking at the matter in retrospect with knowledge of the harm that had actually occurred, would hold that their duty had been fulfilled, vendors would have to exercise extraordinary care to determine the "worthiness" of their customers to purchase potentially dangerous products. Retail establishments would have imposed on them a paternalistic duty to protect total strangers from dangers that might (or might not) be posed by the store's customers if the customer were permitted to purchase a product (such as a knife, a chainsaw, a hammer, kerosene, matches, barbed wire, or innumerable other common products) which could be used to inflict harm. Stores would have

to evaluate each customer to determine his or her sobriety, mental stability, level of anger, and degree of clumsiness (to prevent negligent injuries) in order to ascertain whether the particular customer was worthy of the right to purchase a product. They would have to document what precautionary steps had been taken and indefinitely preserve those documents. Commerce would grind to a virtual halt, and the attendant expenses of such precautions would inevitably be passed along to the buying public.

Placing the economic burden of crime on those who market a product that may lawfully be sold is not likely to have a significant impact on crime. The difficulty that law enforcement officials have in preventing criminal attacks does not justify transferring that responsibility to retail sellers. We respectfully submit that these are not consequences this Court should lightly impose on society.

Additionally, imposing liability on a retailer for selling a firearm to someone who then intentionally uses it to harm another is based on the false assumption that it is reasonably possible to predict violence by a third party (the customer). The fact that someone is intoxicated does not mean that they are dangerous. Reactions to alcohol vary, both between individuals and at different times in the same individual. One person may be giddy at one time, depressed on another occasion, and angry on a third occasion. Intoxication impairs judgment and loosens inhibitions, but those effects could as easily result in socially-unacceptable but comparatively harmless behavior (such as "making a pass" or

telling a superior what the individual really thinks of him or her), as to result in a drunken rage. Intoxication, in and of itself, is not evidence of dangerousness, and the Record in the present case shows nothing more than that Knapp was intoxicated.

It might, perhaps, be reasonable to predict that an intoxicated customer would have an accident due to his inebriation. It is a far different thing to require that the retailer predict that the same customer would intentionally use the firearm in a deliberate attempt to murder somebody. Even trained mental health professionals cannot adequately predict the dangerous propensities of their patients with sufficient certainty to justify imposing liability on the mental health professional for failing to prevent the patient's subsequent violent acts. We recognize, of course, that psychiatrists do not sell firearms. But imposing liability on mental health professionals for failing to predict and prevent violence by their patients rests on the assumption that they can accurately assess "dangerousness" -- and imposing liability on retailers for failing to predict and prevent violence by their customers must likewise rest on the assumption that they can accurately make that prediction of "dangerousness." In point of fact, even trained mental health professionals cannot accurately make that prediction, and for that reason the courts of this state have held that they are not civilly liable for failing to predict and prevent violence by their patients. For the same reason, retail merchants should not be held civilly liable for failing to predict and prevent violence by their customers.

Legal literature is replete with recognition that psychiatrists are inherently unable to reliably predict the "dangerousness" of the patient.[8] Both legal and psychiatric literature have repeatedly pointed out the inability of trained psychiatric professionals to correctly predict "dangerousness."' If psychiatrists cannot accurately predict patient violence, retail sales clerks obviously cannot be expected to do so.

Indeed, it was the inability of psychiatric professionals to correctly predict dangerousness which led the Third District in Bovnton v. Burglass, supra, and Santa Cruz v. Northwest Dade Community Health Center, Inc., supra, to decline to impose liability on a mental health care providers for failing to predict and prevent their patient's subsequent violent attacks on others.

If even a trained mental health professional cannot predict whether a patient poses an imminent danger to others, how can a

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'Chief Justice Burger, concurring in O'Connor v. Donaldson, 422 U.S. 563, 584, 95 S.Ct. 2486, 45 L.Ed.2d 396, 412 (1975), commented that "[t]here can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.' (Citation omitted.)." In Nesbitt v. Community Health of South Dade Inc., supra, Judge Jorgenson, concurring and dissenting, noted (at 717) that "[t]he science of psychiatry represents the penultimate grey area. Numerous cases underscore the inability of psychiatric experts to predict, with any degree of precision, an individual's propensity to do violence to himself or others. (Citations and footnote omitted.)"

[9]See, for instance Stone, The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society 90 Harvard L. Rev. 358 (1976); Diamond, The Psychiatric Prediction Of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Almy, Psychiatric Testimony: Controlling The "Ultimate Wizardry" In Personal Injury Actions, 19 The Forum 233 (1984); Steadman, The Right Not To Be A False Positive: Problems In The Application Of The Dangerousness Standard, 52 Psychiatric Quarterly 84 (1980).

simple retail establishment be held liable for failing to make that same prediction of dangerousness? Psychiatrists and other mental health professionals receive extensive training in understanding the mysterious workings of the human mind. Retail sales clerks do not. Psychiatrists have repeated and extensive contacts with their patients. A retail sales clerk may see a particular customer only one time, and only for a few moments. The interaction between psychiatrists and their patients includes probing into the innermost workings of the patient's mind, feelings and experiences. The most probing question a retail sales clerk is likely to ask a customer is whether he wants to put the purchase price on a credit card. If, as the courts of this state have held, mental health professionals cannot be expected to predict violent outbursts by their patients, and hence cannot be held liable for failing to do so, how in all fairness can a retail store be held liable for failing to appreciate the dangerousness of a customer who purchases a rifle?

For these reasons and others, courts in other jurisdictions have refused to hold sellers liable for the lawful sale of a firearm or ammunition to someone who subsequently harms another with the weapon. See, Hillberg v. F.W. Woolworth Co., 761 P.2d 236 (Colo. App. 1988); Bennet v. Cincinnati Checker Cab Co., Inc., 353 F.Supp. 1206 (E.D. Ky. 1973); Buczkowski v. McKay, 441 Mich. 96, 490 N.W.2d 330 (1992); Robinson v. Howard Brothers of Jackson,

Inc., 372 So.2d 1074 (Miss. 1979);[10] Drake v. Wal-Mart, Inc., 876 P.2d 738 (Okla.App. 1994); Knott v. Liberty Jewelry and Loan, Inc., 50 Wash.App. 267, 748 P.2d 661 (1988).[11] Firearm manufacturers have likewise been held to have no common-law duty to victims of **firearms** violence. Hillbers v. F. W. Woolworth Co., supra; Riordan v. International Armament Corp., 132 Ill.App.3d. 642, 477 N.E.2d 1293 (1985); Linton v. Smith & Wesson, 127 Ill.App.3d 676, 469 N.E.2d 339 (1984); Knott v. Liberty Jewelry & Loan, Inc., supra; Perkins v. F.I.E., Corp., 762 F.2d 1250 (5th Cir. 1985), reh. den., 768 F.2d 1350 (5th Cir. 1985).

It is worthy of note that the Washington court in Knott declined to impose common-law liability on the retailer on the basis that the Legislature had pre-empted the field (as did the district court in the present case) and that the Illinois court in Riordan likewise noted the heavy state and federal regulation of firearms. The Michigan court in Buczkowski similarly held that legislative pre-emption of the field precluded imposition of civil liability.

"Howard Brothers of Phenix City, Inc. v. Penley, 492 So.2d 965 (Miss. 1986), cited by Petitioners, is not to the contrary. No sale was involved in that case: the customer, an intoxicated former mental patient, was examining the gun and, when the salesclerk turned her back, he grabbed some ammunition, **loaded the gun, and** started walking off. Moreover, the store in that case violated state statutes which prohibited lending guns to intoxicated persons. Violation of a state firearms statute also constitutes a violation of 18 U.S.C. §922(b)(2).

[11]The Knott court specifically rejected a claim that handgun sellers had a duty to exceed statutory marketing guidelines, notwithstanding Bernethy v. Walt Failor's, Inc., 97 Wash.2d 929, 653 P.2d 280 (1982), on which Petitioner relies.

We respectfully submit that this Court should not recognize a cause of action in negligence against a retailer who, in full compliance with state and federal firearm statutes, sells a rifle to an intoxicated individual who subsequently intentionally uses that rifle to attempt to kill someone. There is no "special relationship" on which this Court should impose liability for failure to control the customer's subsequent conduct. There was no violation of any state or federal statute in selling the rifle and bullets to Knapp. Although retailers are properly held liable for selling defective products, they are not, and must not be, held liable for selling nondefective products to "defective customers." The Legislature has preempted the field of gun control, and any expansion of liability should be by legislative, not judicial, action. Resolution of such competing public policies require the type of public input that the courts are ill-suited to provide, but which the Legislature is well-equipped to provide. Horne v. Vic Potamkin Chevrolet, Inc., supra; Bankston v. Brennan, supra.

Public policy considerations weigh against imposing vendor liability. Since violence is unpredictable even by trained professionals, who cannot be held liable for failing to predict their patient's subsequent violence, such a duty, and resulting liability, should not be imposed on retailers, who lack such professional training and the extensive and intimate contact which psychiatrists have with their patients. For all of these reasons, this Court should not recognize a common-law negligence action against a retailer who sold a firearm to an intoxicated customer

who subsequently used that firearm in an attempt to murder a third party. In the context of this case, the certified question should be answered in the negative.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT K-MART'S VIOLATION OF ITS OWN INTERNAL RULE WAS EVIDENCE OF NEGLIGENCE.

K-Mart had an internal policy that it would not sell firearms to intoxicated patrons. The jury was instructed that a violation of that internal policy was evidence, albeit not conclusive evidence, of negligence. The district court held that such an instruction was improper, and that the jury should instead have been instructed that an internal rule does not itself fix the standard of care. Since many of our members have internal policies which strive to attain a standard higher than the minimum required by law, we briefly address that issue.

We submit that the district court was correct in this regard. A company's internal rules and policies set forth the way in which the company seeks to do business and to satisfy its customers. The rule may, and indeed often does, exceed the minimum standard imposed by law. For instance, K-Mart's policy of not selling firearms to intoxicated patrons clearly exceeds statutory requirements as well as any common-law duty. other retailers have other policies which exceed legal minimum requirements.

Suppose, for instance, that a car dealership which sells high performance cars decides not to sell vehicles before checking the customer's driving record and making sure the customer does not

have a record of repeated incidents of reckless driving. Assume that a package store decides not to sell alcohol to anyone they knew had a conviction for driving under the influence of alcohol, or a sporting goods store institutes a policy of not selling hunting knives to anyone under the age of 21. In each instance, the store has imposed on itself a higher standard than that required by law. If this Court were to hold that a jury could be told that failure to meet such aspirational goals was evidence of negligence, retailers would be discouraged from having such rules, for fear that they would be used against them if an employee happened to violate the rule in some instance. Surely, that is not a desirable result.

As noted in Nesbitt v. Community Health of South Dade, Inc., 467 So.2d 711 (Fla. 3d DCA 1985), the standard of care is not what is customarily done, but what the ordinary, reasonable, prudent person would do; what is customarily done is merely some evidence of that standard. For that reason, industry standards -- which represent group recognition of what ought to be done -- are admissible as non-conclusive evidence of negligence. Seaboard Coast Line R.R. Co. v. Clark, 491 So.2d 1196 (Fla. 4th DCA 1986); Dean Witter Reynolds, Inc. v. Hammock, 489 So.2d 761 (Fla. 1st DCA 1986); St. Louis-San Francisco Ry. Co. v. White, 369 So.2d 1007 (Fla. 1st DCA 1979), cert. den., 378 So.2d 349 (Fla. 1979). A single company's internal rule, on the other hand, does not reflect a broad group acceptance of a particular standard of care, but only what that one entity expects -- which may well be a

higher standard than that imposed by the common-law. Thus, the two are not truly comparable.

Evidence that a company violated its own internal rules is admissible. Nichols v. Home Depot, 541 So.2d 639 (Fla. 3d DCA 1989); Clements v. Boca Aviation, Inc., 444 So.2d 597 (Fla. 4th DCA 1984); St. Louis-San Francisco Rv. Co. v. White, supra, Reese v. Seaboard Coastline R.R. Co., 360 So.2d 27 (Fla. 4th DCA 1978). However, plaintiffs are not entitled to have the jury instructed that their violation is evidence (albeit non-conclusive evidence) of negligence: instead, the jury should be instructed that an internal rule does not itself fix the standard of care. Metropolitan Dade County v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992); Steinberq v. Lomenick, 531 So.2d 199 (Fla. 3d DCA 1988), rev. den., 539 So.2d 476 (Fla. 1989); Marks v. Mandel, 477 So.2d 1036 (Fla. 3d DCA 1985); Nesbitt v. Communitv Health of South Dade, Inc., supra.

As noted in Metropolitan Dade County v. Zapata, supra, Professor Wigmore would have the jury cautioned that a party's violation of its own internal rule is merely evidential and does not serve as the legal standard -- which is what the district court held in the present case. Such an instruction serves to advance the public policy of encouraging the voluntary setting of standards higher than those customarily employed in the community. Metropolitan Dade County v. Zasata, supra. See also, Artiqas v. Allstate Ins. Co., 541 So.2d 739 (Fla. 1989).

As the Supreme Court of Michigan noted in Buczkowski v. McKay, supra, at 332, n. 1, imposing a legal duty on a retailer on the basis of its internal policies would encourage retailers to abandon all policies enacted for the protection of others, in an effort to avoid future liability.

An entity's internal rule may well impose a higher standard of care than the law imposes. Such rules should be encouraged, not discouraged. The jury should decide whether a party's internal rule constitutes some evidence of the care required and whether that level of care is different from the common-law duty. Nance v. Winn Dixie Stores, Inc., 436 So.2d 1075 (Fla. 3d DCA 1983), rev. den., 447 So.2d 889 (Fla. 1984). That is precisely what the jury charge suggested by the district court, but not that used by the trial court, would do.

There is no apparent reason why, if a retailer desires to exceed the standard of the ordinary, reasonable, prudent person in some particular, but fails in one instance to exceed that standard, it should have to bear the risk of the jury being told that its failure to exceed the standard is evidence that it failed to meet that standard. Indeed, for the trial court to instruct the jury that a party's violation of its own internal policy was evidence of negligence would be an impermissible comment on the evidence -- one which the jury could easily understand (in the context of the present case) to mean that if they found that K-Mart had violated its own policy against selling firearms to intoxicated patrons, that alone (regardless of whether the

ordinary, reasonable, prudent person would have done the same thing) would be enough to make K-Mart liable.

This Court in Horne v. Vic Potamkim Chevrolet, Inc., 533 So.2d 261 (Fla. 1988), held that a car dealer does not fail to meet the ordinary, reasonable, prudent person's standard of care by selling a car to one whom the salesman is convinced cannot drive a block without getting into an accident. Assume that a socially-conscious auto dealer promulgated an internal rule forbidding his employees from selling cars to any customer who seemed unable to competently drive the vehicle during a test drive. If, in one instance, an employee failed to obey the rule, and sold the car to someone who was not a competent driver, and that driver then got into an accident, hurting someone else, there has been no violation by the dealer of the standard of care. Horne v. Vic Potamkin Chevrolet, Inc., susra. Nonetheless, if the trial court's ruling were upheld, the jury in that situation would be told that the employee's violation of the company's rule was evidence that there had been a violation of the standard of care.

It is for that reason that, as the district court properly held, the jury should instead be instructed that an internal rule does not itself fix the standard of care. Contrary to petitioner's protestations, the difference is far more than mere semantics. The instruction given by the trial court tells the jury that violation of a particular internal policy is in fact evidence of negligence -- when it would not be evidence of negligence if the policy in fact establishes a higher standard

than the minimum required by law. The instruction approved by the district court, on the other hand, properly tells the jury that the internal rule does not itself establish the standard of care. In conjunction with other instructions (for instance, Florida Standard Jury Instruction (Civil) 4.1, defining negligence), the jury is then properly advised as to what determines the applicable standard of care.

Violation of an internal rule is not necessarily evidence of negligence, and advising the jury that it is not conclusive evidence of negligence does not alter that fact. Internal rules often impose higher standards than the minimum required by law -- indeed, that is frequently their purpose. Negligence is determined by what the ordinary, reasonable, prudent person would do, which may or may not be the same thing as what a particular business does. Businesses should be free to impose higher standards on themselves without fear that those higher standards will come back to haunt them if, in some particular case, they are not met.

CONCLUSION

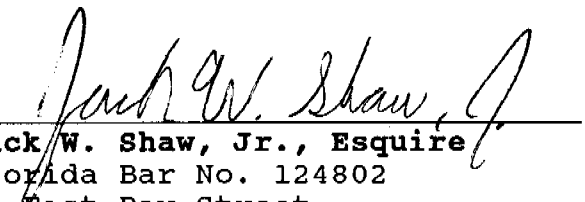
For all the reasons set forth above, this Court should approve the decision of the district court of appeal in this cause. This Court should decline to recognize a common-law negligence action against a retailer who lawfully sells a firearm and ammunition to an intoxicated customer who thereafter uses it to attempt to kill someone, when the retailer had no reason to suspect the customer's violent intentions. As applied to the

facts of this case, in which the sale was lawful, the certified question should be answered in the negative.

This Court should also approve the district court's holding that the trial court erred in instructing the jury that the violation of K-Mart's internal rule was evidence of negligence, rather than instructing the jury that the internal rule did not itself fix the standard of care.

Respectfully submitted,

BROWN, OBRINGER, SHAW, BEARDSLEY & DeCANDIO Professional Association



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 11th day of March, 1996 to Raymond Ehrlich, Esquire 50 North Laura Street, Suite 3900, Jacksonville, Florida, 32202, Joel D. Eaton, Esquire, 25 West Flagler Street, Suite 800, Miami, Florida 33130, Arthur Joel Berger, Esquire, 92 South Dadeland Boulevard, Miami, Florida 33156, Dennis A. Henigan, Esquire, 1225 Eye Street N.W., Suite 1100, Washington, D.C. 20005, John Beranek, Esquire, 227 South Calhoun Street, P. 0. Box 391, Tallahassee, Florida 32302,

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