IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,812

DEBORAH KITCHEN,

Petitioner,

VS.

K-MART CORPORATION,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS

On December 14, 1987, in Tampa, Florida, Thomas Knapp, a 35-year old admitted alcoholic, began drinking at 7:30 a.m. (T. 218, 242, 285, 288, 307-09, 860). He ate nothing the entire day (T. 295, 865-66). By mid-evening he had consumed, by his account, a case of beer and close to a fifth of liquor (T. 307-11, 38 1, 820, 874). At approximately 9:45 p.m., intending to kill his girlfriend, he purchased a rifle and a box of ammunition from a K-Mart store (T. 243, 286-87, 297, 384-87, 570-72, 989). He was unable to fill out the required forms legibly, so the sales clerk filled out the forms for him (T. 230, 301, 552-53, 586-91, 876, 1072). Approximately a half-hour later, he shot his girlfriend, Deborah Kitchen, a 34-year old mother of five children (T. 176, 244-45, 252, 286-87, 326-27, 791, 930, 1100). The bullet struck her in the neck, severed her spinal cord, and rendered her quadriplegic (T. 615, 652-53, 737-38). Mr. Knapp was arrested shortly thereafter, and is presently serving a 40-year sentence for attempted first degree murder (T. 285-86, 896).

Ms. Kitchen sued both Mr. Knapp and K-Mart Corporation (R. 1). Mr. Knapp was sued in two counts, for negligence and intentional battery; he filed a handwrittenpro se answer in which he "pled not guilty" to the allegations of the complaint (R. 27). The plaintiff's first amended complaint (R. 51) contained a single count against K-Mart sounding in common law negligence. It alleged that Mr. Knapp was visibly intoxicated at the time K-Mart sold the rifle and ammunition to him; that the sale was negligent for several separately specified factual reasons (including alleged violations of 9790.17, Fla. Stat,, and 18 U.S.C. $922 et seq.); and that K-Mart's negligence was a proximate cause of the plaintiff's quadriplegia. Paragraph 11 of the first amended complaint alleged the following: "That Defendant, K-MART CORPORATION, owed a duty to exercise reasonable care under the circumstances in order to prevent foreseeable risk of injuries

to third parties" (R. 53).

Although this will come as a surprise to the Court (given the district court's disposition of the case below), paragraph 11 of K-Mart's answer to the first amended complaint (R. ***59) admitted*** this allegation: "This Defendant admits the allegations of Paragraph 11 of Plaintiff's First Amended Complaint" (R. 60).[1/] Although the existence of a common law duty of reasonable care was thereby admitted, liability for a breach of the admitted duty was otherwise denied by the answer. In the joint pre-trial stipulation filed by the plaintiff and K-Mart, the " [n]egligence, if any, of Defendant, K-MART" was listed as an issue of fact to be tried; whether K-Mart owed a duty of reasonable care under the circumstances was ***not*** listed as an issue of law to be decided (R. 253-54).

On the issues thus framed by the pleadings and the pre-trial stipulation, the case was tried to a jury before The Honorable Lucy Brown over a five-day period in October, 1993 (T. 1). Mr. Knapp did not appear to defend. Because the plaintiff ultimately recovered a favorable verdict on her claims against both defendants, she was entitled below, and she is entitled here, to have the evidence viewed in a light most favorable to her verdict, with all conflicts resolved and all reasonable inferences drawn in her favor.[2/]

[1/] This admission followed a prior round of procedural skirmishing in which K-Mart had moved to dismiss the plaintiff's initial complaint, which contained an identical allegation, on the ground that it "improperly alleged and set forth the duty owed by a seller or retailer of a firearm to a third party under Florida law" (R. 3, 15). The plaintiff responded to this motion with a memorandum demonstrating that such a duty ***did*** exist (R. 35), and the trial court denied this aspect of the motion to dismiss (R. 49). K-Mart's subsequent admission of paragraph 11 of the first amended complaint was therefore both fully-informed and plainly purposeful.

[2/] ***See Helman v. Seaboard Coast Line Railroad*** Co., 349 So.2d 1187 (Fla. 1977); ***Welfare v. Seaboard Coast Line Railroad*** Co., 373 So.2d 886 (Fla. 1979); ***Kolosky v. Winn-Dixie Stores, Inc.,*** 472 So.2d 891 (Fla. 4th DCA 1985), ***review denied, 482*** So.2d 350 (Fla. 1986); ***Marks v. Delcastillo, 386*** So.2d 1259 (Fla. 3d DCA 1980), ***review denied,*** 397 So.2d 778 (Fla. 1981).

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Viewed in the proper light, as it must be, the evidence reflects that, in the 14 hours preceding purchase of the gun, Mr. Knapp ate nothing, and (as was apparently his daily routine) drank an *enormous* amount of alcohol -- by his estimation, a case of beer (24 bottles) and close to a fifth of liquor (close to 25 shots) (T. 295, 307-11, 38 1, 820, 865-66, 874, 913, 934, 938-39). According to K-Mart's expert toxicologist, if Mr. Knapp had consumed that much alcohol during the day, as he testified he did, he would have had a blood alcohol level of .80 (eight times the "legal limit") at the time of the purchase -- an amount which would have been lethal to most persons, and which would have rendered Mr. Knapp, an alcoholic, "grossly intoxicated" (T. 307-09, 860, 918, 938-41, 948-51, 955-56, 968, 976). Alcohol, of course (and among other things), affects judgment, eliminates inhibitions, and increases aggression (T. 377-78, 956, 984-88).

According to what Mr. Knapp told a detective after the incident, at some point in the evening, while still in the bar where he and Ms. Kitchen were socializing with friends, he formed an intention to kill her (T. 295, 989). Mr. Knapp acknowledged that someone in the bar told him he should be sitting down rather than standing up, because he was "kind of wobbly" (T. 312).[3/] Having decided to kill Ms. Kitchen, and notwithstanding that he knew he was too drunk to drive, he left the bar by himself at approximately 8:30 p.m.; and, after a brief stop at his mother's house, he drank two more beers while driving to a K-Mart store, where he intended to purchase a weapon (T. 293-97, 312-15, 384-85, 818, 868). According to Mr. Knapp, he spent five or ten minutes "just moseying around" that store, and did not purchase anything (T. 294, 314). He then bought another beer and drove to another K-Mart store where, at approximately

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[3/] Actually, the transcript of the trial reads, "I was kind of wildly" (T. 3 12). This was a typographical error in the deposition which everyone understood to mean "wobbly," however, and which was clarified in a second deposition read at trial, when Mr. Knapp was questioned on the same subject (T. 280-81, 819-20, 869-70).

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9:45 p.m., he purchased the cheapest rifle which K-Mart stocked -- a Marlin .22 caliber bolt-action rifle, which cost approximately $100.00 -- and a box of .22 caliber ammunition (T. 242-243, 286-87, 294, 297, 384-87, 570-72, 989).

The gun was sold to Mr. Knapp by Daniel Chaffman, a 23-year-old college student and part-time sales clerk in the automotive and sporting goods department (T. 552-56, 576-83). Because the firearms were displayed behind a counter in a locked cabinet to which only sales personnel had access (for safety reasons), and because forms had to be filled out at the counter and firearms purchased at the register located there, Mr. Chaffman conceded that he had engaged in an extended conversation with Mr. Knapp, face to face, at a distance of 18 inches or so (T. 561-63, 575-78, 582-83). He had only a vague recollection of the transaction, however (T. 576-83). He did remember that Mr. Knapp had long hair and appeared unclean (T. 577-78). He was unable to recall whether Mr. Knapp appeared intoxicated or smelled of alcohol (T. 576-83). Nevertheless, he assumed from the fact that he sold the gun that Mr. Knapp did not appear to be intoxicated, since K-Mart had a strong policy prohibiting such sales to visibly intoxicated persons, and he would not have violated that policy (T. 559-66, 576-83, 594, 598).

According to Mr. Chaffman, he had been given training materials in the form of a booklet which instructed him on the store's policy and trained him how to recognize the various physical manifestations of intoxication (T. 560-61, 568). He also testified that he had the authority to refuse a sale to a person who appeared intoxicated and to refer the purchaser to the department manager (T. 580; see T. 1030-3 1). K-Mart had also explained to him that the reason for the policy was that intoxicated persons "didn't have the function to control themselves in a reputable manner, " either toward themselves or the general public -- and that, like giving a pack of matches to a five-year-old child, the danger in selling a gun to a drunk was foreseeable (T. 564, 572). The existence of the

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strong internal policy was confirmed by Mr. Chaffman's department manager, who acknowledged that sales had occasionally been refused as a result of the policy (T. 1030-33, 1054). The manager also testified that his sales clerks had been trained in the policy and in the detection of intoxication, but when confronted with the written training materials which K-Mart had produced in the litigation, he was ultimately forced to concede that they contained no mention of the policy and no training in the detection of intoxication (T. 1032, 1045-53; PX. 22, 23, 24). It was therefore fairly inferable that the "booklet" by which Mr. Chaffman claimed to have been trained did not exist -- and that, in fact, Mr. Chaffman had been poorly trained, if he had been trained at all.

Although Mr. Chaffinan had only a vague recollection of the transaction, he did remember that the sale was "unusual" in one respect (T. 584-86, 592-94). Before the sale of the rifle could be consummated, Mr. Knapp was required to fill out a federal "Firearms Transaction Record," a form issued by the Bureau of Alcohol, Tobacco and Firearms (T. 58 1-88, 1024; PX. 5C). The form required Mr. Knapp to print his full name, height, weight, race, residence address, date of birth, and place of birth; to print "yes" or "no" in answer to eight questions; and to sign and date it (see PX. 5C). When Mr. Knapp filled out the form, Mr. Chaffman was unable to read any of the entries he had made because all of them were "illegible" (T. 586-87). Unaware of the reverse side of the form (which required the buyer to "personally complete" the form and prohibited the dealer from doing so), Mr. Chaffman (with the aid of Mr. Knapp's driver's license) filled out a second form for Mr. Knapp, and then had him initial the eight "no" answers and sign the form (T. 301, 587-92; PX. 5C). This, as far as Mr. Chaffman could recall, was the only time he had ever done such a thing (T. 589-92).

According to Mr. Chaffman, *both* forms were paper-clipped together, taken into the department manager's office, and placed in a basket for further processing (T. 584,

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599). The next morning, the manager delivered only the form filled out by Mr. Chaffman to the investigating detective, and the detective was informed that it had been "recopied" because the clerk could not read Mr. Knapp's initial effort at filling out the form (T. 226-30, 598-99, 1032-33). The manager contradicted this version of the facts at trial; he testified that he never saw the first form, and had learned only recently that the one form which he did receive had been filled out by Mr. Chaffman (T. 1036-44). From this conflicting evidence, a reasonable inference was available to the jury that the "illegible" form initially filled out by Mr. Knapp had been destroyed, or perhaps purposefully withheld from the police (see T. 1117-18). The form filled out by Mr. Chaffman, which contains a largely illegible signature of Mr. Knapp, was placed in evidence at trial (T. 330-33, 352-56; PX. 5C; App. 5). For purposes of comparison, a handwritten pleading which Mr. Knapp had filed in the case -- which was printed neatly with easily readable characters, and which contained a perfectly legible signature -- was also placed in evidence (R. 332-34, 356-60, 375-76; PX. 21; App. 6).

The plaintiff presented the testimony of Dr. Werner Spitz -- formerly the Chief Medical Examiner for Wayne County (Detroit), Michigan, now retired -- a forensic pathologist with a national reputation who had written extensively on the subject of alcohol intoxication (T. 364-67) . Based upon (1) his comparison of Mr. Knapp's largely illegible signature on the second ATF forrn with his legible signature on the handwritten pleading, (2) Mr. Knapp's inability to fill out the first ATF form legibly, when the handwritten pleading plainly reflected that he could print in a perfectly readable manner, (3) the prior drinking history related by Mr. Knapp, and (4) Mr. Knapp's subsequent irrational behavior, he was of the opinion, "without hesitation," that Mr. Knapp would have appeared visibly intoxicated to an untrained lay observer at the time he purchased the rifle (T. 388-95, 471-76, 521-28). According to Dr. Spitz, Mr. Knapp "was out of

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his regular mind" at the time of the purchase; he was unable to walk well; his speech was thick and slurred, and he was unable to enunciate words clearly; he probably had glassy, bloodshot eyes and a flushed face; he was uncoordinated and would have been unable to produce his driver's license without fidgeting and scrambling to find it; and he would have exuded a strong odor of alcohol, especially to someone facing him only 18 inches away (T. 390-95, 401-04).

We could expand upon this nutshell of Dr. Spitz's opinion testimony at considerable length. There is no need for elaboration here, however, because K-Mart's expert toxicologist himself conceded that, if the jury chose to believe Mr. Knapp's testimony concerning the amount of alcohol he drank during the day, Mr. Knapp most certainly would have appeared visibly intoxicated to Mr. Chaffman (T. 968):

> Q. Mr. Carroll, based on your review of all of the evidence that you've already told us that you reviewed in this case and your knowledge about alcohol and its affect [sic] on human beings, particularly alcoholics, do you have an opinion within a reasonable degree of scientific probability as to whether it's probable that Thomas Knapp could have gone into the store at nine-forty-five and effected the purchase of a firearm without showing any visible signs of intoxication to the clerk that sold him the gun, meaning the layperson, or showing that he was under the influence of alcohol?
>
> A. If he drank what he said he drank, it would be impossible for him to do it. . . .

K-Mart's expert toxicologist also conceded that the first thing to be impaired by intoxication is the thinking process, followed by motor functions (like the ability to pick up an object, to articulate words, and to walk), and he conceded that motor skills, eyesight, information input, the ability to formulate correct responses to given stimuli, all of these things "are gone long before" a drunk loses the ability to print or to write his name (T. 984-85, 1013-14). Of course, these concessions, when coupled with no more

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than Mr. Chaffman's testimony that he could not read any of the printing or writing on the ATF form which Mr. Knapp initially filled out, and the ***objective*** evidence of the largely illegible signature on the second ATF form and the perfectly legible printing and signature on the handwritten pleading, amounted to a concession by K-Mart's expert that Mr. Knapp was visibly intoxicated at the time of the sale. Most respectfully, given the verdict which the jury ultimately returned, it must be accepted as established beyond any legitimate debate here that Mr. Knapp was visibly intoxicated at the time Mr. Chaffman sold him the rifle and ammunition, in violation of K-Mart's own sensible policy to refuse such a sale for the safety of others.

Rifle and ammunition now in hand, Mr. Knapp returned to the bar where he and Ms. Kitchen had been socializing earlier, and had another drink (T. 295, 320-2 1, 88 1-82). He became upset when Ms. Kitchen left the bar with some friends (T. 32 1-22,882). He ran to his truck, loaded the rifle, maneuvered to shoot Ms. Kitchen in the parking lot behind the bar -- but because he could not get a good "head shot, " he did not fire the rifle (T. 243, 252). Instead, he got into his truck and followed the car in which Ms. Kitchen was riding (T. 322-23, 882). He took a shot at her through the windshield of his truck, but missed (T. 244). He then reloaded the rifle, bumped the car and forced it off the road, and when Ms. Kitchen exited the car, he pointed the rifle at her head and fired a single shot (T. 244,253, 323-27, 884). The shooting occurred approximately a half-hour after the purchase (T. 387, 930). After Mr. Knapp was later apprehended at a convenience store several miles away, the police found a .22 caliber shell casing at the scene of the shooting and a box of .22 caliber ammunition (containing 42 live rounds) in his truck, but no firearm was ever found (T. 2 19-22, 896-90, 903-07). Mr. Knapp told the police that the rifle had been stolen from his truck after the incident (T. 245-46).

K-Mart's defense to these facts was twofold. First, it relied on several facts --

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including Mr. Chaffman's assumption that Mr. Knapp was not visibly intoxicated, the fact that Mr. Knapp was capable of driving and carrying out the shooting, and the fact that the detective who took Mr. Knapp's statement at 3 :52 a.m. made no observation concerning intoxication -- to argue to the jury that Mr. Knapp was not visibly intoxicated at the time of the sale (T. 918-69, 1184-91). The latter fact was countered by Dr. Spitz who opined that, given the six hours which elapsed between the time of the sale and the time the statement was taken, and given Mr. Knapp's ability to eliminate alcohol from his system, it was not surprising that he did not appear to be visibly intoxicated when the detective took his statement (T. 396-401, 491-93). And given all of the other facts which we have sketched above, a jury question was plainly presented on the issue of whether Mr. Knapp was visibly intoxicated at the time of the sale.

K-Mart's second defense to the facts sketched above was that Mr. Knapp did not shoot Ms. Kitchen with the rifle he had purchased from K-Mart a half-hour earlier -- that he shot her instead with a different .22 caliber rifle (T. 1176-80). This version of the facts derived from testimony in Mr. Knapp's depositions, which were taken after the suit was filed, and after he had met with K-Mart's counsel on four occasions (T. 335-36, 885-86). Although Mr. Knapp conceded that he had never told the police or plaintiff's counsel about a second rifle, and that the first person to whom he had related such a story was K-Mart's counsel, he testified in his depositions that he did not think that K-Mart was liable; that he had a bolt-action .22 caliber rifle in his truck that evening, which he had borrowed from his stepfather; that he purchased a nearly identical .22 caliber rifle at K-Mart as a Christmas present for his stepfather; and that he shot Ms. Kitchen with his stepfather's rifle (T. 298-99, 303-05, 318-20, 328, 340, 821, 891-92).

Of course, Mr. Knapp had related an entirely different story to the police: a seamless story of forming an intention to kill Ms. Kitchen before 8:30 p.m.; leaving the

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bar; going into two K-Mart stores; purchasing a rifle and amrnunition in the second store at 9:45 p.m.; returning to the bar; stalking Ms. Kitchen and shooting her within a half-hour of the purchase; and then claiming that the rifle had been stolen from his truck after the incident -- all without mention of any second rifle (T. 223-54, 989). This initial version of the events would plainly support a finding of fact that Mr. Knapp shot Ms. Kitchen with the rifle purchased at K-Mart.

In addition, of course, the jury was entitled to disbelieve the second story told at the depositions, because it was plainly incredible that a highly intoxicated person bent on murder, with an identical weapon readily available to him for that purpose, would interrupt his plan to spend an hour buying his stepfather a Christmas present of a gun he already had, and then carry out his plan with the gun which had been available to him from the outset. Moreover, Mr. Knapp's obvious hatred for Ms. Kitchen provided a perfect motive for a post-litigation fabrication, calculated to deprive her of any recovery in the case -- and we respectfully submit that a jury question was plainly presented on the issue of whether Mr. Knapp shot Ms . Kitchen with the rifle purchased from K-Mart.

K-Mart moved for a directed verdict at the close of the plaintiffs case (T. 823). Fairly paraphrased, its arguments were that there was no evidence to support a finding that Mr. Knapp shot Ms. Kitchen with the gun purchased at K-Mart; that there was no evidence to support a finding that K-Mart violated either 18 U. S .C. $922 or 5790.17, Fla. Stat. ; that there was no evidence to support a finding that Mr. Knapp was visibly intoxicated at the time of the sale; that, because there was no evidence that K-Mart was on notice of Mr. Knapp's drunkenness, it had no duty to protect the plaintiff from the unforeseeable criminal acts of Mr. Knapp; and that there was no evidence to support a finding of proximate causation, because Mr. Knapp's intervening criminal act was unforeseeable (T. 823-34). Consistent with paragraph 11 of its answer to the first

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amended complaint, in which it had admitted the existence of a common law duty of reasonable care, K-Mart acknowledged that a retailer could be held accountable for the negligent sale of a firearm if it was on notice of the unsuitability of the purchaser, but argued that ["t]hat's about the only case where such a responsibility can be held on [a] retailer, " and that no such notice had been proven by the plaintiff (T. 829-30).

The trial court responded that the evidence was sufficient to support jury findings that Mr. Knapp shot Ms. Kitchen with the rifle purchased at K-Mart; that Mr. Knapp was visibly intoxicated at the time of the sale; and that K-Mart was therefore a negligent cause of Ms. Kitchen's quadriplegia (T. 834-42). In the course of making these observations, the trial court declined to direct a verdict on the alleged violations of the two statutes, correctly noting that the plaintiff had pled a single count for common law negligence, rather than statutory causes of action, and that the statutory violations had been alleged only as factual circumstances supporting a finding of negligence (id.). It also stated that it did not believe that the plaintiff had proved violations of the statutes, but that the appropriate place to raise that point would be at the charge conference, in response to any request by the plaintiff for instructions on "negligence per se" or "evidence of negligence" (id.). Finally, the trial court observed that K-Mart had admitted the existence of a common law duty to act with reasonable care under the circumstances, which would include a duty not to sell a firearm to a visibly intoxicated person, and it denied the motion for direct verdict (T. 841-42).

K-Mart renewed its motion for directed verdict at the close of all the evidence, adopting its prior argument and then elaborating briefly (T. 1102-03). Once again, it recognized what it had conceded in its pleadings -- that it owed a common law duty of care to the plaintiff (T. 1103):

> . . . As I understand it, from this Court's prior inclination with regards to eighteen U. S .C. statutes and the Florida

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> statutes on the sale of prior [sic] arms to unsound minds of 790.17, that the only cause of action that the Plaintiff has is for common law negligence against K-Mart in the sale of a firearm and there's been no -- with the issue of foreseeability, there's this intervening criminal act and I adopt all of the cases that I previously cited to the Court with regards to the foreseeability issue on a common law negligence count against K-Mart.

The trial court denied the motion, correctly observing once again that the plaintiff had not alleged any statutory causes of action, and indicating that the sufficiency of the evidence to support jury instructions on violation of the statutes would be determined at the charge conference (T. 1103-04). In neither motion for directed verdict did K-Mart ever take a position contrary to the admission contained in its answer. It did not contend that it owed the plaintiff no common law duty of reasonable care under the circumstances; it did not contend that it could not be held liable for selling a firearm to a purchaser known to it to be intoxicated; and it most certainly did not contend that 5790.17 had entirely displaced civil liability arising under the common law of negligence.

At the charge conference, the plaintiff withdrew her claim for intentional battery against Mr. Knapp, and indicated that only the negligence claim against him would be submitted to the jury, without objection by K-Mart (T. 110506). The plaintiff had previously withdrawn her claims for past lost earnings and future impairment of earning capacity (T. 278-79). At the charge conference, she also withdrew her claim for past medical expenses (T. 1124). The plaintiff requested an instruction patterned upon Fla. Std. Jury Instn. (Civ.) 4.9, which stated that a violation of §790.17, Fla. Stat., "is negligence" -- i. e., a negligence per se instruction (R. 272; T. 1118). K-Mart objected; the trial court ruled that the evidence was insufficient to show a violation of $790.17, and it declined to give the instruction (T. 1118-21). The plaintiff also requested an instruction on the violation of K-Mart's internal policy, to which K-Mart objected (T. 1114-15). The

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trial court declined to give the instruction in the language submitted by the plaintiff, but agreed to give the substance of the proposed instruction in the language of Fla. Std. Jury Instn. (Civ.) 4.11 (T. 1115-16). The trial court also determined that the verdict form would contain a special interrogatory asking, "Was the firearm used to shoot Plaintiff DEBORAH KITCHEN, purchased at K-Mart?" (R. 276; T. 113 1-35).

The issues which were ultimately submitted to the jury were therefore these: whether Mr. Knapp shot the plaintiff with the firearm purchased at K-Mart; whether K-Mart was a negligent cause of damage to the plaintiff; whether Mr. Knapp was a negligent cause of damage to the plaintiff; apportionment of fault between K-Mart and Mr. Knapp; the present money value of the plaintiff's future medical expenses; and the plaintiff's past and future intangible damages (T. 1211-22). On the issue of K-Mart's alleged violation of its internal policy, the jury was instructed in the language of Fla. Std. Jury Instn. (Civ.) 4.11 as follows (T. 1215):

> Violation by a K-Mart employee of a K-Mart internal policy or procedure is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that a K-Mart employee, alleged to have been negligent, violated such a policy or procedure, you may consider that fact, together with all the other facts and circumstances in the case, in determining whether such person was negligent. . . .

The jury returned a verdict which found that the firearm used to shoot the plaintiff was purchased at K-Mart and that both K-Mart and Mr. Knapp were negligent causes of damage to the plaintiff (R. 274-76; T. 1225-27). The verdict apportioned the blame 49% to K-Mart and 51% to Mr. Knapp; assessed the present money value of the plaintiffs future medical expenses at $10,580,768.00; assessed the plaintiff's past intangible damages at $500,000.00; and assessed the plaintiff's future intangible damages at $2,000,000.00 (*Id.*). Two final judgments were thereafter entered against K-Mart -- one in the full amount of the plaintiff's economic damages, $10,580,768.00, and one for 49%

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of the plaintiff's non-economic damages, in the amount of $980,000.00 (R. 278, 279). K-Mart filed a timely motion for new trial (which did not challenge the amount of the damages awarded by the ***jury)*** (R. 289). ***It did not file*** a Rule 1.480(b) motion for judgment in accordance with prior motion for directed verdict. A hearing was held on the motion for new trial, and the motion was denied (R. 362; T. 1236-90).

On appeal, K-Mart argued that the trial court should have granted its motion for directed verdict, for the various reasons argued by trial counsel in the motions for directed verdict made at trial (appellant's initial brief, pp. 17-27). Included in this argument was an offhand contention, without much elaboration, that "common law negligence of a retailer has been replaced by Florida and federal statutory liability" (appellant's initial brief, p. 17). In her answer brief, the plaintiff twice pointed out that this contention had never been asserted below, and was therefore not properly before the court (appellee's brief, pp. 10, 24-25). The point could not have been made more clearly (appellee's brief, pp. 24-25):

> K-Mart makes the surprising statement in its brief (at p. 17), "common-law negligence for retailers has been replaced by Florida and federal statutory liability. " There is not a single case cited in K-Mart's brief that holds the common law to be preempted by the state or federal gun control statute, nor was this argument ever raised by K-Mart to the trial judge below. It is a new argument . . , ,

The plaintiff also pointed out several times that the entire motion for directed verdict made at the close of the evidence had been waived in any event by K-Mart's failure to file a post-trial Rule 1.480(b) motion for judgment in accordance with prior motion for directed verdict (appellee's brief, pp. 10, 12-13, 18, 21-22). Without directing the court to any place in the record where it had ever contended that 9790.17 had displaced the common law duty to exercise reasonable care which it had admitted in its answer, and without responding at all to the plaintiff's reliance on Rule 1.480(b), K-

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Mart argued in its reply brief once again (in slightly altered form) that "general common law negligence for retailers has been altered by the more specific Florida and federal statutory liability" (appellant's reply brief, p. 3).

Relying upon a single decision, K-Mart also argued (among other issues) that the trial court had committed reversible error in instructing the jury that a violation of K-Mart's internal policy was "evidence of negligence, but not conclusive evidence of negligence" (appellant's brief, pp. 27-30). The plaintiff argued in response that it was thorougly settled that a defendant's own policies and practices are admissible in evidence as some evidence of the appropriate standard of care; she cited several decisions holding that, because an internal policy does not fix the standard of care as a matter of law, a jury *must* be cautioned when such evidence is admitted that a violation of internal policies is "evidence of negligence, but not conclusive evidence of negligence"; and she contended that the instruction was therefore properly given (appellee's brief, pp. 29-33).

In a split decision, the district court reversed the plaintiff's judgments, and ordered the entry of a judgment in K-Mart's favor. *K-Mart Corp. v. Kitchen, 662* So.2d 977 (Fla. 4th DCA 1995) (App. 1). Without addressing the plaintiff's contention that the issue had not been preserved for review (and by necessary implication, ruling against the plaintiff on the point), a majority of the panel held (over a vigorous dissent) that 9790.17, Fla. Stat. (which *criminalizes* the sale or entrustment of firearms to minors and persons of unsound mind), displaced the entire field of *civil* liability for the negligent sale of firearms; that K-Mart therefore owed the plaintiff no duty of care; and that K-Mart was entitled to a judgment in its favor as a result. It then certified the following question of great public importance to this Court: "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 purchaser? " (Note that the question correctly postulates what the evidence proved below, when viewed

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in the light required by the verdict -- that Mr. Knapp was "known to the seller to be intoxicated" at the time of the sale.) We will address the certified question in the first issue presented for review, and we will urge that the district court's disposition of the issue should be quashed. In our second issue we will contend that, whatever the answer to the certified question might be, the district court's disposition of the issue must be quashed for the additional reason that the district court erred in entertaining it at all, since it was waived by a failure to preserve it for review.

The district court also held that the trial court had committed reversible error in giving the challenged instruction: "Rather than instructing this jury that the violation of the internal rule was negligence, the court should have instructed that: "An internal rule does not itself fix the standard of care." 662 So.2d at 979. Having reached this conclusion, the district court held that a new trial would therefore be required even if this Court were to quash its disposition of the first issue. In our third issue, we will demonstrate that the trial court did *not* instruct the jury that "violation of the internal rule was negligence"; that the instruction which it did give is precisely the same instruction in substance as the instruction which the district court held it should have given; and that the trial court did not err in giving the instruction at all. We will also demonstrate that, even if the instruction should not have been given, the error was plainly harmless. And we will urge the Court to quash this aspect of the district court's decision as well.

II. ISSUES PRESENTED FOR REVIEW

The issues are stated in the Table of Contents, as required by Rule 9.210(b)(1).

III. SUMMARY OF THE ARGUMENT

Space is at a premium, and our arguments are sufficiently complex that they cannot readily be summarized in a page or two. Requesting the Court's indulgence, we turn directly to the merits.

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IV. ARGUMENT

A. THE DISTRICT COURT ERRED IN HOLDING THAT K-MART WAS ENTITLED TO JUDGMENT IN ITS FAVOR AS A MATTER OF LAW ON THE GROUND THAT IT OWED NO DUTY OF REASONABLE CARE TO THE PLAINTIFF.

The district court concluded that K-Mart owed no common law duty of reasonable care to the plaintiff, and it declined to recognize such a duty because of its perception that $790.17, Fla. Stat. -- which makes it a crime to "sell, hire, barter, lend, or give" a firearm to a "minor under 18 years of age" or to a "person of unsound mind" -- had entirely displaced the common law of negligence where the entrustment of firearms is concerned. We disagree with both conclusions, In the argument which follows, we will demonstrate that K-Mart ***did*** owe a common law duty of reasonable care to the plaintiff (just as it admitted in its pleadings below), and that $790.17 does ***not*** prevent the judiciary from saying so.

We begin with this Court's recent decision in ***McCain v. Florida Power Corp., 593*** So.2d 500, 503 (Fla. 1992), in which it reiterated the long-settled general rule that *all* persons whose endeavors create a foreseeable risk of harm to others owe a duty of reasonable care toward the persons who may be harmed:

> . . . Foreseeability clearly is crucial in defining the scope of ***the general duty placed on every person to avoid negligent acts or omissions.*** Florida, like other jurisdictions, recognizes that ***a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others.*** As we have stated:
>
> > Where a defendant's conduct creates a ***foreseeable zone of risk,*** the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

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> *Kaisner [v. Kolb]*, ***543*** So.2d [732,] at 735 [(Fla. 1989)]. . . . Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. . . .
>
> The statute books and case law, in other words, are not required to catalogue and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, ***the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.***

(Emphasis partially supplied). ***Accord Stevens*** v. ***Jefferson,*** 436 So.2d 33, 35 (Fla. 1983); ***Green Springs, Inc. v. Calvera***, 239 So.2d 264, 265-66 (Fla. 1970); ***Carter v. Livesay Window*** Co., 73 So.2d 411,413 (Fla. 1954); ***Smith v. Hinkley,*** 98 Fla. 132, 123 So. 564, ***566*** (1929); ***Heaven*** *v. Pender*, 11 Q.B.D. 503 (1883).

It is a simple matter of common sense, we think, that placing a dangerous instrumentality in the hands of a person known to be intoxicated creates a foreseeable zone of risk that others may be harmed. Drunks are dangerous. This Court recognized that in ***Ingram v. Pettit,*** 340 So.2d 922, 924-25 (Fla. 1976), where it declared that "drunk drivers menace the public safety"; that drunk driving "creates known risks to the public"; and that driving while drunk "evinces, without more, a sufficiently reckless attitude" to support an award of punitive damages. It logically follows that entrusting a motor vehicle to a drunk is actionable negligence as well: " . . . 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." *Engleman*

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v. *Traeger*, 102 Fla. 756, 136 So. 527, 530 (1931).[4/]

Recognizing a cause of action for negligent entrustment of an automobile to a drunk makes perfect sense, of course -- not merely as a matter of common sense, but because the legislature has declared drunk driving criminal, and it plainly ought to be negligent to entrust a drunk with the means to commit a criminal act which poses a risk of serious injury or death to others. The legislature has also declared it criminal for a drunk merely to possess a loaded firearm. Sections 790.151-790.157, Fla. Stat. And, of course, like an automobile, a firearm is a "dangerous instrumentality," See ***Skinner v. Ochiltree***, 148 Fla. 705, 5 So.2d 605, 140 A.L.R. 410 (1942). It should logically follow, we think, that the entrustment of a rifle and ammunition to a known drunk -- an act which enables a drunk to commit a criminal act which poses risks far more lethal than the operation of an automobile -- ought to be actionable negligence as well.

In view of the lethal nature of firearms, other Florida courts which have considered the issue in circumstances analogous to those presented here have had no difficulty in concluding that a shooting victim has a common law cause of action for negligent entrustment of a firearm (by any manner of delivery, including a sale) to a person known to be a danger to himself or others (notwithstanding that, on the facts in the cases, $790.17 was not violated). ***See Angell v. F. Avanzini Lumber*** Co., 363 So.2d 571 (Fla. 2d DCA 1978) (negligent sale of firearm and ammunition to an adult exhibiting erratic, bizzare behavior is actionable); ***Williams v. Bumpass***, 568 So.2d 979 (Fla. 5th DCA

[4/] Because of the vicarious liability which arises under Florida's "dangerous instrumentality doctrine, " it is presently unnecessary to invoke this doctrine against an owner who has entrusted his automobile to a drunk, but the doctrine retains contemporary viability in cases of negligent entrustrnent by a non-owner. ***See Gorday v. Faris, 523*** So.2d 1215 (Fla. 1st DCA), ***review denied,*** 534 So.2d 399 (Fla. 1988). The doctrine is also, not surprisingly, the law of the land. ***See, e. g., Casebolt v. Cowan, 829*** P.2d 352 (Colo. 1992).

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1990) (negligent entrustment of a firearm to a violent, angry adult in the middle of a fight is actionable); ***Foster*** v. ***Arthur,*** 519 So.2d 1092 (Fla. 1st DCA 1988) (negligent entrustment of a firearm to an adult known to be violent and dangerous is actionable), *Cf.* Sixty-Six, ***Inc.*** v. ***Finley,*** 224 So.2d 381 (Fla. 3d DCA 1969) (negligence in allowing employee to carry a handgun on the job, when he was known to be intoxicated and to have violent propensities, was actionable); ***Brien v. 18925 Collins Avenue Corp., 233*** So.2d 847 (Fla. 3d DCA 1970) (although exonerating defendant on the facts, recognizing that, if owner of premises has notice of dangerous propensities of security guard hired by independent contractor, it can be held liable for negligence of guard in shooting person on premises). ***See also Heist v. Lock & Gunsmith, Inc.,*** 417 So.2d 1041 (Fla. 1st DCA) (although exonerating gun dealer because of absence of facts placing it on notice, recognizing that ***Angell*** would have controlled if dealer had been on notice of dangerous propensities of purchaser), ***review denied,*** 427 So.2d 736 (Fla. 1982). In our judgment, because a known drunk entrusted with a firearm and ammunition is no less a danger to himself and others, it is a certainty that these four district courts would have recognized an action for negligent entrustment on the facts in the instant case.[5/]

It would also appear that this is the law in every other jurisdiction which has considered the question in the context presented here, the sale of a firearm to a person known to present a foreseeable risk of danger to himself or others. The closest case on point is ***Bernethy v. Walt Failor's, Inc.,*** 97 Wash.2d 929, 653 P.2d 280 (1982), in which the Washington Supreme Court held that, notwithstanding the existence of a Washington

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[5/] In fact, the Fourth District has itself held that the common law recognizes an action against parents for negligent entrustment of a firearm to a 14-year-old child. See ***Seabrook*** v. ***Taylor,*** 199 So.2d 315 (Fla. 4th DCA), ***cert. denied,*** 204 So.2d 331 (Fla. 1967). Although the entrustment to the minor violated $790.17, the statute was not mentioned; the duty was bottomed solely upon the general common law duty to exercise reasonable care under the circumstances.

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statute almost identical to $790.17, Fla. Stat., a gun dealer owed a common-law duty of reasonable care to others in the conduct of its business, and that it could be found liable for negligence in selling a firearm and ammunition to a visibly intoxicated person. We commend this well-reasoned decision to the Court.

There are a number of additional decisions reaching the same conclusion in analogous circumstances. ***See, e. g., Decker v. Gibson Products Co. of Albany, Inc., 679*** F.2d 212 (1 lth Cir. 1982) (under Georgia law, common law action for negligent entrustment will lie against gun dealer for sale of firearm to person known to have been convicted of a violent crime); ***First Trust Co. of North Dakota v. Scheels Hardware & Sports Shop, Inc.,*** 429 N.W.2d 5 (N.D. 1988) (common law action for negligent entrustment will lie against gun dealer for sale of firearm to a minor); ***Howard Brothers of Phenix City, Inc.*** v. *Penley*, 492 So.2d 965 (Miss. 1986) (common law action for negligent entrustment will lie against gun dealer where sales clerk allowed mentally deranged person access to firearm and ammunition); ***Cullum & Boren-McCain Mall, Inc. v. Peacock,*** 267 Ark. 479, 592 S.W .2d 442 (1980) (common law action for negligent entrustment will lie against gun dealer for sale of firearm to purchaser who requested a weapon which would blow a big hole in a man); ***Jacoves v. United Merchandising Corp.,*** 9 Cal. App.4th 88, 11 Cal. Rptr.2d 468 (1992) (although exonerating defendant on the facts, recognizing that a common law action for negligent entrustment will lie against a gun dealer for sale of a firearm where purchaser's demeanor would put dealer on notice that he was mentally impaired, incompetent, or irresponsible with regard to the handling of firearms); ***Peek v. Oshman 's Sporting Goods, Inc.,*** 768 S. W .2d 841 (Tex. App. 1989) (although exonerating defendant on the facts, recognizing that a common law action for negligent entrustment will lie against a gun dealer for sale of a firearm to a manifestly irrational person); ***Phillips*** v. ***Roy,*** 431 So.2d 849, 39 A.L.R.4th 509 (La. App. 1983)

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(common law action for negligent entrustment will lie against gun dealer for sale of firearm to person displaying signs of mental incompetence); *Splawnik* **v.** *DiCaprio*, 146 A.D.2d 333, 540 N.Y.S.2d 615 (1989) (common law action for negligent entrustment will lie against person providing loaded firearm to person known to be in a depressed mental state). ***See also Restatement (Second) of Torts,*** §390. ***See generally*** Annotation, ***Firearms -- Provider's Liability,*** 39 A.L.R.4th 517 (1985) (and 1995 pocket part), We have found no decision to the contrary.[6/]

In the instant case, the district court ignored all of the foregoing decisions except one **-- *Angel1 v. F. Avanzini Lumber, supra*** -- which it purported to "distinguish" on the ground that the purchaser in that case displayed "erratic behavior, " whereas the purchaser in this case displayed only that he was drunk. Frankly, given the known propensities of drunks to engage in erratic behavior, we fail to see the distinction. The district court also purported to find precedent for its conclusion that a seller of firearms owes no common law duty of reasonable care to others in ***Buczkowski*** v. ***McKay,*** 441 Mich. 96, 490 N. W .2d 330 (1992). Most respectfully, *Buczkowski* says no such thing,

In the first place, ***Buczkowski*** did not involve the sale of a firearm; it involved the sale of no more than a box of shotgun ammunition. Moreover, the ammunition was not purchased out of a locked cabinet from a sales clerk who was supposed to have been trained in the detection of intoxication and in K-Mart's professed policy of prohibiting sales of firearms to drunks, after a lengthy face-to-face conversation with the clerk in which a federal form had to be filled out; the ammunition was purchased off the shelf and

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[6/] The additional decisions upon which K-Mart has relied in this proceeding contain similar critical distinctions. They turn on a lack of notice to the seller, or because of a ***Lengthy*** delay between the sale and the shooting, an inability to satisfy the element of proximate causation. Since K-Mart may ultimately recognize the inappositeness of these decisions to the certified question and omit them from its answer brief, we will reserve a discussion of their specifics to our reply brief, if necessary.

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routinely paid for at a sales counter without a word being exchanged between the purchaser and the sales clerk. More importantly still, the decision emphasizes in several places that (quite unlike the ***egregious*** facts in the instant case), there was no evidence from which a jury could permissibly have found that K-Mart was on notice that the purchaser was intoxicated or that he might be a danger to others. Those are rather critical distinctions, we think, between that case and this one.

All things considered, and given the unanimity of the decisional law across the nation on the point, we do not believe that this Court will have any difficulty in concluding that the sale of a firearm and ammunition to a person known to be drunk creates a foreseeable zone of risk of harm to others, and that a common law duty to exercise reasonable care under the circumstances therefore existed on the facts in this case -- just as R-Mart admitted in its pleadings, and just as this Court's decision in ***McCain v. Florida Power Corp.,*** 593 So.2d 500, 503 (Fla. 1992), would appear to require: " . , . the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant. " It remains for us to demonstrate that $790.17 does not prevent this Court from following *McCain* in that regard.

The district court declined to recognize an action for negligent entrustment on the facts in the instant case for a single stated reason -- that it could not "distinguish" this Court's decision in ***Bankston v. Brennan,*** 507 So.2d 1385 (Fla. 1987). With all due respect to the district court, ***Bankston*** was badly misunderstood, and it plainly did not require the result reached by the district court. Prior to ***Bankston,*** and after the judiciary had substantially broadened the civil liability of a vendor of alcoholic beverages to liability for simple negligence, the legislature enacted a ***civil*** statute which explicitly ***prohibited*** the imposition of ***civil liability*** "for injury or damage, " with two exceptions for the "willful" sale of alcohol to a minor and the "knowing" sale of alcohol to a habitual

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drunkard. See ***Migliore v. Crown Liquors of Broward, Inc.,*** 448 So.2d 978 (Fla. 1984).

Because this was a ***civil*** statute enacted in response to the judiciary's recent expansion of civil liability, and because the statute plainly ***limited civil liability,*** this Court held in ***Bankston*** that it was no longer free to recognize civil actions for simple negligence in the sale or entrustment of alcoholic beverages. All of this is explained in considerable depth and with exceptional clarity in ***Ellis v. N. G. N. of Tampa, Inc., 586*** So.2d 1042 (Fla. 1991). ***See also Persen v. Southland Corp.,*** 656 So.2d 453 (Fla. 1995). Space does not permit a detailed parsing of that decision here. Suffice it to say that it makes it perfectly clear that the statute at issue in ***Bankston*** was a ***civil*** statute which was purposefully enacted to ***limit civil liability*** in the sale or entrustment of alcoholic beverages -- so this Court had little choice in ***Bankston*** but to hold as it did.[7/]

[7/] In a footnote, the district court also cited ***Horne v. Vic Potamkin Chevrolet, Inc., 533*** So.2d 261 (Fla. 1988), which it perceived to be similar to ***Bankston.*** ***Horne*** is distinguishable here for the same reason that ***Bankston*** is distinguishable. In declining to recognize an action for the negligent sale of an automobile to a known incompetent driver, the Court bottomed its conclusion on a ***civil statute*** which explicitly prohibited the imposition of ***civil liability*** on the seller of an automobile.

Moreover, we perceive that there is a considerable difference between (1) holding a seller liable for negligent entrustment of an automobile to an incompetent driver, where the state has declared the driver competent by issuing her a driver's license, and where the automobile accident which follows involves no violation of the criminal law; and (2) holding a seller liable for negligent entrustment of a firearm and ammunition to a visibly intoxicated person who has no license declaring him sober, and where the entrustment itself immediately presents the risk of possession of a loaded firearm by a drunk, which is conduct proscribed by the ***criminal*** law. See §§790.15 1-790.157. Surely an action for negligent entrustment should lie where the sale amounts, in effect, to a direct aiding and abetting of the purchaser in the commission of a criminal act, whether such an action should lie against an automobile dealer who sells an automobile to a licensed driver or not. (Actually, according to the lower court's decision, the driver in ***Horne*** had only a restricted license, which required the presence of a licensed driver in the car; a licensed driver was present in the car at the time of the purchaser's accident, however, so it was legal for the driver to have been at the wheel.) Most respectfully, ***Horne*** presents no impediment to recognition of the comrnon sense duty which we have urged in the quite different, and far more dangerous, context presented here.

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The instant case presents an ***entirely*** different question than the one presented in ***Bankston.*** The statute upon which the district court staked its decision in the instant case is ***not*** a civil statute. It is a criminal statute (which has been on the books, in one form or another, since 1881). It says nothing at all about civil liability for damages. It simply makes it a crime to sell or entrust a firearm to a minor or a person of unsound mind. The law is, and always has been, that the violation of such a penal statute is negligence per se -- that such a statute establishes a minimum standard of care in an ordinary negligence case as a matter of law, and that a violation of such a statute therefore amounts to negligence as a matter of law, thereby relieving the plaintiff of any obligation to prove negligence as a matter of fact to the satisfaction of a jury. See ***deJesus v. Seaboard Coast Line Railroad*** Co., 281 So.2d 198 (Fla. 1973); ***Restatement (Second) of Torts,*** §288B.[8/]

In fact, this Court has previously held that the violation of an earlier version of the very statute in issue here was simply that -- negligence as a matter of law. ***See Tamiami Gun Shop*** v. ***Klein,*** 116 So.2d 421 (Fla. 1959). ***See also Wyatt v. McMullen, 350*** So.2d 1115 (Fla. 1st DCA 1977). The same conclusion has been reached where violations of local ordinances and federal statutes regulating the sale of firearms are involved. See ***Coker v. Wal-Mart Stores, Inc.,*** 642 So.2d 774 (Fla. 1st DCA 1994), ***review denied, 65*** 1 So.2d 1197 (Fla. 1995); ***Sogo v. Garcia's National Gun, Inc.,*** 615 So.2d 184 (Fla. 3d

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[8/] The necessary corollary of this rule is also thoroughly settled: because legislative enactments ordinarily represent only minimum standards of care, a defendant's compliance with them does not prevent a finding of negligence where a reasonable man would have taken additional precautions. ***See, e. g., Westland Skating Center, Inc. v. Gus Machado Buick, Inc.,*** 542 So.2d 959 (Fla. 1989); ***Palm Beach County Board of County Commissioners v. Salas***, 511 So.2d 544 (Fla. 1987); ***Lindsey v. Bill Arflin Bonding Agency Inc.,*** 645 So.2d 565 (Fla. 1st DCA 1994); ***Seaboard Coast Line Railroad Co. v. Louallen,*** 479 So.2d 781 (Fla. 2d DCA 1985), ***review denied,*** 491 So.2d 280 (Fla. 1986); ***Restatement (Second) of Torts,*** §288C.

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DCA 1993); ***Everett v. Curter,*** 490 So.2d 193 (Fla. 2d DCA), ***review denied,*** 501 So.2d 1281 (Fla. 1986); ***K-Mart Enterprises of Florida, Inc.*** v. ***Keller, 439*** So.2d 283 (Fla. 3d DCA 1983), ***review denied,*** 450 So.2d 487 (Fla. 1984).

In effect, these decisions recognize the very duty which we seek here, because they do not hold that the statutes and ordinances create the duty; they hold instead that the general duty to exercise reasonable care which arises from the creation of a foreseeable zone of risk is breached, as a matter of law, by their violation, The fact that K-Mart's sale to Mr. Knapp may not have violated 9790.17 therefore meant no more than this: that the plaintiff had not proven that K-Mart was negligent ***as a matter of law;*** that she was not entitled to have the jury instructed, in the language of Fla. Std. Jury Instn. (Civ.) 4.9, that violation of the statute was negligence as a matter of law; and that she was therefore required to prove to the jury's satisfaction, ***as a matter*** of ***fact,*** that K-Mart breached its more general duty to exercise reasonable care under the circumstances. ***See Restatement (Second) of Torts,*** §§288B and 288C. Most respectfully, that is the ***only*** significance of 9790.17 to this case -- and the district court was plainly confused in concluding that, by placing the statute in the criminal code more than a century ago, the legislature meant to abolish the common law of negligence where the sale of firearms is concerned.?'

In neither ***deJesus*** nor ***Tamiami Gun Shop,*** nor in any of their numerous progeny, has any court ***ever*** held (as the district court did below) that a common law ***civil*** action for ordinary negligence will not lie simply because the legislature has designated some acts of obvious misconduct toward the public, but not others, as violations of ***the criminal***

9/ In this connection, a brief reminder of a settled rule of statutory construction would appear to be in order -- the settled rule that a statute will not be construed to displace the common law further than is clearly necessary, and that courts will presume that no change in the common law is intended unless the statute is explicit in that regard. See ***Carlile v. Game & Freshwater Fish Commission,*** 354 So.2d 362, 364 (Fla. ***1977); State v. Egan,*** 287 So.2d 1 (Fla. 1973). ***See generally*** 49 Fla. Jur.2d, ***Statutes,*** §192.

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law. In effect, by misreading ***Bankston*** as it did, the district court held that only ***criminal*** acts can amount to negligent acts for purposes of civil liability -- which is plainly not the law. Indeed, if the district court is correct, then K-Mart could have sold a rifle and ammunition to Mr. Knapp, with absolute impunity and without liability for its obvious negligence, even if he had informed the sales clerk in his drunken stupor that he intended to return to the bar where he had been drinking all day and kill Ms. Kitchen with his newly-purchased arsenal! Most respectfully, for this Court to agree with the district court in this case, it will necessarily have to hold that no civil action for negligence will lie unless the legislature has explicitly made the conduct ***criminal*** -- a holding which would effectively overrule thousands of decisions presently on the books; a holding which would effectively destroy the civil common law of negligence; and a holding which we are therefore confident will never emanate from this Court.

K-Mart is likely to respond (as most defendants facing "duty issues" do) that imposition of a duty of reasonable care will create an unrealistic and onerous burden -- that imposing such a duty upon it will require its clerks to conduct background investigations of, and to administer breathalyzer tests to, all of its firearm purchasers. The argument will be hyperbolic and unjustified. We are not asking the Court to recognize any duty which is not already imposed, according to *McCain*, upon *all* persons whose conduct creates a foreseeable zone of risk of harm to others. We are not asking the Court to recognize any duty which K-Mart itself does not already owe in all other aspects of its business. ***See, e. g., Budet v. K-Mart Corp.,*** 491 So.2d 1248 (Fla. 2d DCA 1986). In fact, we are not asking the Court to recognize any duty which K-Mart itself has not already recognized as a prudent business practice. Because K-Mart professes to have adopted a strong internal policy prohibiting its clerks from selling firearms to visibly intoxicated persons, recognition of the duty we seek will not change

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its business practices one whit. As this Court observed in an analogous context, it is ***not*** "too onerous a burden to place upon [a socially desirable enterprise] the duty to exercise reasonable care . . . . If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the [enterprise] to liability. " *Nova University,* Inc. *v. Wagner,* 491 So.2d 1116, 1118 (Fla. 1986). In our judgment, that is not an awful lot to ask in the compelling circumstances presented here -- and we respectfully urge the Court to answer the certified question in the affirmative and quash the district court's decision.

B. THE DISTRICT COURT ERRED IN HOLDING THAT K-MART WAS ENTITLED TO JUDGMENT IN ITS FAVOR AS A MATTER OF LAW WHERE THE GROUND UPON WHICH IT REVERSED THE PLAINTIFF'S JUDGMENTS WAS NOT PRESERVED FOR REVIEW.

If the Court has answered the certified question in the affirmative, it will not be necessary to reach this second issue.[10/] If, however, the Court has agreed with the district court that a retailer of firearms can sell a gun and ammunition to an obvious drunk without accountability for the predictable consequences, it should nevertheless quash this aspect of the district court's decision because the district court simply had no power to reverse the plaintiff's judgments and order entry of a judgment in K-Mart's favor on the ground that it did.

[10/] Although it will be unnecessary to reach the issue in that event, we urge the Court to reach and resolve it nevertheless. As we will demonstrate, the issue involves an important procedural question concerning the meaning of Rule 1.480(b), Fla. R. Civ. P., which this Court has never addressed. It should also be apparent from the district court's rejection of our position on the issue (which, as we will demonstrate, conflicts with a Third District decision on the very point) that the Bench and the Bar is in need of guidance in the area. This would be a good opportunity for the Court to clarify the law, even if unnecessary to do so, and we urge the Court to take advantage of the opportunity to resolve the apparent confusion.

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This issue is properly raised here, because once this Court acquires jurisdiction by way of a certified question of great public importance, it has jurisdiction to decide *all* the issues in the case, whether addressed in the district court's decision or not -- including ***any*** issue which demonstrates error in the district court's disposition of the case, and even if resolution of the issue renders the certified question moot. ***Feller*** *v.* ***State, 637*** So.2d 911 (Fla. 1994); ***State*** v. ***Gray,*** 654 So.2d 552 (Fla. 1995); ***Lawrence v. Florida East Coast Railway*** Co., 346 So.2d 1012 (Fla. 1977); ***Cleveland v. City of Miami, 263*** So.2d 573 (Fla. 1972); ***Zirin v. Charles Pfizer &*** Co., 128 So.2d 594 (Fla. 1961). See ***Jacobson v. State,*** 476 So.2d 1282 (Fla. 1985); ***Bould v. Touchette,*** 349 So.2d 1181 (Fla. 1977). Put more simply perhaps, ". . . when a case is properly lodged here [on a certified question] there is no reason why it should not then be terminated here." ***Zirin, supra*** at 596.

Confident that this issue is properly before the Court, we turn to the point. In our judgment, the district court had no power to reverse the plaintiff's judgments and order entry of a judgment in K-Mart's favor on the ground that it did, because K-Mart waived the issue at least three times in the trial court. First, we remind the Court that K-Mart ***admitted*** in its answer to the first amended complaint that it owed the plaintiff a common law duty of reasonable care under the circumstances. By doing so, it removed the "duty issue" from the case for the remainder of the litigation; it was not permitted to argue to the contrary in the district court; and the district court had no authority to order the entry of a judgment in its favor on the ground that it owed no duty of care to the plaintiff. See *Carvell* v. *Kinsey*, 87 So.2d 577 (Fla. 1956); ***Clark*** *v.* ***Groves,*** 154 Fla. 13, 16 So.2d 340 (1944); ***City of Deland*** *v.* ***Miller,*** 608 So.2d 121 (Fla. ***5th*** DCA 1992); ***Heinold Commodities, Inc. v. Trude***, 508 So.2d 1327 (Fla. ***4th*** DCA 1987); ***Vann v. Hobbs,*** 197 So.2d 43 (Fla. 2d DCA 1967).

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Second, in neither of the motions for directed verdict which K-Mart made at trial did it assert a position contrary to the admission contained in its answer, and it most certainly did not raise the contention upon which it ultimately prevailed in the district court. It is thoroughly settled that the failure to make a motion for directed verdict at the close of ***the*** evidence (whether such a motion was made at the close of the plaintiff's case or not) is a waiver of any entitlement to a subsequent judgment in accordance with prior motion for directed verdict. ***See, e. g., 6551 Collins Avenue Corp. v. Millen***, 104 So.2d 337 (Fla. ***1958); Gulf Heating & Refrigeration Co. v. Iowa Mutual Ins. Co.,*** 193 So.2d 4 (Fla. 1966); ***Prime Motor Inns, Inc. v. Waltman***, 480 So.2d 88 (Fla. 1985); Grossman ***v. Florida Power & Light Co.,*** 570 So.2d 992 (Fla. 2d DCA 1990); ***Dean Witter Reynolds, Inc. v. Hammock,*** 489 So.2d 761 (Fla. 1st DCA 1986).

This thoroughly settled rule is not avoided by the fact that K-Mart did make a motion for directed verdict at the close of the evidence, because it is also settled that simply making such a motion is not enough. Because Rule 1.480(a), Fla. R. Civ. P., requires that a motion for directed verdict "state the specific grounds therefor, " only the specific, unambiguous grounds raised in the motion will support a claim of entitlement to a directed verdict on appeal -- and an appellate court is powerless to order entry of a judgment in a defendant's favor on any ground not specifically and unambiguously stated in the motion made at the close of the evidence below. ***See, e. g., Wagner v. Nottingham Associates,*** 464 So.2d 166 (Fla. 3d DCA), ***review denied,*** 475 So.2d 696 (Fla. 1985); ***United State Fire Insurance Co. v. Johnston,*** 431 So.2d 1018 (Fla. 4th DCA 1983); *Adamson* ***v. First Federal Savings & Loan Ass'n of Andalusia,*** 519 So.2d 1036 (Fla. 1st DCA 1988). ***See generally*** 55 Fla. Jur.2d, ***Trial,*** §79.

Third, the issue was waived once again by K-Mart's election ***not*** to file a post-trial motion for judgment in accordance with prior motion for directed verdict, as required by

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Rule 1.480(b), Fla. R. Civ. P. Curiously, although it is widely understood that the subsequent failure to renew a motion for directed verdict made at the close of the evidence constitutes a waiver of the motion,[11/] we have only been able to find one Florida decision which addresses the question. It holds that the failure to file a post-trial Rule 1.480(b) motion ***does*** result in a waiver of the motions for directed verdict made at trial. General ***Motors Acceptance Corp. v. City of Miami Beach,*** 420 So.2d 601 (Fla. 3d DCA 1982), ***review denied,*** 431 So.2d 988 (Fla. 1983). We commend that decision to this Court. In the absence of any additional authority on the question, however, and because it does not appear that this Court has ever addressed the question, we deem it prudent to argue the point at some additional length.

The controlling rule of procedure is Rule 1.480(b), which reads as follows:

> When a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, ***the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.*** Within 10 days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for directed verdict. . , .

(Emphasis supplied). It is abundantly clear from the plain language of the rule that the denial of a motion for directed verdict at the close of all the evidence is, in legal effect, a reservation of decision on the motion for ***later*** determination. A party ***must*** therefore file a post-trial motion for judgment in accordance with prior motion for directed verdict in order to obtain a legal ruling upon its motion for directed verdict. And, because the very existence of the rule itself implies that it has a purpose, noncompliance with the rule

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[11/] See "Author's Comment-1967" to Rule 1.480, 30A F.S.A. 299: "Note under this rule alone failure to make a motion for directed verdict or for a judgment non obstante veredicto . . . might prove fatal."

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simply must have a consequence.

Rule 1.480(b) is identical to Rule 50(b), Fed. R. Civ. P. It is well settled that where a Florida rule is patterned after a federal rule, it will be assumed that this Court adopted the rule with the intention of achieving the same results which inure under the federal rules. In the absence of a controlling decision on point, a Florida court should therefore look to federal law to determine the meaning of Rule 1.480(b). ***See Miami Transit*** Co. v. ***Ford,*** 155 So.2d 360 (Fla. 1963); ***Savage v. Rowell Distributing Corp.,*** 95 So.2d 415 (Fla. 1957); Gross ***v. Franklin, 387*** So.2d 1046 (Fla. 3d DCA 1980); ***Zuberbuhler v. Division of Administration,*** 344 So.2d 1304 (Fla. 2d DCA 1977), ***cert. denied, 358*** So.2d 135 (Fla. 1978); ***Jones v. Seaboard Coast Line Railroad Co., 297*** So.2d 861 (Fla. 2d DCA 1974); ***Gangelhoff v. Lokey Motors Co., Inc., 270*** So.2d 58 (Fla. 2d DCA 1972).

Whether the failure to file a Rule 50(b) motion waives appellate review of a motion for directed verdict made at the close of the evidence is a question which was definitively resolved by the United States Supreme Court several years before this Court adopted the federal rule (in 1954, initially as RCP 2.7) as Rule 1.480(b). A federal court is powerless to reverse a trial court and direct the entry of judgment in accordance with a prior motion for directed verdict, where the appellant has failed to move for judgment under Rule 50(b). ***Cone v. West Virginia Pulp & Paper Co., 330*** U.S. 212, 67 S. Ct. ***752,*** 91 L. Ed. ***849*** (1947); ***Globe Liquor Co. v. San Roman, 332*** U.S. 571, 68 S. Ct. ***246, 92*** L. Ed. ***177 (1948); Johnson v. New York, New Haven & Hartford Railroad, 344*** U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952).

If the federal construction of Rule 50(b) is to be followed here -- as we think it should be, especially since its waiver principle had been firmly established for several years before it was adopted by this Court as Rule 1.480(b) -- then K-Mart plainly waived

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any entitlement to the judgment which it ultimately obtained in its favor on appeal.[12/] And because the issue upon which K-Mart prevailed on appeal was waived at least ***three*** separate times below, the district court simply had no power to reverse the plaintiff's judgments and order the entry of a judgment in K-Mart's favor on the ground that it did. We therefore respectfully submit that, whatever the answer to the certified question might be, this aspect of the district court's decision should be quashed,

C. THE DISTRICT COURT ERRED IN HOLDING THAT K-MART WAS ENTITLED TO A NEW TRIAL ON THE GROUND THAT THE TRIAL COURT HAD COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY THAT VIOLATION OF K-MART'S INTERNAL POLICY WAS "EVIDENCE OF NEGLIGENCE, BUT NOT CONCLUSIVE EVIDENCE OF NEGLIGENCE."

[12/] Where the issue is the sufficiency of the evidence to support a verdict, the failure of the defendant to renew its motion for directed verdict after trial will not be entirely fatal if it has filed a motion for new trial challenging the verdict as contrary to the manifest weight of the evidence; although an appellate court is powerless to order entry of a judgment in that circumstance, it can at least order a new trial. See the U.S. Supreme Court decisions cited above, and ***Ruth*** v. ***Sorensen,*** 104 So.2d 10 (Fla. 1958); ***General Motors Acceptance Corp. v. City of Miami Beach,*** 420 So.2d 601 (Fla. 3d DCA 1982), ***review denied,*** 431 So.2d 988 (Fla. 1983); ***Yoder v. Adriatico***, 459 So.2d 449 (Fla. 5th DCA 1984).

However, on an issue which arises during the course of the litigation and which is not created by the verdict itself, like the issue of whether a duty exists as a matter of law, a defendant cannot withhold the contention, wait and see whether the verdict will be adverse to it, and then seek the proverbial "second bite at the apple" only after the verdict proves adverse. If a contention like the one in issue here has not been raised before verdict, it has been waived, and it cannot be revived by asserting it for the first time in a motion for new trial, or on appeal. ***See, e. g., White Construction Co., Inc. v. DuPont, 455*** So.2d 1026, 1030 (Fla. 1984); ***Sears Roebuck & Co. v. Jackson, 433*** So.2d 1319 (Fla. 3d DCA 1983); ***County of Volusia*** v. ***Niles***, 445 So.2d 1043 (Fla. 5th DCA 1984); ***Hargrove v. CSX Transportation, Inc.,*** 631 So.2d 345 (Fla. 2d DCA 1994); ***Nissan Motor Corp. in U.S.A. v. Padilla,*** 545 So.2d 274 (Fla. 3d DCA 1989); ***Walt Disney World Co. v. Althouse,*** 427 So.2d 1135 (Fla. ***5th*** DCA 1983); ***Cameron v. Sconiers,*** 393 So.2d 11 (Fla. ***5th*** DCA 1980); ***Robbins v. Graham,*** 404 So.2d 769 (Fla. ***4th*** DCA 1981); ***Nadler v. Home Insurance*** Co., 339 So.2d 280 (Fla. 3d DCA 1976).

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If the district court's decision is to be quashed for either of the reasons argued above, K-Mart will not be entitled to entry of a judgment in its favor. The question which remains is whether K-Mart will nevertheless be entitled to the new trial which the district court ordered in the alternative. Because this Court's certified question jurisdiction extends to *all* issues in the case (see p. 29, ***supra),*** this question is properly raised here. And because, as we intend to demonstrate, the district court plainly erred in holding that the trial court committed reversible error in instructing the jury that violation of K-Mart's internal policy was "evidence of negligence, but not conclusive evidence of negligence, " the question is one which ought to be resolved in order to terminate the litigation here in a legally correct manner. In our judgment, fundamental notions of fairness and due process require no less.

Because we believe that at least two of the district courts are, at present, ***thoroughly*** confused on the subject, we deem it prudent (at the expense of unfortunate length) to begin with "the basics" here, to provide a solid foundation upon which resolution of the issue must ultimately be constructed. In Florida, as a general rule, the appropriate standard of care in any given negligence case is for the jury to determine:

> The general principle is thoroughly settled. What is and what is not reasonable care under the circumstances is, as a general rule, simply undeterminable as a matter of law. Rather, "it is 'peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care, ' "

Nichols v. Home Depot, Inc., 541 So.2d 639, 641-42 (Fla. 3d DCA 1989), ***quoting Orlando Executive Park v. Robbins***, 433 So.2d 491, 493 (Fla. 1983).[13/]

[13/] ***Accord Weis-Patterson Lumber Co.*** v. ***King,*** 131 Fla. 342, 177 So. 313 (1937); ***Acme Electric, Inc. v. Travis,*** 218 So.2d 788 (Fla. 1st DCA), ***cert. denied, 225*** So.2d 917 (Fla. 1969); ***Grissett*** v. ***Circle K Corp.*** of ***Texas,*** 593 So.2d 291 (Fla. 2d DCA 1992); ***Holley v. Mt. Zion Terrace Apts., Inc.,*** 382 So.2d 98 (Fla. 3d DCA 1980); ***Walt Disney World***

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There are exceptions and qualifications to this general rule, of course. Where (as we have previously demonstrated) a penal statute is designed to protect a particular class of persons from their inability to protect themselves, or where a statute establishes a duty to take precautions to protect a particular class of persons from a particular type of injury, the statute *fixes* the standard of care in a negligence case; a violation of it is negligence ***per*** se, or negligence as a matter of law; and a jury is not free to find otherwise. ***deJesus v. Seaboard Coast Line Railroad*** Co., 281 So.2d 198 (Fla. 1973); ***Tamiami*** Gun ***Shop*** v. ***Klein,*** 116 So.2d 421 (Fla. 1959). And where ***professional*** negligence is in issue, although the jury remains the ultimate arbiter of the standard of care, evidence in the form of expert testimony is required to establish the professional standard of care. See, e. g., $766.102, Fla. Stat. (1995) (requiring expert testimony to establish the standard of care in a medical negligence case). In ***the ordinary*** negligence case (like the instant case), however, the general rule plainly applies, and the appropriate standard of care is always a question of fact.

In an ordinary negligence case, where expert testimony is not required, the jury is free to determine the appropriate standard of care as a matter of common sense and from its own everyday experiences in the world. The parties are not prohibited from assisting the jury in that regard, however. Because the appropriate standard of care is a fact question, Florida law allows the parties to present ***evidence*** to aid the jury in its determination of what is and what is not reasonable care under the circumstances presented by the facts in the case. The point is nicely explained in ***Seaboard Air Line Railway Co. v. Watson,*** 94 Fla. 571, 113 So. 716, 718 (1927), as follows:

> . . . "What usually is done may be evidence of what ought to

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Co. v. ***Goode,*** 501 So.2d 622 (Fla. ***5th*** DCA 1986), ***review dismissed, 520*** So.2d 270 (Fla. 1988).

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> be done, but ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." . . . While in some jurisdictions the ordinary usage or custom of the business or occupation is made the test of negligence, the weight of authority is that as negligence is the doing or failure to do what ordinarily prudent men would do under the same circumstances the test of ordinary custom, while relevant and admissible in evidence, is not controlling, especially where the custom is clearly a careless or dangerous one. . . . It would seem to us that the proper rule in such a matter would be, in cases where the method used was not clearly and inherently negligent or dangerous, to admit evidence of the general custom of others engaged in the same kind of business or occupation, as to the particular method under investigation, for the consideration of the jury for whatever light it might throw upon the question as to whether or not the method used was or was not negligent under the circumstances of the particular case, but not to any extent whatever as conclusive of the question. There is a common sense and reasonable basis for the contention that what is ordinarily and usually done by men generally, engaged in the same work, has some relevance to the inquiry as to what an ordinarily prudent person would do under the same circumstances. . . .

Since this seminal decision, the decisional law has established at least three separate categories of evidence which is plainly admissible for the purpose of assisting the jury in determining the appropriate standard of care:

(1) Statutes which do not themselves fix the standard of care (and the violation of which is therefore not negligence per se), like "traffic regulations, " are admissible as ***evidence*** of the standard of care, but not conclusive evidence of the standard of care. ***Seaboard Coastline Railroad Co. v. Addison, 502*** So.2d 1241 (Fla. 1987); ***Chimerakis v. Evans,*** 221 So.2d 735 (Fla. 1969); ***Clark*** v. ***Sumner,*** 72 So.2d 375 (Fla. 1954); ***Allen*** v. ***Hooper,*** 126 Fla. 458, 171 So. 513 (1937); ***Baggetf v. Davis,*** 124 Fla. 701, 169 So. ***372*** (1936). See ***deJesus v. Seaboard Coast Line Railroad*** Co., 281 So.2d 198 (Fla. 1973).

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(2) "Industry standards," customs and practices, and the care exercised by others situated similarly to the defendant are admissible as ***evidence*** of the standard of care, but not conclusive evidence of the standard of care. ***Seaboard Air Line Railway Co. v. Watson,*** 94 Fla. ***57*** 1, 113 ***So. 7 16*** (1927); ***Lockwood v. Baptist Regional Health Services, Inc.,*** 541 So.2d 731 (Fla. 1st DCA 1989); ***Seaboard Coast Line Railroad 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); ***Nesbitt v. Community Health of South Dade, Inc., 467*** So.2d 711 (Fla. 3d DCA 1985); ***Stambor v. One Hundred Seventy-Second Collins Corp.,*** 465 So.2d 1296 (Fla. 3d DCA), ***review denied,*** 476 So.2d 675 (Fla. 1985); ***Ploetz v. Big Discount Panel Center, Inc.,*** 402 So.2d 64 (Fla. ***4th*** DCA 198 1); ***St. Louis-San Francisco Railway*** Co. v. ***White,*** 369 So.2d 1007 (Fla. 1st DCA), ***cert. denied,*** 378 So.2d 349 (Fla. 1979). See ***Marks v. Delcastillo,*** 386 So.2d 1259 (Fla. 3d DCA 1980), ***review denied,*** 397 So.2d 778 (Fla. 1981).

(3) A defendant's own "safety rules" and internal policies are admissible as ***evidence*** of the standard of care, but not conclusive evidence of the standard of care. ***Metropolitan Dade County v. Zapata,*** 601 So.2d 239 (Fla. 3d DCA 1992); ***Nichols v. Home Depot, Inc.,*** 541 So.2d 639 (Fla. 3d DCA 1989); ***Lockwood v. Baptist Regional Health Services, Inc., supra; Dean Witter Reynolds, Inc. v. Hammock, supra; Marks v. Mandel***, 477 So.2d 1036 (Fla. 3d DCA 1985); ***Clements v. Boca Aviation, Inc., 444*** So.2d 597 (Fla. ***4th*** DCA 1984); ***Nance v. Winn-Dixie Stores, Inc.,*** 436 So.2d 1075 (Fla. 3d DCA 1983), ***review denied,*** 447 So.2d 889 (Fla. 1984); ***Reese v. Seaboard Coast Line Railroad*** Co., 360 So.2d 27 (Fla. ***4th*** DCA), ***cert. dismissed,*** 366 So.2d 884 (Fla. 1978). ***See Holley v. Mt. Zion Terrace Apts., Inc.,*** 382 So.2d 98 (Fla. 3d DCA 1980); ***Homan*** v. ***County of Dade,*** 248 So.2d 235 (Fla. 3d DCA 1971).

The admission of evidence in all three categories makes perfect sense -- because

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(as the Court explained in ***Watson*** in one of the three contexts) evidence of what the legislature deems reasonable care, evidence of what others similarly situated deem reasonable care, and evidence of what the defendant itself deems reasonable care provides the jury with an appropriate measure of what the common law's hypothetical "reasonable man" might deem to be reasonable care under the circumstances. ***See generally 3*** Harper, James & Gray, ***The Law of Torts,*** §17.3, pp. 578-92 (2d Ed. 1986) (and 1995 Supp.). However, because such evidence does not itself *fix* the standard of care, but is admissible only as ***evidence*** on the issue of the appropriate standard of care, and because there is some risk that a jury might misunderstand the distinction, Florida courts have generally concluded that the legal consequences of the admission of such evidence should be explained to the jury. Similarly, where a statute has been admitted into evidence which ***does*** fix the standard of care, Florida courts have concluded that the legal consequences of the admission of such evidence should be explained to the jury as well.

In fact, Florida's Standard Jury Instructions contain an instruction for each circumstance. Fla. Std. Jury Instn. (Civ.) 4.9 addresses the circumstance in which a statute actually fixes the standard of care. It reads in pertinent part: "Violation of this [statute] [ordinance] is negligence, If you find that a person alleged to have been negligent violated this [statute] [ordinance], such person was negligent. . . ." Fla. Std. Jury Instn. (Civ.) 4.11 addresses the circumstance in which evidence has been admitted which does not actually fix the standard of care, but which is merely evidence which the jury can consider in determining the appropriate standard of care. It reads:

> Violation of this [statute] [ordinance] is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that a person alleged to have been negligent violated such a traffic regulation, you may consider that fact, together with the other facts and circumstances, in determining whether such person was negligent.

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When faced with the three categories of evidence which are admissible merely as ***evidence*** of the standard of care, Florida courts have concluded that the legal consequences of such evidence should be explained to the jury, and that Fla. Std. Jury Instn. (Civ.) 4.11, or an appropriately-tailored variation thereof, should therefore be given:

(1) When statutes, like "traffic regulations," which do not themselves fix the standard of care have been admitted into evidence, and there is evidence that they have been violated, then an "evidence of negligence, but not conclusive evidence of negligence" instruction must be given. This Court has made that perfectly clear:

> . . . At issue here is respondent's alleged violation of a statute . . . , part of the Florida Uniform Traffic Control Law. Standard Instruction 4.11 was the instruction that should have been given by the trial court. This instruction tracks the established rule of law that a violation of a traffic regulation is evidence of negligence. . . . Where there is evidence of such a violation a party is entitled to a jury instruction thereon. This is simply a specific application of the equally established rule of law that a party is entitled to have the jury instructed upon his theory of the case where there is evidence to support the theory. . . .
>
> . . . .
>
> We . . . reaffirm that a violation of a traffic ordinance is evidence of negligence, and that when there is evidence of such a violation a requesting party is entitled to have the jury so instructed. When the trial judge fails to read or paraphrase the statute and inform the jury that a violation of the statute is evidence of negligence, the jury is given no guidance on either the requirements of the statute or what effect a violation of the statute should have on its deliberations.

Seaboard Coastline Railroad Co. v. Addison, 502 So.2d 1241, 1242 (Fla. 1987). ***Accord Palm Beach County Board of County Commissioners v. Salas, 511*** So.2d 544, 547 (Fla. 1987) (" . . . [W]e point out that Blount's alleged violation of a traffic ordinance is merely ***evidence*** of her negligence and the county is entitled to have the jury so

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instructed. ***See . . . Addison . . . .*** ").[14/]

(2) When "industry standards" or customs and practices have been admitted into evidence, and there is evidence that they have been violated, then an "evidence of negligence, but not conclusive evidence of negligence" instruction -- like Fla. Std. Jury Instn. (Civ.) 4.11 -- should be given. ***St. Louis-San Francisco Railway Co. v. White, 369*** So.2d 1007 (Fla. 1st DCA), ***cert. denied, 378*** So.2d 349 (Fla. 1979); ***Seaboard Coast Line Railroad Co. v. Clark,*** 491 So.2d 1196 (Fla. 4th DCA 1984). ***See Nesbitt v. Community Health*** of ***South Dade, Inc.,*** 467 So.2d 711 (Fla. 3d DCA 1985).

(3) And this, of course, brings us to the instant case. In essence, all that we asked the district court to do was to fill in the blank, and we thought then, and we continue to think now, that the required entry is obvious. If all three categories of evidence are admissible in evidence ***for the same purpose*** -- as evidence of the standard of care, but not conclusive evidence of the standard of care -- and if (upon proof of a violation) an "evidence of negligence, but not conclusive evidence of negligence" instruction is required in categories (1) and (2), then it should logically follow that the same instruction is proper in category (3).

In fact (the district court's perception below notwithstanding), there ***are*** decisions

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[14/] There are several district court decisions which have followed ***Addison*** where "traffic regulations" are concerned, but there is no need to collect them here because of the authoritative nature of ***Addison*** itself. It is worth pointing out, however, that the logic of ***Addison*** has compelled an expansion of its holding beyond mere "traffic regulations, " and that Fla. Std. Jury Instn. (Civ.) 4.11 has been required in cases involving violations of other types of "legislative" enactments which do not themselves ***fix*** the standard of care. ***See Scott v. Seaboard System Railroad, Inc., 578*** So.2d 499 (Fla. 2d DCA) (violation of federal regulation governing vegetation on railroad right-of-way), ***review denied,*** 592 So.2d 682 (Fla. 1991); ***Riley v. Willis,*** 585 So.2d 1024 (Fla. 5th DCA 1991) (violation of county ordinance requiring that dogs be kept on a leash); ***Winemiller v. Feddish***, 568 So.2d 483 (Fla. 4th DCA 1990) (violation of municipal ordinance prohibiting placement of coral rocks in swales).

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in this third category which hold that such an instruction ***must*** be given. They derive from an observation made in ***Nesbitt v. Community Health of South Dade,*** *Inc., 467* So.2d 711, 714-15 (Fla. 3d DCA 1985), where, in discussing the admissibility of evidence of "custom and practice," the district court (echoing ***Watson)*** wrote:

> . . . "[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. ", . , The fact that a person deviates from or conforms to an accepted custom or practice does not establish conclusively that the person was or was not negligent. . , .
>
> Because what is usually done is merely some evidence of the standard of care, it is admissible for that limited purpose. Its admission, however, must be qualified by a cautionary instruction to the jury that the evidence does not by itself establish a standard of care. . . .

In a subsequent case involving the admissiblity of a defendant's own internal policies, the same district court wrote:

> . . . Courts have held repeatedly that these internal manuals should be admitted when they contain either 1) evidence of a general industry custom or standard, or 2) evidence that the defendant violated its own policy or an industry standard. , , , Thus, on retrial, the emergency room policy and procedure manual should be admitted and the trial court should give the relevant jury instructions pertaining to evidence of general standards or of specific policies. See ***Nesbitt . . . .***

Marks v. Mandel, 477 So.2d 1036, 1039 (Fla. 3d DCA 1985).

And more recently, the same district court wrote:

> Rules made by a defendant to govern the conduct of employees are relevant evidence of the standard of care. . . .
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> . . . [T]his court has held that a jury receiving such evidence must be cautioned that the existence of an internal rule does not itself fix the standard of care. ***Nesbitt*** . . . . Accordingly, if the plaintiffs decide to introduce the training film, we

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> direct the trial judge, upon timely request of counsel, to issue a cautionary instruction to the jury, limiting the use of the film as only some evidence of the standard of care.

Metropolitan Dade County v. Zapata, 601 So.2d 239, 244 (Fla. 3d DCA 1992).

At this point, we think, it should be evident to the Court why we spent so much time on "the basics." The purpose of all of that background was to demonstrate to the Court that the instruction ***required*** by ***Nesbitt, Marks,*** and *Zapata* -- that "the existence of an internal rule does not itself fix the standard of care" -- is, albeit differently phrased, the very "evidence of negligence, but not conclusive evidence of negligence" instruction represented by Fla. Std. Jury Instn. (Civ.) 4.11. And the most probable reason that the latter, "standard" formulation of the concept is not phrased in terms of the "standard of care" is that the drafters of the instruction purposefully avoided the use of legal terminology, like "standard of care," in favor of general language which laypersons could be expected to understand. See ***General Note on*** Use, Fla. Std. Jury Instns. (Civ.), pp. xviii-xxi. In fact, the phrase "standard of care" appears in ***none*** of the standard instructions for negligence cases.

Consistent with this philosophy, everyday language designed for laypersons was used to express the complicated legal concept that a "traffic regulation" does not *fix* the standard of care (and that a violation of it is therefore not negligence ***per*** se), but that the regulation is admissible as ***evidence*** of the standard of care (and that a violation of it is therefore "evidence of negligence") -- resulting in a simple instruction that a violation of this [fill in the blank] is evidence of negligence, but not conclusive evidence of negligence, and you may consider that fact, together with all the other facts and circumstances, in determining whether the defendant was negligent.[15/] Most respectful-

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[15/] It would also appear that the phrase "standard of care" was avoided in favor of "violation . . . is evidence of negligence" because this Court had previously approved the

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ly, the difference between this instruction and the instruction required by ***Nesbitt, Marks,*** and ***Zapata*** is purely semantic; both instructions say exactly the same thing.

Curiously (in view of the decision presently before the Court), the Fourth District has itself recognized that the two instructions say the same thing. In ***Seaboard Coast Line Railroad*** Co. v. ***Clark,*** 491 So.2d 1196, 1198-99 (Fla. 4th DCA 1986), it wrote:

> All parties are entitled to jury instructions on their theory of the case, even when the defendant offers evidence controverting that theory, where the evidence substantially supports the plaintiffs' theory. . . . Further, Florida courts have upheld instructions which stated that violation of industry standards was evidence of negligence in a railroad crossing collision setting. ***See St. Louis-San Francisco Railway v. White, 369*** So.2d 1007 (Fla. 1st DCA), ***cert. denied,*** 378 So.2d 349 (Fla. ***1979). See generally Nesbitt v. Community Health of South Dade, Inc.,*** 467 So.2d 7 11 (Fla. 3d DCA 1985), and cases cited therein (admission of evidence of industry custom must be accompanied by cautionary instruction stating that such evidence does not by itself establish a standard of care).
>
> . . . .
>
> [The defendant] argues that the trial court properly rejected plaintiffs' proposed instruction regarding industry custom because such instruction would have elevated industry custom to the level of a statute. We disagree. We concede that the language of plaintiffs' proposed instruction tracks the language of Standard Charge 4.11, which describes the effect of the violation of a statute in a negligence case. However, the proposed instruction correctly states the law where it states that violation of industry standards is evidence of negligence. ***See Nesbitt, supra; . . .*** There is no suggestion in plaintiffs' proposed instruction that violation of an industry standard

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latter formulation in ***Baggett v. Davis,*** 124 Fla. 701, 169 So. 372 (1936). It is also apparent that the phrase, "It is not, however, conclusive evidence of negligence," was borrowed from this Court's similar expression in ***Seaboard Air Line Railway Co. v. Watson,*** 94 Fla. 571, 113 So. 716 (1927) (quoted at p. ***35-36, supra),*** or one of its progeny.

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> would be negligence per se. In our view, the plaintiffs' proposed instruction did not elevate the violation of an industry custom to the potential probative level of the violation of a statute. Further, the proposed instruction certainly would have assisted the jury in placing the abundant evidence regarding the violation of industry standards in its proper legal context.

We repeat, the difference between an instruction patterned upon Fla. Std. Jury Instn. (Civ.) 4.11 and the instruction required by ***Nesbitt, Marks,*** and *Zapata* is purely semantic; both instructions say exactly the same thing.

There is, of course, a fly in the ointment: ***Steinberg v. Lomenick*, 53** 1 So.2d 199 (Fla. 3d DCA 1988), ***review denied,*** 539 So.2d 476 (Fla. 1989). In that case, the plaintiffs presented evidence that the defendant had violated one of its own internal safety rules, and they requested an instruction patterned upon Fla. Std. Jury Instn. (Civ.) 4.11, The trial court declined to give the instruction; the defendant received a favorable verdict; and the plaintiffs appealed, contending that the instruction should have been given. On rehearing (of a contrary initial majority opinion), the district court disagreed. It conceded that the safety rule had been properly admitted as "evidence of negligence": "Concededly, rules made by a defendant to govern the conduct of employees are relevant evidence of the standard of care. " 531 So.2d at 200. However, it held that the requested instruction should not have been given -- with the following explanation:

> . . . Indeed, this Court has held that a party's internal policies and procedure are admissible as some evidence of the appropriate standard of care. . . . However, as Professor Wigmore has noted, a difficulty
>
> > "arises from the necessity of distinguishing between the use of such facts ***evidentially*** and their use as involving a ***standard of conduct*** in substantive law . . . . To take [the defendant's] conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard

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> set by the substantive law, and would be improper. . . . The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard.". . .
>
> Consistent with the Wigmore analysis, this court has held that the jury receiving such evidence must be cautioned that the existence of an internal rule does not itself fix the standard of care. ***Nesbitt . . . .***
>
> Therefore, to instruct the jury, as the plaintiffs requested, that a violation of a defendant's internal rule is evidence of negligence is to give far more weight to the evidence than it deserves; evidence that the rule was violated is ***not*** evidence of negligence unless and until the jury finds -- which according to the caveat it is free not to do -- that the internal rule represents the standard of care.
>
> No statute or regulation or even industry-wide standard . . . required that the defendant's employees keep each child in view at all times. This unquestionably desirable goal was set by the defendant itself, and that it was not met should not result in the court permitting the jury to ipso facto find the defendant negligent.

531 So.2d at 200-01.

With all due respect to the ***Steinberg*** Court, to the extent that we understand this explanation at all, we think it makes no sense. As we have taken considerable pains to explain, although an internal policy does not itself *fix* the standard of care (and a violation of it therefore cannot amount to negligence ***per*** se), evidence of the policy is admissible as some ***evidence*** of the standard of care; and a jury is free to accept the policy as the appropriate standard of care if, after considering all the facts and circumstances in the case, it chooses to do so. And if the jury has accepted the policy as the appropriate standard of care, as it is entitled to do, it most certainly may "find the defendant negligent" for violating the policy -- which is all that Fla. Std. Jury Instn. (Civ.) 4.11 says. See ***Nichols v. Home Depot, Inc.,*** 541 So.2d 639, 642 (Fla. 3d DCA 1989)

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("These breaches of the defendant's own safety rules could provide all the evidence that a jury could possibly need to find the defendant negligent").

Moreover, the distinction drawn by Professor Wigmore between "the use of such facts ***evidentially*** and their use as involving a ***standard*** of ***conduct"*** is merely the distinction we have discussed at length between "evidence of negligence" and "negligence ***per se."*** And the "difficulty" addressed by Professor Wigmore is therefore exactly the difficulty which Fla. Std. Jury Instn. (Civ.) 4.11 is ***designed*** to address: the "express caution that it is merely evidential and is not to serve as a legal standard" is contained in the language "[v]iolation . , , is evidence of negligence. It is not, however, conclusive evidence of negligence. " And if we are correct that an instruction that "an internal rule does not itself fix the standard of care" is the same instruction in substance as the instruction represented by Fla. Std. Jury Instn. (Civ.) ***4.11,*** then ***the Steinberg*** Court's conclusions that the first must be given, but that the second is prohibited, are internally contradictory. Most respectfully, ***Steinberg*** was wrongly decided.[16/]

All of which brings us to the instant case, in which the district court uncritically followed ***Steinberg.*** After reiterating Professor Wigmore's "difficulty" (and announcing a so-called "public policy" which we will address in a moment), it held that the trial court had committed reversible error in giving the instruction in issue, explaining as follows:

[16/] It is a curious historical fact that, in the initial majority opinion filed in ***Steinberg,*** the district court concluded, as its sister court had in ***Clark,*** that the requested instruction was the functional equivalent of the instruction required by ***Nesbitt*** and ***Marks;*** that "the jury would have been at a loss to know the purpose of the admission" of the evidence without such an instruction; and that the instruction should have been given. Judge Hendry, who had joined in the initial majority opinion, died while the motion for rehearing was pending, and a differently constituted panel ultimately decided the issue the other way round. We mention these facts simply to underscore the confusion which the subject has generated in the Third District. Unfortunately, the initial majority opinion was not published in the Southern Reporter. It can be located in this Court's files, in the appendix to the petitioners' jurisdictional brief in case no. 73,283.

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"Rather than instructing this jury that the violation of the internal rule was negligence, the court should have instructed that: "An internal rule does not itself fix the standard of care." 662 So.2d at 979. Most respectfully, there are two things wrong with this explanation. First, the instruction at issue did *not* state that "the violation of the internal rule was negligence." The jury was *not* given a negligence per se instruction; it was given the long-accepted and time-honored formulation of Fla. Std. Jury Instn. (Civ.) 4.11, that the violation of the internal policy was "evidence of negligence, but not conclusive evidence of negligence." Second, as we have demonstrated, *that* instruction is exactly the same thing in substance as an instruction that the "internal rule does not itself fix the standard of care." In our judgment, the district court was thoroughly confused on this issue -- and it erred in its conclusion, for the same reasons that *Steinberg* was wrongly decided.

It remains for us to address the district court's additional concern that allowing the instruction in issue here would be contrary to "public policy," because it would discourage persons from adopting internal rules and policies. In our judgment, this reasoning is logically fallacious, for at least three reasons. To begin with, people adopt internal rules and policies for legitimate business reasons (like the safety of their customers, their reputation as responsible businesspersons, and goodwill in the community), because the viability of their business depends upon such things -- and they are not likely to abandon those policies simply because an "evidence of negligence, but not conclusive evidence of negligence" instruction may be given at the conclusion of litigation against them. In addition, requiring such an instruction where "industry standards" are concerned might discourage entire industries from adopting standards, but the instruction is nevertheless plainly required by Florida law.

Much more importantly, where there is a public policy against discouraging

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particular conduct, the remedy is to ***preclude admission of the evidence of the conduct itself,*** because that is the only logical way to encourage the conduct. ***See Seaboard*** *Air* ***Line Ry. Co. v. Parks, 89*** Fla. 405, 104 So. 587 (1925) (declaring evidence of "subsequent remedial measures" inadmissible, in order not to discourage the taking of corrective action); ***City of Miami Beach*** v. ***Wove, 83*** So.2d 774 (Fla. 1955) (same); 590.407, Fla. Stat. (1995). The remedy is ***not*** to admit evidence of the conduct as "evidence of negligence" and then fail to explain the legal consequences of the evidence, because that does not encourage the conduct at all, and is likely to confuse the jury. See ***generally*** 3 Harper, James & Gray, ***The Law of Torts,*** §17.3, pp. 578-92 (2d Ed. 1986).

As we have demonstrated, unlike the Evidence Code's prohibition of evidence of "subsequent remedial measures, " there is no public policy in the Evidence Code precluding admission of evidence of a defendant's internal rules and policies; instead, such evidence is plainly ***admissible*** in Florida as evidence to assist the jury in determining the standard of care. See the decisions cited at page 37, ***supra.*** It should therefore logically follow -- indeed, we think this Court's decision in ***Addison*** (quoted in part at page 39, ***supra),*** logically compels the conclusion -- that a jury must be instructed on the legal consequences of the evidence of a violation of internal rules and policies, just as it must be instructed on the legal consequences of evidence of a violation of "traffic regulations" and "industry standards. " Indeed, absent the guidance provided by such an instruction, a jury may very well conclude that a defendant's internal policy *fixes* the standard of care, and that a violation of it is therefore negligence in and of itself -- which is exactly what Fla. Std. Jury Instn. (Civ.) 4.11 is designed to prevent. Most respectfully, neither ***Steinberg*** nor the district court's resolution of this issue makes any sense. ***Steinberg*** should be disapproved, and this aspect of the district court's decision should be quashed.

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Finally, in an abundance of caution, we must respectfully insist that, even if the district court correctly concluded that the instruction should not have been given, it is inconceivable to us that the instruction could amount to *reversible* error, rather than harmless error. As we have demonstrated, evidence of K-Mart's policy against selling guns to drunks was properly admitted as some evidence of the standard of care, but not conclusive evidence of the standard of care -- and the jury was entitled to consider it, together with all the other facts of the case, in determining the appropriate standard of care to which the common law's hypothetical "reasonable man" would have conformed his behavior under the circumstances. Since that was the purpose of admitting the evidence in the first place, instructing the jury that a violation of the policy was "evidence of negligence, but not conclusive evidence of negligence," and that it could consider that fact, together with all the other facts and circumstances in the case, in determining whether K-Mart was negligent, was an absolutely correct statement of the law. And because the instruction was a correct statement of the law governing the legal effect of the evidence, it could not possibly have misled the jury in any way.

Neither did the phrase "evidence of negligence" give more weight to the evidence than it deserved, as *the Steinberg* Court opined, because the phrase was immediately followed by the cautionary qualification demanded by *Nesbitt, Marks,* and ***Zapata*** -- "It is not, however, conclusive evidence of negligence," as well as an additional explanation of the weight to be given the evidence in the jury's deliberations. Indeed, the instruction actually benefitted K-Mart substantially because, as it was designed to do, it cautioned the jury that a violation of K-Mart's policy was not in and of itself negligence. In Florida, only an error which causes a "miscarriage of justice" requires a new trial; a harmless error does not. Section 59.041, Fla. Stat. (1995). If it were error to give the instruction, the error was plainly harmless -- and there is clearly no need for a retrial of

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the entire case simply to have a second jury redecide it without mention of the three short sentences in issue here. Although we are confident that this Court will conclude that it was the district court which erred, rather than the trial court, if our confidence ultimately proves to be misplaced, we respectfully submit that the Court should at least declare the error harmless; quash that portion of the district court's decision which orders a new trial; and terminate the litigation here as it should have been terminated below.[17/]

V. CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the certified question should be answered in the affirmative; that the district court's decision should be quashed; and that the district court should be directed upon remand to affirm the plaintiffs judgments. If a new trial is to be required, it should be limited to the issue of liability only.

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By: _____
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[17/] In the hopefully unlikely event that the Court should agree that giving the instruction was both erroneous and prejudicial, it is plain that the error affected only the liability issue. The district court therefore clearly erred in concluding that the instruction would "require a new trial." 662 So.2d at 979. On remand, the district court should be directed to limit the retrial to the issue of liability only. ***Martinello v. B & P USA, Inc.,*** 566 So.2d 761, 764 (Fla. 1990); ***Purvis v. Inter-County Tel. & Tel. Co.,*** 173 So.2d 679 (Fla. 1965); ***Eggers v. Narron,*** 254 So.2d 382, 386 (Fla. ***4th*** DCA 1971), ***approved, 263*** So.2d 213 (Fla. 1972); ***Larrabee v. Capeletti Bros., Inc.,*** 158 So.2d 540 (Fla. 3d DCA 1963), ***approved*** in ***Purvis, supra.***

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LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET • SUITE 800, MIAMI, FLORIDA 331304780
(305) 358-2800

K-MART CORPORATION, Appellant,

v.

Deborah KITCHEN, Appellee.

No. 93-3731.

District Court of Appeal of Florida, Fourth District.

Oct. 18, 1995.

Woman brought action against store for negligence in selling a firearm to her intoxicated ex-boyfriend who shot and severely injured her. The Circuit Court, Palm Beach County, Lucy Brown, J., awarded woman $12,580,768 in damages. Store appealed. The District Court of Appeal, Klein, J., held that: (1) store could not be held liable to woman for selling firearm to intoxicated customer, and (2) store's internal policy did not fix store's standard of care.

Reversed and remanded; question certified.

Glickstein, J., concurred in part, dissented in part, and filed separate opinion.

1. Weapons ⇐18(1)

Store could not be held liable to third party for negligence in selling firearm to intoxicated customer who shot third party: there was no evidence that customer engaged in erratic behavior, making it foreseeable that someone would be injured as a result of the sale, and imposing common law liability on vendor under such circumstances would extend law in an area in which legislature had entered field by regulating sale of firearms. West's F.S.A § 790.151; F.S.1987, § 790.17.

2. Negligence ⇐5

A business' internal rule does not itself fix the standard of care in negligence action against the business.

G. Bart Billbrough and Geoffrey B. Marks of Walton, Lantaff, Schroeder & Carson, Miami, and John Beranek of MacFarlane, Ausley, Ferguson & McMullen, Tallahassee, for appellant.

Richard A Kupfer of Richard A Kupfer, P.A., and Edward Ricci & Associates, P.A., West Palm Beach; Portner & Stine, P.C., Palm Beach Gardens; and Thomas, Garvey, Garvey & Sciotti, P.C., St. Clair Shores, Michigan, for Appellee-Deborah Kitchen.

KLEIN, Judge.

Thomas Knapp, after a day-long drinking spree, purchased a .22 caliber rifle at K-Mart and then shot his ex-girlfriend, leaving her a quadriplegic. A jury found K-Mart guilty of common law negligence, and returned a verdict in the amount of $12580,768. We reverse because we conclude that where, as here, there is no statutory prohibition against the sale of a firearm to a person who is intoxicated, the seller is not responsible to a third person for the improper use of the firearm. We do certify the question as one of great public importance.

The facts, in a light most favorable to plaintiff, reflect that Knapp, by his own estimate, had consumed a fifth of whiskey-and a case of beer, from the morning of December 14, 1987, when he started to drink, until he left a bar around 8:30 p.m., after becoming angry at plaintiff, who was his ex-girlfriend. Knapp drove to a K-Mart where he purchased a .22 caliber bolt action rifle and a box of bullets at approximately 9:45 p.m. Knapp then drove back to the bar and, after observing plaintiff leave in an automobile with friends, followed them in his truck and rammed them from behind when they were stopped at a light. He then forced them off the road and shot plaintiff, rendering her a permanent quadriplegic.

Knapp, who pled guilty to attempted murder and is serving a 55 year sentence, had no recollection of what occurred in K-Mart. The K-Mart clerk who sold Knapp the rifle testified that Knapp's handwriting on the federal form required for a firearm purchase was not legible, and that he then 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 a policy against selling fire-

arms to intoxicated persons. There was no direct evidence regarding Knapp's behavior in K-Mart besides the testimony of this clerk, Plaintiff presented experts who testified that if Knapp had consumed as much alcohol during the day as Knapp had indicated, it would have been apparent to the clerk that Knapp was intoxicated.

Plaintiffs complaint alleged both common law negligence and violations of section 790.17, Florida Statutes (1987) (prohibiting sale to minors or persons of unsound mind), and the Federal Gun Control Act, 18 U.S.C. § 922 (prohibiting sale to minors, felons, unlawful drug users, adjudicated mental defectives, et cetera); however, the trial court directed a verdict for K-Mart on the statutory claims (which has not been cross-appealed) and submitted the case to the jury only on the theory of common law negligence. The court instructed the jury that K-Mart's violation- of its own internal rule against selling firearms to intoxicated persons was evidence of negligence. We conclude that the jury should not have been so instructed, and that the trial court should have directed a verdict in favor of K-Mart.

[1] The only Florida case cited by plaintiff in which the seller of a firearm has been held subject to liability for common law negligence is *Angell v. F. Avanzini Lumber Co.*, 363 So.2d 571 (Fla. 2d DCA 1978). In that case, however, the customer was engaging in bizarre behavior in the store, and after observing that behavior, the store's employee called the sheriff's office and told-one of the officers that a woman wanted to buy a rifle, but was acting strangely. The officer advised him that he did not have to sell the rifle, but he, nevertheless, sold her the rifle, along with ammunition, and shortly thereafter she shot and killed another person. The court held that the complaint stated a cause of action because the customer's erratic behavior made it foreseeable that someone would be injured as a result of the sale. In the present case there was no evidence that Knapp engaged in any type of erratic behavior, only that he consumed a substantial amount of alcohol

In all of the other Florida cases relied on by plaintiff it was undisputed that the vendors violated the Federal Gun Control Act, *K-Mart* Enterprises *of Florida, Inc. v. Keller*, 439 So.2d 283 (Fla. 3d DCA 1983), and *Coker v. Wal-Mart*, 642 So.2d 774 (Fla. 1st DCA 1994); a Florida statute, *Tamiami Gun Shop* v. *Klein*, 116 So.2d 421 (Fla.1959); or a local ordinance, *Sogo* v. *Garcia's* National *Gun, Inc.*, 615 So.2d 184 (Fla. 3d DCA 1993).

Although we do not favor the indiscriminate sale of firearms, we are persuaded by decisions of the Florida Supreme Court involving analogous factual situations that we cannot extend the common law liability of a vendor under the circumstances of this case.

In *Bankston* v. *Brennan*, 507 So.2d 1385, 1387 (Fla.1987), the Florida Supreme Court rejected common law liability of a social host who furnished alcoholic beverages to a minor who then drove while drunk and injured the plaintiff. After concluding that there was no violation of a statute, the court stated:

> Petitioners' final argument is that . . we should recognize a common law cause of action in favor of similarly situated plaintiffs. We decline. We do not hold that we lack the power to do so, but we do hold that when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch; (Footnote omitted.)

We cannot distinguish the present case from *Bankston*. As it has with alcohol, our legislature has also entered the field of regulating the sale of firearms. Section 790.17, Florida Statutes (1987), which was in effect when this incident occurred, provides:

> Whoever sells, hires, barters, lends, or gives any minor under 18 years of age any pistol, dirk, electric weapon or device, or other arm or weapon, other than an ordinary pocketknife, without permission of the parent of such minor, or the person having charge of such minor, or sells, hires, barters, lends, or gives to any person of unsound mind an electric weapon or device or any dangerous weapon, other then an ordinary pocketknife, is guilty of a misdemeanor of the first degree, punisha-

(2)

ble as provided in s. 775.082 or s. 775.083 or s. 775.084.

And in 1991, several years after this incident, the Florida legislature passed section 790.151, Florida Statutes (1991), which makes it unlawful for a person to use a firearm while under the influence of alcohol or a controlled substance. The legislature has not, however, gone so far as to prohibit the sale of a firearm to a person who is known to be intoxicated, as some states have. See, e.g., Miss.Code Ann., § 97-37-13 (1972).

Since our legislature has not extended vendor liability for the sale of a firearm under the circumstances of this case, our imposition of liability on K-Mart here would be taking a step which our supreme court declined to take in *Bankston.*[1] We therefore conclude that the trial court should have directed a verdict in favor of K-Mart."

Because we anticipate plaintiff will seek review of our decision in the Florida Supreme Court, we address another issue raised by K-Mart which would, if we were not reversing for entry of a directed verdict, require a new trial.

[2] The evidence showed that K-Mart had an internal policy that it would not sell a firearm to a visibly intoxicated person, and over K-Mart's objection the trial court instructed the jury that a violation of the internal policy or procedure was evidence of negligence. In ***Steinberg v. Lomenick,*** 531 So.2d 199 (Fla. 3d DCA 1988), the third district held, while recognizing that defendant's own rules of conduct are relevant,[3] that it would be improper to instruct the jury that a violation of such a rule is evidence of negligence. The court quoted from Professor Wig-more, who explained:

> To take [the defendant's] conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. , . The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard."

2 J. Wigmore, Evidence § 461, at 593.

In ***Bucrkowski*** *v.* ***McKay,*** 441 Mich. 96, 490 N.W.2d 330 (1992), the Michigan Supreme Court disapproved the same type of jury instruction:

> Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy. Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability.

Id., 490 N.W.2d at 332, n. 1. See *also* Judge Baskin's concurring opinion in ***Steinberg,*** ,531 So.2d at 201.

Rather than instructing this jury that the violation of the internal rule was negligence, the court should have instructed that: "An internal rule does not itself fix the standard of care." ***Steinberg,*** 531 So.2d at 200; ***Nesbitt v. Community Health*** *of* ***South Da&, Inc.,*** 467 So.2d 711, 715 (Fla. 3d DCA 1985), citing *Wigmore.*

We therefore reverse and remand for entry of a judgment in favor of K-Mart, but certify the following question as one of great public importance:

1. *See also Home v. Vic Potarnkin Chevrolet. Inc..* 533 So.2d 261 (Fla.1988), in which an automobile salesman sold and delivered a vehicle to a purchaser whom the salesman knew was an incompetent driver. In holding that the plaintiff whom the customer struck shortly after leaving the dealership had no cause of action against the dealer, the Florida Supreme Court, citing *Bankston,* again said that expansion of the liability of a vendor was for the legislature.

2. Although we rest our conclusion that K-Mart cannot be held liable entirely on Florida law, we would note that plaintiff has not cited any cases from other jurisdictions in which the seller of a firearm was held liable in a similar factual situation. *In Buczkowski v. McKay, 441* Mich. 96, 490 N.W.2d 330, 334–35 (1992), the Michigan Supreme Court found that there would be no common law liability for the sale of shotgun ammunition to a person who was intoxicated, stating:

> **Recognizing such a duty would place on the retailer a duty to discover each customer's fitness to purchase any product that could conceivably harm unknown third parties. The result here was no more foreseeable than the potential harm from any product sold to an apparently inebriated customer that might be used to injure third parties. (Footnote omitted).**

3. *Marks v. Mandel, 477* So.2d 1036 (Fla. 3d DCA *1985).*

3

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 PURCHASER?

SHAHOOD, J., concurs.

GLICKSTEIN, J., concurs in part and dissents in part with opinion.

GLICKSTEIN, Judge, concurring in part and dissenting in part.

I agree with certification of the question and with reversal because of the jury's being instructed over appellant's objection that violation of the K-Mart internal policy was evidence of negligence. It is unfortunate that the discussion in *Steinberg v. Lomenick*, 531 So.2d 199 (Fla 3d DCA 19881, *rev. denied*, 539 So.2d 476 (Fla.1989), as to the reasonable limit to which a trial court may go, was not recognized by appellee at the trial level.

However, I disagree with the majority's reliance *upon Bankston v. Brennan*, 507 So.2d 1385 (Fla.1987), and Home *v. Vic Potamkin Chevrolet, Inc.*, *533* So.2d 261 (Fla. 1988), and believe the issue of foreseeability here was properly submitted to the jury. See *Angell v. F. Avanzini Lumber Co.*, *363* So.2d 571 (Fla. 2d DCA 1978).

The court in *Bankston* concluded that it could not consider common-law liability because the legislature had considered and limited the scope of civil liability. *Horne*, too, involved judicial reluctance to tread on legislative turf. Neither situation exists here.

Accordingly, I view the door of common-law liability as being wide open and regret its being shut.

4

DEPARTMENT OF THE TREASURY-- BUREAU OF ALCOHOL, TOBACCO AND FIREARMS'

FIREARMS TRANSACTION RECORD

PART I – INTRA-STATE OVER-THE-COUNTER

TRANSFEROR'S TRANSACTION NO. 17-5-25

NOTE: Prepare in original only. All entries other than signatures must be typed or clearly printed in ink. All signatures on this form must be in ink.

1 TOTAL 146.97 TAX 7

4413-4413 053 21 12/14/87 4245

SECTION A – MUST BE COMPLETED PERSONALLY BY TRANSFEREE (BUYER) *(See Notice and Instructions on reverse).*

1. TRANSFEREE'S (Buyer's) NAME (Last, First, Middle) (Mr., Mrs., Miss)	2. HEIGHT	3. WEIGHT	4. RACE
THOMAS WAYNE KNAPP	6'0	185	W

5. RESIDENCE ADDRESS (No., Street, City, State, Zip code)	6. DATE OF BIRTH	7. PLACE OF BIRTH

8. CERTIFICATION OF TRANSFEREE *(Buyer)* – An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question.

a. Are you under indictment or information* in any court for a crime punishable by imprisonment for a term exceeding one year? **A formal accusation of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury.*	NO TK	c. Are you a fugitive from justice?	NOK
		d. Are you an unlawful user of, or addicted to, marijuana, depressant, stimulant, or narcotic drug?	NOK
b. How you been convicted in any Court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter – a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute. However, a crime punishable by imprisonment for a term exceeding one year does not include a conviction which has been set aside under the Federal Youth Corrections Act.)	NO TK	e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?	NOTK
		f. Have you been discharged from the Armed Forces under dishonorable conditions?	NOTK
		g. Are you an alien illegally in the United States?	NOTK
		h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?	NO K

I hereby certify that the answers to the above are true and correct. I understand that a person who answers "Yes" to any of the above questions is prohibited from purchasing and/or possessing a firearm, except as otherwise provided by Federal law. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S (Buyer's) SIGNATURE	DATE
Thomas Wayne Knapp	12-14-87

SECTION B – TO BE COMPLETED BY TRANSFEROR (SELLER) *(See Notice and Instructions on reverse.)*

THIS PERSON DESCRIBED IN SECTION A: ☐ IS KNOWN TO ME ☑ HAS IDENTIFIED HIMSELF TO ME IN THE FOLLOWING MANNER

9. TYPE OF IDENTIFICATION *(Driver's License, etc. Positive identification is required. A Social Security card is not considered positive identification.)*	10. NUMBER ON IDENTIFICATION
DRIVERS LISCENSE (FLA)	

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the currant list of Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver or otherwise dispose of ths firearm described below to tho person identified in Section A.

11. TYPE *(Pistol, Revolver, Rifle, Shotgun, etc.)*	12. MODEL	13. CALIBER OR GAUGE	14. SERIAL NO..
RIFLE	783	22	14689136

16. MANUFACTURER *(and Importer, if any)*

MARLIN

16. TRADE/CORPORATE NAME AND ADDRESS OF TRANSFEROR *(Seller)* *(Hand stamp may be used.)*	17. FEDERAL FIREARMS LICENSE NO.

18. TRANSFEROR'S (Seller's) SIGNATURE	19. TRANSFEROR'S TITLE	20. TRANSACTION DATE
	FLOOR ASSISTANT	12-14-87

ATF F 4473 (5300.9) PART I (11-79) EDITION OF 1-79 MAY ● BE USED

(5)

IN THE CIRCUIT COURT OF The
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FL
CIVIL DIVISION

DEBORAH KITCHEN
PLAINTIFF

Case No. CL-91-9095 AI

K-MART CORPORATION, A Corporation
& THOMAS W. KNAPP, AN INDIVIDUAL

DEFENDANTS

MOTION TO FORWARD STATE COURT RECORDS

Comes Now, Thomas Knapp Defendant, in proper person, and moves This Court To Forward All Documentation Concerning This Case CL-91-9095 AI, including All Documentation Filed.

1. I have not recived any Documentation Concerning This Case and prayerfuly ask That I be furnished with All Documentation filed in This Case, so I Thomas Knapp can properly perpair a Defense.

2. I Thomas Knapp hereby deny All Allegations Concerning This Case CL-91-90-95 AI.

Respectfully Submitted
Thomas Knapp

Thomas Knapp 755915 Prose
NEW RIVER Corr Inst West
P.O. Box 333 26-B-60
Raiford, Fl 32083

CC.
ATTY Amy Smith
ATTY EDWARD RICCI & ASS P.A.

EXHIBIT
C

(6)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of January, 1996, to: John Beranek, Esq., MacFarlane, Ausley , Ferguson & McMullen, 227 South Calhoun Street, Post Office Box 391, Tallahassee, Fla. 32302; G. Bart Billbrough, Esq., and Geoffrey Marks, Esq., Walton Lantaff Schroeder & Carson, One Biscayne Tower, 25th Floor, Two South Biscayne Blvd., Miami, Fla. 33131; Marla Ann Mudano, Esq., Walton Lantaff Schroeder & Carson, Suite 800, United National Bank Tower, 1645 Palm Beach Lakes Blvd., West Palm Beach, Fla. 33401; Edward M. Ricci, Esq., Ricci, Hubbard, Leopold & Frankel, P.A., 1645 Palm Beach Lakes Blvd., West Palm Beach, Fla. 33401; Gregory Stine, Esq., Portner & Stine, P.C., 165 N. Woodward Avenue, Birmingham, Michigan 48009; Robert Garvey, Esq., Thomas, Garvey, Garvey & Sciotti, 24825 Little Mack, St, Clair Shores, Michigan 48080; Richard A. Kupferf P.A., The Forum, Tower C, Suite 810, 1655 Palm Beach Lakes Blvd., West Palm Beach, Fla. 33401; and to Mark Polston, Esq., Suite 1100, 1225 I Street N.W., Washington, D. C , 20005.

By: Joel D. Eaton
JOEL D. EATON