IN THE SUPREME COURT OF FLORIDA

Case No. 86,812

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DEBORAH KITCHEN,

Petitioner,

vs.

K-MART CORPORATION,

Respondent.

****

ON A CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER KITCHEN

THE CENTER TO PREVENT HANDGUN VIOLENCE;
AMERICAN PUBLIC HEALTH ASSOCIATION;
FLORIDA POLICE CHIEFS ASSOCIATION;
TAMPA BAY AREA CHIEFS OF POLICE ASSOCIATION;
FLORIDA COALITION AGAINST DOMESTIC VIOLENCE, INC.;
CENTER AGAINST SPOUSE ABUSE, INC.; *AND* THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., FLORIDA CHAPTER

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INTEREST OF AMICI CURIAE

The Center to Prevent Handgun Violence (the "Center"), chaired by Sarah Brady, is a non-profit organization working to reduce firearm deaths and injuries through education, research and legal advocacy. Through its Legal Action Project, the Center participates in key court cases throughout the nation, advocating legal principles that will reduce gun violence. At issue in this case is the duty of a gun dealer to refrain from negligently selling his wares to high-risk individuals. This issue is a core concern of the Center.

The Center is joined on this brief by a coalition of local, state and national organizations whose members must address the threat of gun violence every working day. Their interest in ensuring that gun dealers refrain from negligently selling firearms, particularly to intoxicated persons, is direct and immediate.

The American Public Health Association (APHA) is a 124-year-old membership organization that represents over 50,000 public health professionals at the national and state affiliate levels. The object of APHA is to protect and promote personal and environmental health. APHA focuses its policies on the interrelationship between health and quality of life and on solving technical problems related to health.

The Florida Police Chiefs Association ("FPCA") is a professional organization of police executives in the State of Florida. The FPCA's goals are to secure a closer official and personal relationship among the Florida Chiefs of Police,

departmental heads of law enforcement agencies, and police officials throughout the State of Florida, in order to secure unity of action in all police matters and the advancement in all lines pertaining to the prevention and detection of crime.

The Tampa Bay Area Chiefs of Police Association is a professional organization of police executives in the Tampa Bay area. Members of the Association represent forty-seven different law enforcement agencies.

The Florida Coalition Against Domestic Violence, Inc. ("FCADV") is a not-for-profit organization incorporated in the State of Florida for the purpose of providing services and advocacy to the victims of domestic violence and their minor children. FCADV is a membership organization of 38 certified domestic violence centers and more than 80,000 battered women, their dependent children and those who serve them in Florida. For almost 17 years FCADV has provided training and technical assistance to domestic violence programs, the judiciary, law enforcement agencies, public employees, and health care professionals on issues of domestic violence.

CASA is a Florida domestic violence center which provides shelter, child advocacy, legal advocacy, community education and support for victims and survivors of domestic violence and their children, as well as a safe, supportive environment for those in crisis. CASA's purpose is to halt the perpetuation of domestic violence.

The National Association of Social Workers, Inc., Florida

Chapter is a state-wide chapter of a national organization of social workers which seeks to promote the quality and effectiveness of social work practices in the United States through services to the individual and improve the conditions of life through utilization of the professional knowledge and skills of social work.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case and statement of facts presented in petitioner Kitchen's brief.

INTRODUCTION

This case raises the fundamental issue of the legal duty of a gun dealer to refrain from selling his dangerous wares to high-risk persons. The court below reversed a jury's finding that a dealer who negligently permits a firearm to fall into the hands of one likely to use it in an unsafe or reckless manner, can be held accountable for the violent acts subsequently committed with his product. At a time when more than 200 million firearms are already in the hands of private citizens in the United States and an estimated 7.5 million firearms are sold by federally licensed firearms dealers annually,[1] this is an issue of enormous public importance.

Along with the easy availability of guns comes an unmatched

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[1] ATF Facts, FY-95-3, Bureau of Alcohol, Tobacco and Firearms Facts, Department of Treasury (Nov. 1994).

level of firearms **violence.**[2] In 1992, 37,776 people were killed with firearms in the United **States.**[3] The Justice Department reports that approximately 1.1 million people in this country faced **a** criminal offender wielding a handgun in **1993.**[4]

In the United **States,** guns have long been the homicide weapon of choice. In 1994, gunshots were the cause of death in 70% of the 22,076 homicides in this country.' Florida residents **are** in no **way** immune from this plague. In 1993, firearms were the leading cause of injury death in Florida, outranking even motor vehicle **injuries.**[6] That same year Florida ranked third in the nation in violent crimes committed with **firearms.**[7]

The vast majority of guns eventually used in crime were originally sold by firearms merchants licensed by the U.S. Department of Treasury's Bureau of Alcohol, Tobacco, and **Firearms**

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[2] **See** John Henry Sloan, et al., Handaun **Regulations,** Crime. Assaults, and Homicide: A Tale of Two Cities, The New England Journal of Medicine, Nov. 10, 1988, at 1256-1262 (comparing crime rates in Seattle, Washington where guns are easily available and Vancouver, British Columbia where guns are strictly controlled.)

[3] Kenneth Kochanek, et **al.,** Advance Report of Final Mortalitv Statistics, 1992, 43 Monthly Vital Statistics Report 56 (1995).

[4] Bureau of Justice **Statistics,** U.S. Department of Justice, Guns Used In Crime 1-2 (July 1995).

[5] Federal Bureau of Investigations, U.S. **Dep't** of Justice, Uniform Crime Resorts, 1994, at 18.

[6] Scott, J.D., Iniuries in Florida: 1993 Mortality Facts, State of Florida Department of Health and Rehabilitative Services, Florida Injury Prevention and Control Program (1993).

[7] Kathleen O'Leary Morgan, et al. Crime State Rankinss 1995: Crime in the 50 United States, at 288 (1995).

("BATF").[8] Currently, there are approximately 197,500 of these retail firearms dealers.[9] In 1993, the BATF reported that there were over 10,000 of these dealers in Florida alone.[10]

The broad issue presented by this case was succinctly described by Judge Zatkoff of the Federal District Court for the Eastern District of Michigan:

> [W]e live in a very violent society where careless and violent individuals use guns to kill and maim innocent people. Those who distribute guns must be held accountable as they are the first step in preventing lawless individuals from obtaining guns.

Al's Loan Office, Inc. v. United States Dep't, of Treasury, 738 F. Supp. 221, 225 (E.D. Mich. 1990) (emphasis added). The jury took a small step toward redressing this violence when it returned a verdict against K-Mart for creating an unreasonable risk of harm to the general public by selling a rifle to an obviously-intoxicated buyer. The court below overturned that verdict because, in its view, K-Mart had no duty to refrain from selling a gun to an obviously-intoxicated buyer. This holding was clear error and should be reversed by this Court.

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[8] Some guns eventually used in crime may have been stolen from licensed gun dealers or manufacturers.

[9] Pierre Thomas, Gun Dealer Licenses Hit 3-Year Low, Wash. Post, Feb. 22, 1995 at A3.

[10] Information provided by the Bureau of Alcohol, Tobacco and Firearms, U.S. Dep't of Treasury.

SUMMARY OF ARGUMENT

The District Court of Appeal's rejection of a common law duty to decline a firearm sale to an intoxicated person rested primarily on a gross misreading of Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). In Bankston, this Court held that section 768.125, Florida Statutes, which imposes civil liability upon alcohol vendors who willfully sell to minors, could not be read to impose civil liability upon social hosts who serve alcohol to minors. In addition, because the statute actually narrowed the civil liability of alcohol vendors which had existed at common law, this Court refused to find a common law duty on the part of social hosts to refrain from serving alcohol to minors.

Thus, Bankston stands for the proposition that a court should not extend common law liability to certain persons in an area where the legislature has passed a statute narrowing a preexisting common law duty on behalf of other persons. Because there is no statute narrowing civil liability in this case, Bankston did not prevent the lower appellate court from finding a common law duty to refrain from selling a firearm to an intoxicated person. The lower appellate court, however, misinterpreted Bankston to mean that a court should not extend common law liability whenever the legislature has "entered the field of regulating" a broad subject matter area. Because of this misreading, the court held, in effect, that it would never be negligent to sell a firearm under any circumstances that are

not also a violation of a criminal statute.

This holding also departs from well-accepted principles of common law negligence. Several courts, including one Florida District Court of Appeal, have held that gun retailers possess a common law duty not to transfer a firearm to anyone the seller can foresee is likely to be a danger to himself or others, regardless of whether the transcaction is a criminal act. This duty is akin to the doctrine, long accepted in Florida, that a firearm is a dangerous instrumentality, and that those who control a firearm possess a duty not to entrust that firearm to anyone they know is likely to use that firearm in a manner involving an unreasonable risk of harm, regardless of whether the entrustment violates a criminal statute. Aggressive and violent behavior is an obviously foreseeable consequence of entrusting a firearm to an intoxicated person. Traditional principles of negligence require that firearm retailers be held responsible for selling to such intoxicated people.

Finally, the District Court of Appeal's holding in this case contradicts the common law principle, widely accepted in Florida and other jurisdictions, that compliance with statutory and administrative standards of care does not establish as a matter of law that a defendant acted without negligence. It may be, and often is, the case that a reasonable person would take precautions additional to those imposed by the legislature. In this case, a reasonable perosn would not have sold a firearm to an intoxicated person, even though it was not criminal.

I. BANKSTON DOES NOT REQUIRE REJECTION OF A COMMON LAW DUTY FOR GUN DEALERS TO REFRAIN FROM SELLING GUNS TO VISIBLY INTOXICATED BUYERS

The District Court of Appeal's rejection of a common law duty in this case rested primarily on a gross misreading of this Court's decision in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). Contrary to the lower appellate court's ruling, nothing in Bankston prevents the recognition of a common law duty for gun dealers to refrain from selling guns to visibly intoxicated buyers.

In Bankston, this Court was asked to impose civil liability on a social host for serving alcohol to a minor who then injured a third party. This Court first examined whether such liability existed under section 768.125 of the Florida Statutes. In pertinent part, section 768.125 provides that "a person who willfuly and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age , . . may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." This Court found that this statute did not create liability for social hosts.

This Court noted that prior to enactment of section 768.125, the courts had recognized a common law duty on behalf of vendors not to provide alcohol to minors, but had not held social hosts to a similar standard. Bankston found that in response to the judicial recognition of a vendor's duty, the Florida legislature enacted section 768.125, narrowing the duty imposed by the courts. The Bankston court reasoned that it would be anomalous

to read a statute that was intended to limit vendor liability to expand that duty to include social hosts.

Having rejected the statutory cause of action, this Court next asked whether social hosts have a common law duty to refrain from providing alcohol to minors. Bankston declined to impose such a duty, not because it "lack[ed] the power to do so," but because by enacting section 768.125, "the legislature ha[d] actively entered [the] field and ha[d] clearly indicated its ability to deal with [the] policy question . . . of civil liability for a social host." Bankston, supra at 1387. This Court reasoned that when "[t]he legislature has evidenced . . . a desire to make decisions concerning the scope of civil liability in [an] area," this Court should not expand liability beyond those confines. Id. According to this Court, section 768.125, which narrowed a common law duty earlier recognized by the courts, evidenced just such a legislative desire.

Thus, when properly read, Bankston stands for the proposition that a court should not extend common law liability to certain persons in an area where the legislature has passed a statute narrowing a preexisting common law duty on behalf of other persons. That is not the situation here. There is no statute comparable to section 768.125 in the area of vendor liability for the sale of guns.

The lower appellate court clearly overextended the Bankston holding. Quoting the decision out of context, it held that by enacting provisions criminalizing the sale of firearms to minors

and the use of firearms while intoxicated the legislature had "entered the field of regulating the sale of firearms." Thus, the court concluded, under the reasoning of Bankston, the courts must refrain from imposing a common law duty on gun sellers to decline sales of firearms to obviously intoxicated buyers. But, as discussed above, the "field" the Bankston court was referring to was the issue of civil liability itself, not simply regulation in the broad subject matter area. As succinctly put by Justice Barkett in her Bankston concurrence, "Since the legislature has acted to limit the liability of vendors . . . we cannot find social hosts more liable than the legislature has determined vendors should be." Bankston, supra at 1388 (emphasis added).

The lower appellate court made the same mistake in citing to this Court's decision in Horne v. Vic Potamkin Chevrolet. Inc., 533 So.2d 261 (Fla. 1988). In Horne, this Court refused to extend civil liability to a automobile dealer who allowed the purchaser to drive away with a car even though the salesman knew that the purchaser was an incompetent driver. The Court found that this fact situation was directly addressed by a civil statute, section 319.22(2) of the Florida Statutes. Citing Bankston, the Court noted that "by enacting section 319.22(2), the legislature has evidenced its intent to bar a cause of action against the seller once ownership and possession of a motor vehicle is transferred to the purchaser." Id. at 263. Thus, Horne is wholly consistent with the reading of Bankston outlined above.

Finally, in Persen v. Southland Corn., 656 So.2d 453 (Fla. 1995), a decision not cited by the court below, this Court cited Bankston for the proposition that section 768.125 "was enacted to limit the existing liability of liquor vendors, which had been broadened by judicial decision." Id. at 454. Thus, the Persen decision recognizes that "the field" that concerned the Bankston court was the legislature's specific declaration on the question of civil liability for vendors who serve alcohol to minors, not simply the regulation of the sale of alcohol in general.

In sum, Bankston would require rejection of a common law duty on the part of K-Mart under the circumstances of this case only if the Florida Legislature had previously spoken to the issue of the civil liability of gun sellers for negligent sales. Since no such legislation exists, Bankston does not absolve K-Mart of liability.

II. THE LOWER APPELLATE COURT'S DECISION CONTRADICTS WELL-ACCEPTED PRINCIPLES OF COMMON LAW NEGLIGENCE.

Relying upon its misreading of Bank&on, the lower appellate court held, in effect, that it would never be negligent to sell a firearm under any circumstances that are not also a violation of a criminal statute. According to this holding, courts are constrained to interpret the legislature's list of prohibited firearm transfers as an exhaustive inventory of the situations in which the sale of a firearm may impose a foreseeable risk of harm

to the general public." Thus, the most unreasonable behavior would be excused simply because it is not prohibited by a criminal statute. Under the lower court's reasoning, a gun dealer would not be liable for selling a gun to a person who has indicated to the dealer that he might use it to commit an act of violence, because such a sale would violate no criminal statute.

The lower court's reasoning departs from well-accepted principles of common law negligence. First, it ignores the fact that there are a myriad of circumstances and situations in which the sale or transfer of a firearm presents an obviously foreseeable risk of harm to the public, though the transfer may not be a criminal act. Recognizing this fact, at least one Florida court, and several courts in other jurisdictions, have held that gun retailers possess a common law duty not to transfer a firearm to anyone the seller can foresee is likely to be a danger to himself or others, regardless of whether the transaction violates a criminal statute.

The District Court of Appeal's holding also conflicts with Florida's well-established doctrine of negligent entrustment. Florida courts have long held that firearms are dangerous instrumentalities, and that those who control firearms possess a duty not to entrust a gun to anyone they know is likely to use it in a manner involving an unreasonable risk of harm to himself or

[11] This is precisely the conclusion reached by the Supreme Court of Michigan in **Buczkowski v. McKay**, 490 **N.W.2d** 330 **(1992)**, which is cited favorably by the court **below.** As the discussion below makes clear, **Buczkowski** is contrary to the majority of case law in this area and should be rejected by this Court.

others, regardless of whether the entrustment violates a statute.

Finally, the District Court of Appeal's holding in this case contradicts the common law principle, widely accepted in Florida and other jurisdictions, that compliance with statutory and administrative standards of care does not establish as a matter of law that a defendant acted without negligence. It may be, and often is, the case that a reasonable person would take precautions additional to those imposed by a legislature.

A. Courts Routinely Have Held That Gun Retailers Possess A Duty Not To Transfer A Firearm To Anyone Who Is Likely To Be A Danger To Himself Or Others, Regardless Of whether The Transaction Violates Criminal Law.

Unlike the District Court of Appeal, courts in other jurisdictions have not been hesitant to impose a common law duty upon a gun retailer to decline a sale when the retailer has reason to believe that the purchaser may harm himself or others even thoush the sale is not criminal. Each of these courts simply applied the controlling principle of common law negligence: "a defendant owes a legal duty of care to persons who are foreseeably endangered by the defendant's conduct. . . ." Jacoves v, United Merchandisinq Corn., 11 Cal.Rptr.2d 468, 487 (Cal. Ct. App. 1992) (duty to decline gun sale to people who appear to be a danger to themselves or others), See also McCain V. Florida Power Corn., 593 So.2d 500, 503 (Fla. 1992) ("Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others."). This principle also applies whenever

the defendant's "affirmative conduct greatly increase[s] the risk of harm to the plaintiff through the criminal acts of others." Prosser & Keeton, Prosser & Keeton on Torts 203 (5th ed. 1984).

A gun retailer presents this very risk by selling a gun to any person the retailer has reason to believe is likely to do harm, including intoxicated persons. See infra section III. The common law duty to avoid this foreseeable risk should not be extinguished simply because it would not be "illegal" to sell the gun in these situations.

In a case almost identical to this one, the Washington Supreme Court held that firearm retailers possess a duty not to sell to someone who is incompetent due to intoxication even though, as in Florida, no statute prohibited the sale of guns to intoxicated persons. See Bernethv v. Walt Failor's, Inc., 653 P.2d 280, 283 (Wash. 1982) (sale of rifle to intoxicated man who killed his wife). Like Florida, the legislature of Washington had regulated in the field of firearm sales and prohibited the sale of handguns to minors, convicted violent felons, drug addicts, alcoholics, and people of unsound mind. Id. at 282, citing, RCW 9.41.080. Rather than interpret the statute as an exhaustive list of high risk firearm sales, the court declared that the statute reflected "a strong public policy in [the] state that certain people should not be provided with dangerous weapons."[12] Id.

[12] It would not make sense to read either the Washington prohibited transfer statute or the Florida statute as an exhaustive list of all high-risk firearm sales for purposes of

Adopting this policy, the court held that "one should not furnish a dangerous instrumentality such as a gun to an incompetent." Because this principle "applies equally well to one who is incompetent due to intoxication", the court reasoned that there should be a duty not to sell a firearm to an obviously intoxicated person. Id. at 283. This duty is analogous, according to the Bernethv court, with the established duty not to entrust a car to an intoxicated person and is best expressed in the doctrine of negligent entrustment set forth in the Restatement (Second) of Torts § 390 (1965).[13] Id.

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civil liability. First, legislatures cannot possibly anticipate every factual situation in which the sale of a firearm would create a foreseeable risk of harm to the public. Second, a criminal statute announces the policy of the state that the regulated activity is so unworthy that it merits prohibition. This pronouncement says nothing about other activities not prohibited, especially whether they impose a foreseeable risk of harm to the public which merits civil liability.

[13] Section 390 of the Restatement (Second) of Torts states:

> § 390 Chattel for Use by Person Known to be Incompetent
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965).

Section 390 of the Restatement also makes clear that a party may be considered to be incompetent due to intoxication. See Id. comment b, Illustration 4 (lending car to habitually intoxicated person); see also comment c (supplier may be responsible for the

Numerous other courts have held that gun retailers have a duty not to sell a firearm when the seller can foresee that the buyer may harm himself, herself or others even thoush the sale was not illeaal. See Phillips v. Roy, 431 So.2d 849, 852, 853 (La. Ct. App. 1983) (because of the "recognized unpredictability and dangerous propensities of the mentally ill," gun retailers have a duty to "refrain from selling a weapon to an individual manifesting signs of instability."): Peek v. Oshman's Sportinq Goods. Inc., 768 S.W.2d 841, 847 (Tex. ct. App. 1989) ("[W]ith regard to the sale of a firearm to a manifestlv irrational or mentally imbalanced person, we would impose a duty of ordinary care upon the seller because such a sale could foreseeably result in irresponsible use of the firearm by the purchaser with accompanying foreseeable injury to a third party."); Salvi v. Montaomerv Ward & Co., Inc., 489 N.E.2d 394, 403 (Ill. Ct. App. 1986) (14 year-old's negligent handling of air gun was foreseeable and, therefore, retailer possessed duty not to sell to minor) ; Jacoves v. United Merchandisinq Corp., supra at 487 ("Buyers of firearms, who appear to be a danger to themselves or others when purchasing a gun, are a class of individuals whom we legally recognize as incompetent to purchase firearms * * * [If] the seller knows or has reason to know that the purchaser is likely to be a danger to himself, herself, or others, the seller has a duty to decline to sell the firearm."); and Cullen & Boren-

harm to the entrusted party if the supplier knows the person cannot exercise the care of "a normal sober adult.").

McCain Mall, Inc. v. Peacock, 592 S.W.2d 442, 444 (Ark. 1980) (duty to decline sale because purchaser's comment suggested criminal intent).

Most notable of these cases is the Florida Court of Appeal decision in Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978), in which the court found a common law duty to decline a sale to a person exhibiting erratic behavior because the retailer "could have foreseen that injury to someone was highly probable." Id. at 572. The court reached this conclusion even though no statute was violated, the very fact which led the lower court in this case to reject liability. The lower court, however, attempted to distinguish Angell by stating that there is "no evidence" in this case that the buyer "engaged in any type of erratic behavior, only that he consumed a substantial amount of alcohol," see, Kitchen, supra at 3. This is a distinction without a difference: injury from an intoxicated person wielding a gun is no less foreseeable than the injury that may occur when an erratic person is given a gun.[14]

In each of these gun dealer liability cases, federal or state statutes controlled the retail sale of firearms and were

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[14] Such a cursory dismissal of this essential point suggests that the court below concluded, as a matter of fact, that the K-Mart sales clerk had no reason to believe the sale of a firearm to Thomas Knapp created a risk to the public despite evidence of Knapp's severe intoxication. Of course, whether the evidence is sufficient to show that a defendant has breached a duty of care is a question solely for the jury to decide. Messner v. Webb's City, Inc., 62 So.2d 66, 67 (Fla. 1952). The court's role is limited to determining "whether a foreseeable, general zone of risk was created by the defendant's conduct." McCain, supra at 502 n.1.

virtually no different in scope than the Florida statute prohibiting sales to minors and persons of unsound mind. Yet none of these courts interpreted these statutes as an exhaustive inventory of the situations in which the sale of a firearm may impose a foreseeable risk of harm to the general public. Indeed, the Bernethy court reached the opposite (and more compelling) conclusion that the statute set forth a general policy in the state to prevent the sale of firearms to high-risk, incompetent purchasers. See Bernethv supra at 282. Other courts rejected outright the defendant's claim that because they had complied with the applicable statute, they could not be considered negligent. See, Salvi v. Montsomerv Ward & Co.. Inc., supra at 404; Peek v. Oshman's Sportinq Goods, Inc., supra at 845 ([W]e . . . reject any suggestion that either the existence of the federal statute, or the nonexistence of a Texas statute, forecloses the further possibility of a common law negligence action brought by a third party against a seller of firearms. . . ."). For other courts, including the Anqell court, these statutes were simply irrelevant. See, e.q., Angell, supra at 572 (dismissing without comment negligence per se claim that purchaser was of "unsound mind" under Florida Statute section 790.17 but sustaining ordinary negligence claim); and Peacock, supra at 444 (undisputed evidence that defendant had followed the Gun Control Act).

Thus, despite the fact that, in these cases, legislatures had "actively entered the field of regulating the sale of

firearms," each of these courts recognized that a gun retailer increases the risk of harm to the public by selling to any person the retailer has reason to believe is likely to do harm, regardless of whether the sale is illegal. As discussed more fully in Section III below, sales of firearms to intoxicated persons certainly involve a foreseeable risk of harm to the public.

B. The Lower Appellate Court's Decision Contradicts Well-Established Principles Concerning The Doctrine Of Negligent Entrustment.

Florida courts have long recognized that firearms are dangerous instrumentalities, and that one who entrusts a gun to another, whether by sale or other transfer, is liable for its negligent or intentional use if the entruster knew, or had reason to know, that the other person is likely to use it in a manner involving an unreasonable risk of harm to others. See, e.g., Foster v. Arthur, 519 So.2d 1092, 1093-94 (Fla. 1st DCA 1988) (citing Restatement (Second) of Torts § 390); Jordan v. Lamar, 510 So.2d 648 (Fla. 5th DCA 1987); Horn v, I.B,I. Security Service of Florida, Inc., 317 So.2d 444, 445 (Fla. 4th DCA 1975), cert. denied, 333 So.2d 463 (Fla. 1976); Langill v. Columbia, 289 So.2d 460, 461 (3rd 1974); Seabrook v. Taylor, 199 So.2d 315, 318 (Fla. 4th DCA 1967), cert. denied, 204 So.2d 331 (Fla. 1967) (jury question whether leaving firearm accessible to child is negligent entrustment). As with the gun retailer cases cited

above, the duty not to entrust the gun attaches whenever "the harm was or should have been foreseeable by the person entrusting or delivering the weapon to another." William v. Bumpus, 568 So.2d 979, 981 (Fla. 5th DCA 1990), citing, Angell v. F. Avanzini Lumber Co., supra. Because foreseeability of harm is the focus, it makes no difference whether the firearm in question was sold by a gun dealer, see Angell v. F. Avanzini Co., supra, as opposed to being loaned by a private gun owner to another person, see Bumpus, suwra, or being left accessible to a child, for example see Wyatt v. McMullen, 350 So.2d 1115, 1118 (Fla. 1st DCA 1977). Most important, prior to the decision below, no court has required that the entrustment of the firearm be a crime in order to be considered negligent.

The District Court of Appeal ignored each of these Florida decisions and held that, as long as the sale of a firearm is "legal," there is no duty not to entrust the firearm, even if the seller can foresee the risk of harm to others. This different result is mandated in this case, according to the court, because the Florida Legislature has "actively entered the field of regulating the sale of firearms."[15] However, the Florida statute

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[15] The doctrine of negligent entrustment makes no distinction between the sale of a chattel and any other type of transfer. See Restatement (Second) of Torts § 390 comment a (rule applies to "sellers, lessors, donors or lenders"). Thus, it makes no difference that most, though not all, of the Florida gun entrustment cases did not involve the sale of firearms. This Court has elected not to apply the doctrine to sales only where a statute specifically precluded its application. See Horne v. Vic Potamkin Chevrolet, Inc., 533 So.2d 261 (Fla. 1988). No such statute precludes the application of the doctrine to firearms sales.

cited by the court not only regulates the retail sale of firearms by dealers, but purports to regulate all private transfers -- i.e., entrustments -- of firearms as well, including non-retail transfers. See 5790.17 Florida Statutes (1987) ("Whoever sells, hires, barters, lends, or qives any minor . . . or . . . person of unsound mind . . . .") (emphasis added). Yet, this statute did not (and should not) prevent other Florida courts from concluding that additional, common law standards of care for entrusting firearms are appropriate where prudence requires. See, e.g., Williams v. Bumpus, supra.

One court in another jurisdiction reached the same conclusion when it was alleged that a firearm was negligently entrusted to a sixteen year-old boy. See Reida v. Lund, 96 Cal.Rptr. 102, 106 (1971). In California, a statute provided for civil liability if a parent left a firearm accessible to a child under fifteen. Id. Rather than interpret the statute as the exclusive standard of care, the Lund court held that the statute did not foreclose common law liability for negligent entrustment of a firearm to an older child. Id. In fact, similar to the court in Bernethv v. Walt Failor's, Inc., supra, the Lund court concluded that the policy behind the statute supported the ordinary negligence claim by revealing the "general direction in which the law is moving with respect to liability for the use of firearms . . . ." Lund, supra at 106.

Finally, the lower appellate court simply refused to recognize that harm to other parties is a foreseeable result of

entrusting a dangerous instrumentality to an intoxicated party. As we argue more fully below, the consumption of alcohol is linked with aggressive, violent behavior, **See** Section III, **infra.** Florida courts already recognize that consumption of alcohol impairs motor skills and judgment: therefore, harm to the public is a foreseeable consequence of entrusting other dangerous instrumentalities to the intoxicated, such as automobiles. See, **e.g., Gordy v**. Farris, 523 **So.2d** 1215, 1217 (Fla. 1st DCA **1988),** rev. denied, 534 **So.2d** 399 (Fla. 1988); Rio v. **Minton,** 291 **So.2d** 214, 215 (Fla. 2d DCA **1974), cert. denied,** 297 **So.2d** 837 (Fla. **1974), citing,** Engleman v. Traeaer, 102 Fla. 756, 136 So 527 (1931) **("Every** court in the land has recognized the liability of an automobile owner for damages resulting when he **intrusts** his car to a person who is drinking and likely to become intoxicated while operating **it.").** It is well-recognized in other jurisdictions that intoxication increases the risk of harm arising from the entrustment of a dangerous instrumentality. Blake v, Moore, 208 Cal.Rptr. 703 (Cal. Ct. App. 1984) (entrustment of car); Bennett v. Geblein, 421 **N.Y.S.2d** 487 (N.Y. App. Div. 1979) (entrustment of car); **Snowhite** v. State, 221 **A.2d** 342 (Md. Ct. App. 1966) (entrustment of car). The foreseeability of harm that results when intoxicated people are entrusted with a firearm is no different. **See** Bernethv v. Walt Failor's, Inc., **supra.**

C. Compliance With The Florida Statute Regulating Firearm Sales Does Not Establish As A Matter Of Law That K-Mart Acted Non-Negligently

It is axiomatic that, though "the violation of a criminal statute is negligence, it does not follow that compliance with it is always due care." Prosser & Keeton, Prosser & Keeton on Torts, 233 (5th ed. 1984). Lindsev v. Bill Arflin Bonding Agency, Inc., 645 So.2d 565, 567 (Fla. 1st 1994) (compliance is not tantamount to reasonableness as a matter of law). The common law rule is that statutory standards are no more than a minimum unless the statutory scheme specifically states that compliance is to serve as the standard for tort liability. Kidron, Inc. v. Carmona, 20 Fla. L. Weekly D2666 n. 1 (Fla. App. 1995). If the statute is silent as to liability, as the Florida firearm retail statute is in this case, then compliance with the statute "does not prevent a finding of negligence where a reasonable man would take additional precautions." Restatement (Second) of Torts § 288C (1965).

For some time, Florida courts have accepted the principle that circumstances may require a reasonable person to exceed statutory or administrative standards of care. See, e.g., Palm Beach County v. Salas, 511 So.2d 544, 547 (Fla. 1987) (county's compliance with established manual on safe traffic control practices did not conclusively establish due care); Nicosia v. Otis Elevator Co., 548 So.2d 854, 855 (Fla. 3rd DCA 1989) (citing Restatement (Second) of Torts § 288C); Seaboard Coast Line Railroad Co. v. Louallen, 479 So.2d 781, 783 (Fla. 2d DCA 1985),

rev. denied, 491 So.2d 280 (Fla. 1986) (rejecting the argument that "if the evidence shows that all statutory requirements have been met, it is improper for the jury to consider whether additional precautions may be reasonably necessary under the circumstances.@@); Miller v. Florida East Coast Railway Co., 477 So.2d 55, 56 (Fla. 5th DCA 1985); Duff v. Florida Power & Light, 449 So.2d 843 (Fla. 4th DCA 1984), rev. denied, 458 So.2d 272 (Fla. 1984); and Fries v. Florida Power & Light Co., 402 So.2d 1229, 1230 (Fla. 5th DCA 1981). This rule is especially appropriate where dangerous products or instrumentalities -- those which require a higher standard of care due to the high risk of injury they impose -- are involved. See, e.g., Blueflame Gas. Inc. v. Van Hoose, 679 P.2d 579, 587 (Colo. 1984) (defendants required to exceed administrative standards involving sale of propane); Jones v. Hittle, 549 P.2d 1383, 1390 (Kan. 1976) (same),

The lower appellate court's decision in this case turns this common law rule on its head, and, as a result, actually promotes careless behavior. That court would have a rule that whenever the legislature has "actively entered a field of regulating" -- a standard which the court below fails to define with specificity--, individuals possess no greater duty of care than that set forth in the legislation. This is true even when prudence would require a person to act more carefully.

That is precisely the illogical result reached in this case. Because of the well-recognized link between alcohol use and

violent behavior, any reasonable person about to sell or otherwise give a firearm to an intoxicated purchaser would take greater precaution than simply ensuring that the person was not a minor or of unsound mind. No reasonable person would permit the transfer to go forward under this circumstance even if these minimum statutory conditions were met. Nonetheless, this is exactly the behavior excused by the court below.

III. AGGRESSIVE, VIOLENT CONDUCT INVOLVING A FIREARM IS A FORESEEABLE CONSEQUENCE OF THE SALE OF A FIREARM TO AN INTOXICATED BUYER.

It is a matter of common knowledge, supported by scientific evidence, that alcohol abuse is likely to lead to impulsive aggressive acts. According to Dr. Deborah Prothrow-Stith, Assistant Dean of the Harvard School of Public Health, "The chemical most often associated with human aggression is alcohol."[16] The scientific literature on alcohol and aggression confirms that individuals behave more aggressively while under the influence of alcohol.

Scientific studies have consistently documented an association between alcohol consumption and homicide/assault, sexual assault, domestic violence, and suicide.[17] A 1990 review of studies of the drinking patterns of homicide offenders

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[16] Deborah Prothrow-Stith, Deadlv Consequences 9 (1991).

[17] See, e.q., James J. Collins and Pamela M. Messerschmidt Epidemiology of Alcohol-Related Violence, Alcohol Health and Research World 93-100 (1993); David A Brent et al., Alcohol, Firearms and Suicide Among Youth, 257 JAMA 3369-3372 (1987).

concluded that in more than 50% of homicides and assaults the assailant was under the influence of alcohol at the time of the crime.[18] This review also concluded that the strength or viciousness of the attack increased when the offender was under the influence of alcohol.

Other studies, designed to assess the causal relationship of alcohol to violence, have documented that alcohol consumption causes heightened aggression." Psychotherapists and other health care professionals have found that the availability of weapons and the use of drugs or alcohol are among the verifiable elements useful for predicting violent behavior.[20]

Mixing alcohol and guns presents a particularly explosive combination because of the inherent dangerousness of firearms. An assault with a firearm is five times more likely to result in a fatality than an assault with a knife.[21] Domestic assaults

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18 D. Murdoch et al., Alcohol and Crimes of Violence, 25 The International Journal of the Addictions 1065-1081 (1990).

19 See, e.g., P.R. Giancola and A. Zeichner, Alcohol-Related Aggression in Males and Females: Effects of Blood Alcohol Concentration, Subjective Intoxication, Personality, and Provocation, 19 Alcohol Clin. Exp. Res. 130-34 (1995); M.A. Lau et al., Provocation, Acute Alcohol Intoxication, Cognitive Performance and Aggression, 104 J. Abnorm. Psychol. 150-55 (1995); R.F. Valois et al., Correlates of Aggressive and Violent Behaviors Among Public High School Adolescents, 16 J. Adolesc. Health 26-34 (1995); B.J. Bushman and H.M. Cooper, Effects of Alcohol on Human Aggression: An Integrative Research Review, 107 Psychological Bulletin 341-354 (1990).

20 Kenneth Tardiff, A Model for the Short-Term Prediction of Violence Potential, in Current Approaches to the Prediction of Violence (D.A. Brizer & M.L. Crowner eds. 1989).

21 Franklin Zimring, Firearms, Violence and Public Policy, Scientific American 49 (Nov. 1991).

with firearms are twelve times more likely to end in death than domestic assaults with other weapons.[22] As the Centers for Disease Control have stated, "[i]mmediate access to a potentially lethal weapon, especially a firearm, may increase the likelihood that a lethal event would result from a violent altercation.[23]

The Florida Legislature has itself acknowledged that the incendiary combination of firearms and alcohol presents a public safety issue. Under Florida law, it is a crime to use a firearm while under the influence of alcohol. § 790.151, Fla. Stat. Although the court below acknowledged the existence of this prohibition, it failed to recognize its significance.

Courts have taken judicial notice of the ability of alcohol to trigger assaultive behavior in cases involving guns. As the Massachusetts Supreme Court stated in Carey v. New Yorker of Worchester, Inc, 355 Mass. 450, 453 (1969), "serving hard liquor, particularly to one already drunk, has a consequence which is not open to successful dispute. Such action may well make the individual unreasonably aggressive, and enhance a condition in which it is foreseeable that almost any irrational act is foreseeable." In Carey, the court held the liquor provider liable when an underage, inebriated youth shot the plaintiff.

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[22] Linda Saltzman, et al., Weapon Involvement and Injury Outcomes in Family and Intimate Assaults, 267 JAMA 3043-47 (1992).

[23] Centers for Disease Control, U.S. Dept. of Health and Human Services, Weapon-Carrying Among High School Students -- United States, 1990, 40 Morbidity and Mortality Weekly Report 681 (1991).

A loaded gun is an instrument of violence. One who is both armed and inebriated is presumably more dangerous than a sober person carrying a loaded gun or an intoxicated person without a gun. Therefore, supplying a gun to an intoxicated buyer involves a recognizable, indeed obvious, danger to third parties.

CONCLUSION

For the foregoing reasons, amici curiae ask this Court to reverse the ruling of the lower appellate court in K-Mart Corp. v. Kitchen, 662 So.2d 977 (Fla. 4th DCA 1995).

Respectfully submitted,

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