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 REPLY BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS

In our initial brief, we stated the case and facts carefully and accurately, and supported every word with copious references to the record. The facts were stated properly, in a light most favorable to the verdict. In a perfect world, K-Mart would simply have accepted our statement as appropriate, and proceeded from there to debate the three legal issues we presented to the Court. Unable to admit the nose on its face, however, K-Mart has restated the facts in their entirety (including a number of purported "facts" which were not even in evidence below) -- all in an effort to convince the Court that the certified question is entirely "hypothetical," and that it is an established fact here that Mr. Knapp was *not* visibly intoxicated when K-Mart armed him with the means to cripple Ms. Kitchen. In our judgment, this tactic reflects a complete lack of understanding of several rather elementary principles of the law.

As its initial justification for the tactic, K-Mart asserts that we had no business stating the facts in a light most favorable to the verdict -- that the facts must be viewed in a light most favorable to ***K-Mart*** here, because *it* was the prevailing party in the district court (respondent's brief, p. **2,** n. 1). Most respectfully, this assertion is (in a word we are rarely forced to use in an appellate brief) simply nonsense. In our system of jurisprudence, juries decide facts; courts decide questions of law. When a jury has resolved conflicting factual evidence in favor of one party -- like finding that the traffic light through which the defendant proceeded into the intersection was red at the time, not green -- that fact is established for all time, at every level of the judicial system. In ruling on a renewed motion for directed verdict after trial, the trial court must accept the fact that the light was red; in reviewing a ruling on a such a motion, the district court must accept the fact that the light was red; and in reviewing the district court's review of a ruling on such a motion, this Court must accept the fact that the light was red. The

light does not become ***green*** in this Court as a matter of established fact simply because the district court has reversed the plaintiff's judgment; for the purpose of reviewing the district court's reversal, the light plainly remains red in this Court, because that is the way the jury decided the facts. The Constitution, which guarantees the right to have a jury determine questions of fact, requires no **less.**

The point is simple, basic, and so thoroughly settled that we should never have been put to the task of making it at all.[1/] K-Mart has not cited -- and because it simply made up its proposition, cannot cite -- any authority to the contrary. Most respectfully, because she received a favorable jury verdict at trial, the evidence ***must*** be viewed in a light most favorable to Ms. Kitchen here; our statement of **the** facts was therefore perfectly appropriate; the certified question is not at all "hypothetical"; and K-Mart's tactic in restating the facts in a light most favorable to itself was simply wrong,

K-Mart offers a second justification for its unique, wrong-light tactic. It asserts that it must be accepted here that Mr. Knapp was not visibly intoxicated because the only ***direct*** evidence on the point, from its sales clerk, was that Mr. Knapp did not appear to be intoxicated. This assertion is as nonsensical as the first, for three separate reasons. To begin with, and in point of fact, the sales clerk provided *no* direct evidence on the point, When asked to describe Mr. Knapp at **the** time of the sale, the clerk remembered *only* that he had long hair and appeared unclean (T. **577-78).** He could not remember if Mr. Knapp's eyes were bloodshot or clear, but he assumed from the fact that he sold

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[1/] ***See, e. g., Markham v. Fogg,*** 458 So.2d **1122** (Fla. **1984); *Welfare v. Seaboard Coast Line Railroad Co.*, 373** So.2d **886** (Fla. **1979); *Lubell v. Roman Spa, Inc.*, 362** So.2d **922** (Fla. 1978); ***Helman v. Seaboard Coast Line Railroad Co.*, 349** So.2d **1187** (Fla. 1977); ***Odoms v. Traveler's Insurance Co.*, 339** So.2d **196** (Fla. **1976); *Exchange Bank of St. Augustine v. Florida National Bank of Jacksonville,*** 292 So.2d **361** (Fla. 1974); ***Westerman v. Shell's City, Inc.*, 265** So.2d **43** (Fla. 1972); ***Parsons v. Reyes, 238*** So.2d **561** (Fla. **1970); *Midstate Hauling*** Co. ***v. Fowler,*** 176 So.2d **87** (Fla. **1965).**

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him the rifle that his eyes were not bloodshot (T. **578-79).** He also could not recall if Mr. Knapp smelled of alcohol, but he assumed once again from the fact that he sold him the rifle that he did not smell of alcohol (T. **579-80).** He could remember nothing else about Mr. Knapp's appearance **(T.** 580-81). The clerk later testified, "I mean, obviously, I seen the individual. I didn't feel that he was intoxicated" (T. 590) -- but when this statement is read in the context of what went before, this "feeling" is obviously another mere inference from the fact that the sale was made. The clerk also testified that he could not "recall" anything unusual about the sale (T. **594)** -- but that is not direct evidence that he actually recalled that Mr. Knapp did not appear intoxicated. In short, the clerk ***inferred*** from the little he remembered that Mr. Knapp must not have appeared intoxicated, but he provided no direct evidence of any actual recollection of that fact.[2/]

Second, K-Mart is simply wrong that "[n]o one in the entire trial actually testified that Knapp ever appeared intoxicated at the Kmart store" (respondent's brief, **p. 3).** The plaintiff's expert squarely testified "without hesitation," based on various facts proven by direct evidence, 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).** And K-Mart's own expert conceded that, if the jury were to find that Mr. Knapp drank what he said he drank, it was impossible that he could have purchased the rifle without showing visible signs of intoxication (T. 968). Most respectfully, these expert opinions on the point were ***direct*** evidence from which the jury could find that Mr. **Knapp** was visibly intoxicated at the time of the sale. *See Wale v.* ***Barnes,*** **278** So.2d **601** (Fla. **1973)**

[2/] In addition, of course, the jury was entitled to ***disbelieve*** the clerk. His testimony was obviously self-serving; a reasonable inference was available that he had had destroyed the first, illegible form filled out by Mr. Knapp; and a comparison of the illegible signature on the second form with Mr. Knapp's neatly handwritten pleading provided rather graphic evidence that Mr. Knapp was not in control of even the most basic of his faculties at the time of the sale.

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(expert opinion testimony on a point is direct evidence of the point).

Third, and just as importantly, juries are not limited to direct evidence in deciding questions of fact. Circumstantial evidence is equal in dignity to direct evidence, and juries are plainly entitled to draw inferences from circumstantial evidence. That point is also so basic and so thoroughly settled that we should not have been put to the task of having to make it here.[3/] The circumstantial evidence that Mr. Knapp was visibly intoxicated at the time K-Mart sold him the means to cripple Ms. Kitchen was simply overwhelming, and the jury was clearly entitled to draw that inference from all the evidence, and obviously did. Most respectfully, the certified question is not at all "hypothetical"; because the jury's verdict was favorable to Ms. Kitchen, it is an established fact here that Mr. Knapp was visibly intoxicated at the time of the sale; and K-Mart's tactic in restating the facts in a light most favorable to itself was simply wrong,

There is an additional aspect of K-Mart's highly unconventional restatement of the case and facts which deserves to be addressed here: its reliance upon some purported "facts" which were ***not*** admitted into evidence below -- specifically, purported evidence of Ms. Kitchen's pre-incident alcohol and substance abuse, purported evidence by which K-Mart sought to "impeach" the plaintiff's expert, and purported evidence that plaintiffs counsel had talked to Mr. Knapp before trial."' (In the district court, K-Mart raised

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[3/] ***See, e. g., Ellis v. N. G.N. of Tampa, Inc., 586*** So.2d 1042 (Fla. 1991); ***Voelker v. Combined Insurance Co. of America***, 73 So.2d 403 (Fla. 1954); ***Byers v. Gunn,*** 81 So.2d 723 (Fla. 1955); ***Tucker Brothers v. Menard,*** 90 So.2d 908 (Fla. 1956); ***Neilsen v. City of Sarasota,*** 117 So.2d 731 (Fla. 1960).

[4/] K-Mart's restatement also includes mention of the plaintiffs 1976 felony conviction and a 1984 misdemeanor conviction, both of which were excluded from evidence at trial. The 17-year old felony conviction was excluded because it was too remote in time to have any bearing on the character of the plaintiff at the time of trial, in 1993, and the misdemeanor conviction was excluded because the crime did not involve dishonesty or a false statement (T. 124-30). Because these rulings were simply ***required*** by the plain

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three separate issues on appeal seeking a new trial for each of these three rulings; by ordering a conditional new trial for the sole reason that the trial court had given the jury instruction which is the subject of our third issue on appeal, the district court obviously found each of K-Mart's challenges to these rulings to be meritless.) Of course, because this evidence was ***excluded*** at trial, it plainly cannot be utilized as any part of the "facts" underlying the three legal issues presented here.

To the extent that the excluded evidence might have been related as a predicate for separate issues on appeal challenging the district court's rejection of the three issues on appeal relating to these rulings below, which would not have been improper, we note that K-Mart has ***not*** raised any separate 'issues on appeal directed to any of these exclusionary rulings. (In fact, the evidence excluded by two of the rulings is not mentioned anywhere in the argument section of the brief.)?' Indeed, K-Mart has filed a notice of voluntary

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language of § 90.610, Fla. Stat., K-Mart did not even bother to challenge them as erroneous in the district court. And because this Court is reviewing the district court's disposition of the issues which K-Mart raised in the district court, rather than rulings made by the trial court which were waived when they were not challenged in the district court, it is simply impossible that the trial court's perfectly proper exclusionary rulings concerning this evidence can be relevant to any issue presently before the Court.

K-Mart also mentions in a footnote that, over its objection, the trial court admitted into evidence a "day in the life" video. Because this ruling is mentioned only as a purported "example" that "the trial court had great sympathy for the plaintiff" (respondent's brief, pp. 8-9 and n. 3), and is mentioned nowhere else in the brief for any other purpose, there is no need to address the footnote further -- except to note that it, like the reliance upon the excluded evidence of the plaintiff's convictions, is gratuitous and irrelevant to any issue before the Court.

5/ K-Mart's claim that it had evidence that the plaintiff's expert witness had engaged in "unprofessional and unlawful operation of the Detroit Medical Examiner's office" is simply preposterous. In the lengthy proffer which K-Mart adduced on the subject, it established only that an individual had accused Dr. Spitz of these things, that the accusations were thoroughly investigated, and that Dr. Spitz had been completely exonerated of any wrongdoing by the county government (T. 410-42). Most respectfully, mere accusations, proven to be unfounded, are not evidence of "unprofessional and

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dismissal of its "cross-petition. " As a result, the mere fact that the rulings are mentioned in the statement of the case and facts provides the Court with no basis for reviewing them here, or for quashing the district court's rejection of K-Mart's challenges to the rulings below -- so we can properly assume that K-Mart's discussion of them amounts to mere surplusage, irrelevant to any issue before the Court.[6/]

One of the rulings -- the exclusion of the purported evidence of the plaintiff's pre-incident alcohol and substance abuse -- is argued at the conclusion of K-Mart's brief. It is not argued as an issue on appeal seeking quashal of the district court's decision, however; it is argued solely in response to footnote 17 of our initial brief, as "right for the wrong reason" support for the district court's conditional grant of a new trial on all issues, rather than on the issue of liability alone. For reasons which we will explain in our argument on the third issue on appeal, where we will defend the trial court's exclusion of the evidence, the Court may not need to reach the argument at all.

In another of its numerous irrelevancies, K-Mart has devoted a substantial amount

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unlawful " conduct.

K-Mart's additional claim that the trial court excluded evidence that plaintiff's counsel had met with Mr. Knapp before trial is simply false. This evidence was admitted (T. 858, 888). The only thing which the trial court excluded was a statement in Mr. Knapp's deposition which K-Mart had read to mean that plaintiff's counsel had asked him to sign a "power of attorney." The trial court ruled: "This is not relevant to any issue that the jury is going to decide in this case. And, furthermore, this doesn't say what you're saying it says. And it's confusing, and it's not proper for the jury" (T. 282-83). The excluded statement was not proffered, and it is not in the record on appeal, so the Court has little choice but to accept as accurate the trial court's characterization of it here.

[6/] ***See Singer v. Borbua,*** 497 So.2d 279, 281 (Fla. 3d DCA 1986) ("It is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal"), ***review dismissed, 503*** So.2d 328 (Fla. 1987). ***Accord W.*** R. ***Grace & Co.-Conn.*** v. ***Pyke,*** 661 So.2d 1301 (Fla. 3d DCA 1995); ***Lester*** *v.* ***Arb,*** 658 So.2d 583 (Fla. 3d DCA 1995); ***F.M. W. Properties, Inc. v. Peoples First Financial Savings & Loan Ass'n,*** 606 So.2d 372 (Fla. 1st DCA 1992); ***Rodriguez v. State,*** 502 So.2d 18 (Fla. 3d DCA 1986).

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of space to the "statutory violations" which the trial court concluded we had not proven at trial. Because this ruling was favorable to K-Mart, and because we did not cross-appeal it in the district court, and because we have made no issue of it here, it is a non-issue, the background of which is plainly irrelevant to any issue before the Court.

Some additional aspects of K-Mart's restatement need to be corrected, At page 6, n. 2 (and in the argument section, at pp. 37-38) of its brief, K-Mart acknowledges that it admitted in its answer that it owed the plaintiff a duty of reasonable care under the circumstances; it asserts, however, that it "specifically denied that it owed any duty to this plaintiff on these facts." The assertion is false. After admitting that it owed the plaintiff a duty of reasonable care, K-Mart denied that it ***breached*** its admitted duty on the facts alleged in the complaint (and the issue of K-Mart's ***negligence*** was therefore tried to verdict) -- but that denial was plainly ***not*** a denial of the existence of the duty which it admitted it owed to the plaintiff (R. 3-5, 60-61). And to the various arguments which K-Mart and its amici have bottomed on an assertion that the shooting was intentional, we remind the Court that the jury found as a fact that Mr. Knapp's conduct was negligent, not intentional.

There are other incorrect statements in K-Mart's restatement, but space does not permit us to parse them all. Instead, we simply stand upon the accuracy of our initial statement of the case and facts -- and because K-Mart's restatement is obviously an unacceptable substitute for it, we respectfully submit that our initial statement should be accepted as the proper foundation for determination of the three legal issues we have asked the Court to resolve. Finally, we are constrained to suggest that, because K-Mart's restatement is replete with nonsensical legal premises, numerous irrelevancies, and significant inaccuracies, the Court should have very little confidence in the accuracy or legitimacy of anything else which K-Mart has to say in the remainder of its brief.

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11. ARGUMENT

ISSUE A. In our initial brief, we demonstrated 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 the existence of $790.17 (which makes it a crime to sell a firearm to a minor or person of unsound mind) does ***not*** prevent the judiciary from saying so. Both K-Mart and its amici disagree. They do not disagree for the same reasons, however, so we will have to reply to their arguments separately. We will reply to K-Mart's three arguments first. First, and curiously, K-Mart ***agrees*** with us that Florida law recognizes "a general duty placed on every person to avoid negligent acts or omissions," and that "a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. " *McCain* ***v. Florida Power Corp., 593*** So.2d 500, 503 (Fla. 1992). This general duty, incidentally, was recognized by this Court once again, less than a month ago, in ***Union Park Memorial Chapel v. Hutt,*** 21 Fla. L. Weekly S133 (Fla. Mar. 21, 1996). K-Mart also more or less ***agrees*** with us that the retailer of a firearm owes a common law duty of reasonable care to refuse to sell a firearm to an obviously dangerous customer.[7/]

[7/] Although the decisional law upon which we relied for this duty would appear to be unanimous, K-Mart states that, "in the majority of petitioner's cases, there was an ultimate determination of no duty" (respondent's brief, p. 18). This assertion is false. K-Mart is confused in the same way it was confused when it contended that its answer denied that it owed the plaintiff a duty of care in this case. Although some of the decisions upon which we relied reached an ultimate determination of no ***liability --*** because of the absence of notice, the failure to prove proximate causation, or the like -- ***all*** of them recognized the existence of the ***duty*** which is in issue here.

Similarly, in all of the decisions relied upon by K-Mart, there was an ultimate determination of no ***liability,*** because of the absence of notice, or the failure to prove proximate causation, or the like. In none of them did the courts hold that the retail sale of a firearm and ammunition to an obvious drunk was not actionable negligence. It also goes without saying that K-Mart's (and its amici's) reliance upon cases finding no liability against firearm ***manufacturers*** and ***wholesalers*** is badly misplaced. It is only at the point of sale to the ultimate consumer that anyone can be on notice of the drunken condition of the purchaser, which is the critical fact in the instant case.

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It argues, however, that no such duty existed on the facts in this case, because Mr. Knapp "acted in a normal fashion" and "did not appear to be intoxicated," and K-Mart was therefore not on "notice" of any foreseeable danger in entrusting a rifle and ammunition to him (respondent's brief, pp. 18, 29).

With all due respect to K-Mart's counsel, those are not the facts in this case. As we demonstrated in our initial brief, there was abundant evidence from which the jury could have found that Mr. Knapp was visibly intoxicated at the time of the sale, and it obviously did. And as we demonstrated at the outset of this brief, we are constitutionally entitled to have the evidence viewed in a light most favorable to the verdict here. K-Mart's claim to the contrary is, as we said before, simply nonsense. Because of the jury's verdict, it must be accepted here that Mr. Knapp was obviously drunk when K-Mart armed him with the means to cripple Ms. Kitchen. And because K-Mart has conceded that it owed a common law duty of reasonable care to avoid such a sale, it seems to us that K-Mart has conceded the error of the district court's decision.

For its second argument, K-Mart advances the astonishing contention that, "[i]n the absence of any statutory prohibition, the courts cannot create a cause of action" (respondent's brief, p. 29). This, of course, is essentially what the district court concluded below, but the conclusion is dead wrong, for the reasons explained in our initial brief. The common law of negligence is not statutory. There are no statutes governing negligence actions for premises liability or products liability, for example, but causes of action for negligence in these contexts are firmly established in the common law. As this Court recently said, "The statute books and case law . . . are not required to catalog 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. " *McCain, supra* at 503. More

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recently still, in ***Hutt, supra,*** after observing that the statute governing funeral processions imposed no duty of care on funeral directors, this Court held that the common law would recognize such a duty. Most respectfully, whether a common law duty of care exists in the sale of a dangerous instrumentality to an obvious drunk is a matter for this Court to decide, and the fact that the legislature has not enacted a civil (or criminal) statute creating such a duty is simply irrelevant. ***See, e.g., Insinga v. LaBella, 543*** So.2d 209 (Fla. 1989) (recognizing that the "corporate negligence doctrine" was a part of the common law prior to its post-incident codification by statute). ***See generally Prosser & Keeton on Torts, 93,*** pp. 17-20 (5th Ed. 1984). In fact, if K-Mart were correct, then this Court has been in error for over a century every time it has announced a principle of the common law of negligence which the legislature had not addressed.

To be sure, the legislature occasionally reacts to this Court's decisions and intervenes with statutes modifying the common law of negligence, as it did in the two statutes limiting civil liability which were in issue in ***Bankston v. Brennan, 507*** So.2d 1385 (Fla. 1987), and ***Horne v. Vic Potumkin Chevrolet, Inc.,*** 533 So.2d 261 (Fla. 1988). But as we explained in our initial brief (where K-Mart's reliance upon both ***Bankston*** and ***Horne*** was anticipated, and where both decisions remain adequately distinguished), there is no authority for the proposition which K-Mart is attempting to sell here -- that there can be no civil liability for negligence unless the legislature has declared the conduct ***criminal.*** Criminal liability for criminal conduct and civil liability for mere negligent conduct are two different things. They always have been -- and for this Court to hold otherwise would effectively overrule thousands of decisions presently on the books, and destroy the common law of negligence in the process.

K-Mart's final argument is a "right for the wrong reason" argument which the district court ***rejected*** below. It contends again that Mr. Knapp's intervening criminal act

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was unforeseeable ***as a matter of law,*** and that it therefore "broke the chain of causation" between the sale and the shooting, relieving it of liability for its negligent contribution to Ms. Kitchen's quadriplegia. The law governing this contention is ***thoroughly*** settled, and plainly required its rejection below. Where a defendant's negligent conduct sets in motion a chain of events in which a "subsequent tortfeasor" causes an injury, (1) whether the negligence of the "subsequent tortfeasor" constitutes an "efficient independent intervening cause" sufficient to break the chain of "but for" causation and relieve the defendant of liability for its initial negligence depends upon whether the subsequent negligence was reasonably foreseeable; (2) foreseeability in this context does not require foresight of the precise sequence of events which occurred, but only that some injury is likely to result in some manner as a consequence of the initial negligent act; and (3) foreseeability in this context is always a jury question, unless reasonable persons simply cannot differ on the question. The cases so holding are legion.[8/]

The issue of the foreseeability of Mr. Knapp's "intervening act" was submitted to the jury in this case, with an appropriate instruction -- F.S.J.I. 5. lc (T. 1216). The jury decided the issue in Ms. Kitchen's favor, and there is ample support in the evidence for that finding of fact. To begin with, it is a simple matter of common sense that arming an obvious drunk with a loaded firearm poses a serious risk of danger. Moreover, the clerk who sold the rifle conceded on the record that, like giving a pack of matches to a five-year-old child, the danger in selling a gun to a drunk was foreseeable. Moreover

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[8/] ***See, e.g., City of Pinellas Park*** v. ***Brown,*** 604 So.2d 1222 (Fla. 1992); ***McCain v. Florida Power Corp., 593*** So.2d 500 (Fla. 1992); ***Palm Beach County Board of County Commissioners v. Salas,*** 511 So.2d 544 (Fla. 1987); ***Allen v. Babrab, Inc., 438*** So.2d 356 (Fla. 1983); ***Stevens v. Jefferson,*** 436 So.2d 33 (Fla. 1983); ***Rupp v. Bryant,*** 417 So.2d 658 (Fla. 1982); ***Gibson v. Avis Rent-A-Car System, Inc.,*** 386 So.2d 520 (Fla. 1980); ***Hendeles v. Sanford Auto Auction, Inc.,*** 364 So.2d 467 (Fla. 1978); ***Schwartz v. American Home Assurance*** Co., 360 So.2d 383 (Fla. 1978); ***Vining v. Avis Rent--A-Car Systems, Inc.,*** 354 So.2d 54 (Fla. 1977).

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still, K-Mart's own policy prohibiting such sales is itself a recognition -- indeed, a concession -- of the foreseeability of the danger." K-Mart might have had a position on this issue if the shooting had occurred while Mr. Knapp was sober, at some point in time remote from the sale itself (as in some of the decisions upon which K-Mart relies), but Ms. Kitchen was shot within a mere 30 minutes of the sale, while Mr. Knapp was in the same drunken condition in which he purchased his arsenal. On those facts, we respectfully submit, reasonable persons can certainly differ on the issue of foreseeability, and the issue of proximate causation was therefore a jury question, not an issue which can be decided by this Court as a matter of law."[9] In short, not one of K-Mart's three arguments has any merit.

The arguments of K-Mart's amici are more focussed, but they are equally without merit. In fact, amici have made a rather critical concession at p. 18, n. 5, of their brief, where they concede that the 1991 enactment of $790.15 1, Fla. Stat. -- which makes it a crime for a drunk to possess a loaded firearm -- now justifies imposition of civil liability on a retailer who aids and abets such a crime by selling a firearm and ammunition to an obvious drunk. Although this concession is not really pertinent to our position that civil liability for negligence does not depend upon the existence of a statute *criminalizing* the conduct, we mention the concession because we think it all but destroys most of amici's arguments. For example, $790.151 has been on the books for half a decade, yet

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[9] ***See Rupp v. Bryant,*** 417 So.2d 658, 669 (Fla. 1982) (where school board's own policy prohibited hazing and required teacher supervision of school club's meetings, "intervening act" of hazing at an unsupervised meeting was foreseeable and did not break the chain of causation).

[10] ***See, e.g., Angell v. F. Avanzini Lumber Co.,*** 363 So.2d 571 (Fla. 2d DCA 1978); ***K-Mart Enterprises of Florida, Inc.*** v. ***Keller,*** 439 So.2d 283 (Fla. 3d DCA 1983), ***review denied,*** 450 So.2d 487 (Fla. 1984); ***Coker v. Wal-Mart Stores, Inc.,*** 642 So.2d 774 (Fla. 1st DCA 1994), ***review denied,*** 651 So.2d 1197 (Fla. 1995).

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commerce has not "ground to a virtual halt, " as amici prophesy in their hyperbolic "parade of horribles. " Amici's concession that imposition of civil liability on aiders and abetters is appropriate today would also appear to subvert all of the "public policy" arguments they have advanced for non-recognition of such liability prior to 1991, For example, to amici's argument that there are "competing public policy considerations" which ought to be resolved by the legislature rather than this Court, the existence of $790.151 allows us to respond that those competing considerations have already been resolved by the legislature, and that the Court can therefore comfortably hold that the policy represented by the statute has been the policy of the state all along. ***See Insinga*** v. *LaBella,* 543 So.2d 209 (Fla. 1989).

Moreover, we must respectfully insist that there are ***no*** "competing public policy considerations" where the sale of a firearm and ammunition to an obvious drunk is concerned. No rational legislature could ever determine that such conduct should be encouraged by rendering it immune from a civil negligence action."' The question is simply not a close one, and the Court should therefore feel no need whatsoever to defer to ***anyone*** in providing its obvious answer. Even K-Mart recognizes that only one policy is appropriate where such a sale is concerned, since (the "wheels of commerce" notwithstanding) it has adopted its own internal policy prohibiting such a sale by its clerks. If that policy is good enough for K-Mart, and if it were good enough for the legislature in 1991, then no good reason suggests itself why the Court should not declare the public policy of the state to be the same in the instant case.

To amici's claim that drunks are "not necessarily dangerous," we say nonsense.

11/ After all, the "wheels of commerce" can grind much too noisily if they are not occasionally greased with a little social responsibility -- and why should a $25.00 profit on a cheap rifle be so important to the GNP that society cannot discourage the sale of guns to drunks? Amici's "wheels of commerce" argument is hyperbolic in the extreme.

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In *Ingram v. Pettit,* 340 So.2d 922, 924-25 (Fla. 1976), this Court declared that "drunk drivers menace the public safety," and that the use of a dangerous instrumentality by a drunk "is an intentional act which creates known risks to the public . . . [and evinces] reckless disregard for the public safety." Most respectfully, drunks are dangerous. In any event, amici's argument badly misses the point. The issue presented here is not about Mr. Knapp's drunkenness; it is about the fact that K-Mart armed him with a deadly weapon while he was drunk. It is *the combination* of the dangerous instrumentality and the drunk which is dangerous -- an obvious danger which even K-Mart recognized when it prohibited its clerks from selling firearms to drunks. And if the negligent entrustment of an automobile to a drunk is actionable negligence, as this Court recognized in *Engleman v. Traeger,* 102 Fla. 756, 136 So. 527, 530 (1931), then the negligent entrustment of the far more lethal "dangerous instrumentality" in issue here should be actionable negligence as well.[12/]

K-Mart's amici attempt to finesse this obvious conclusion by arguing that this is not really a negligent entrustment case -- that it is governed instead by §§ 314 and 315 of *the Restatement (Second)* of *Torts,* which state that an actor has no duty to control the conduct of a third person unless a special relation exists between them. This contention is simply wrong. The plaintiff's cause of action does *not* turn on K-Mart's failure to "control the conduct" of Mr. Knapp on the day of the incident; the gist of the plaintiff's action is K-Mart's negligence in delivering a weapon and ammunition to him when he was obviously drunk. *That* quite different cause of action is governed by $390 of the

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12/ This observation should also dispose of amici's argument that even psychiatrists have a difficult time predicting violence in their patients. Whether true or not, the argument misses the point. Surely if a psychiatrist were to hand a loaded firearm to a psychotic patient (or even a drunk patient) and allow him to leave the office with it, the law of Florida would recognize an action for negligent entrustment of the firearm if the patient shot someone with it less than 30 minutes later.

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Restatement (Second) of *Torts,* which states that it is actionable negligence to supply a dangerous chattel to a person who is not competent to use it safely.

K-Mart's amici say no, the cause of action recognized by §390 applies only to persons who loan or give chattels to obvious incompetents, since they "generally know each other"; it does not apply to sellers, they contend, because sellers generally do not have "an adequate basis for judging whether the other party can safely be loaned the weapon. " There are two things wrong with this highly contrived makeweight. First, the cause of action recognized by §390 plainly "applies to anyone who supplies a chattel for the use of another," including "sellers, lessors, donors, or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration." Comment a to §390. Second, when the potential purchaser is visibly intoxicated, as Mr. Knapp was in the instant case, the seller most certainly has "an adequate basis for judging whether the other party can safely be [sold] the weapon," whether it knows anything else about him or not. Most respectfully, §390 is plainly the appropriate pigeonhole for the cause of action at issue here, not §§ 3 14 and 3 15. See the decisions cited at pp. 20-22 of our initial brief.[13/]

Finally, amici argue that the single cause of action in issue here is "expressly

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[13/] This observation should also dispose of the additional float in amici's hyperbolic "parade of horribles, " that recognition of a cause of action on the facts of this case would mean that a retailer could be found negligent for selling other non-defective products (like knives, chainsaws, pool acid, and the like) to a "defective customer. " Frankly, we see nothing wrong with imposing such a duty on retailers; if the customer is "defective" because he is obviously drunk, then a jury question ought to be presented as to whether the retailer used reasonable care in entrusting him with any product which he was obviously not competent to use safely, just as a jury question would be presented if a retailer were to sell a box of matches to a five-year-old child. In any event, these other products at least have legitimate, non-dangerous uses. A firearm, in contrast, is designed for only one purpose -- to enable its possessor to kill another living thing. Surely, the terribly lethal nature of the product in issue here should distinguish this case from amici's considerably more mundane " hypotheticals. "

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preempted" by §790.33(1), Fla. Stat. However, by its plain language -- and by the plain language of the statute's "Policy and Intent" section, §790.33(3) -- the *only* thing declared to be "preempted" by Chapter 790 is "county, city, town, or municipal ordinances and regulations" regulating the manufacture, sale, and purchase of firearms and ammunition -- which would include ordinances requiring taxation, registration, waiting periods, and the like. There is not a single word in the statute which even arguably supports the notion that the legislature intended to preempt state common law civil remedies for negligence in the manufacture, sale, or use of firearms. And because it is thoroughly settled in this Court that a statute will not be deemed to preempt the common law unless its intent to do so is made "explicit" in "clear, unequivocal terms," amici's "preemption" argument is plainly a red herring .[14/] All things considered, and for the reasons explained in our initial brief, we continue to insist that the district court erred in concluding that K-Mart did not owe the plaintiff the ordinary duty of reasonable care.

ISSUE B. In our initial brief, we demonstrated that the district court had no power to reverse the plaintiffs judgment on the ground that it did because K-Mart waived the issue at least three times in the trial court. K-Mart smugly responds that our "argument that Kmart did not 'preserve' the issue of a directed verdict on the issue of statutory liability is a pig in a poke that this Court should not buy"; that we failed to challenge the trial court's ruling on the "statutory claims" in the district court; and "[h]ence, preservation is petitioner's problem, not respondent's" (respondent's brief, p. 37). Most respectfully, K-Mart is obviously (and badly) confused. The issue presented here is *not* whether the *trial court* erred in concluding that we had proven no statutory violations which would have supported a negligence *per* se instruction. K-Mart is correct

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[14/] *Carlile v. Game & Freshwater Fish Commission,* 354 So.2d 362, 364 (Fla. 1977). *Accord Ady v. American Honda Finance Corp.,* 21 Fla. L. Weekly S 130 (Fla. Mar. 21, 1996); *State v. Egan, 287* So.2d 1 (Fla. 1973).

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that we did not challenge this ruling in the district court; neither have we challenged it in this Court, so the ruling is plainly a non-issue here. The issue which *is* presented here is whether the *district court* erred in ordering the entry of a judgment in K-Mart's favor on the ground that it owed the plaintiff no common law duty of care, a ground which K-Mart did not preserve in the trial court for review in the district court. The lack of preservation is therefore plainly the respondent's problem, not the petitioner's.

To our contention that the issue was waived the first time when K-Mart admitted in its answer that it owed the plaintiff a duty of reasonable care, K-Mart acknowledges the admission, but asserts that it specifically denied that it owed any duty to the plaintiff on the facts alleged in the complaint. As previously explained at page 7, *supra*, however, this assertion is false. And because K-Mart's *only* response to our argument on the first of its three waivers is an easily demonstrable falsehood, our argument stands unrebutted, and therefore essentially conceded.

To our contention that the issue was waived for the second time when K-Mart did not move for a directed verdict at the close of the evidence on the ground that it owed the plaintiff no duty of care, K-Mart responds with (1) a lengthy paragraph discussing the argument it directed to the alleged "statutory violations," and (2) a single sentence claiming that it "also argued that it had no common law duty to this plaintiff . . . ." (respondent's brief, p. 38). The discussion in the paragraph is irrelevant to the different issue presented here; the assertion in the sentence, although relevant to the issue, is untrue. The grounds which K-Mart raised in its motions for directed verdict are accurately summarized at pages 10- 12 of our initial brief. Although K-Mart did argue that, because (in its view) there was no evidence that K-Mart was on notice of Mr. Knapp's drunkenness, it had no duty to protect the plaintiff from his unforeseeable criminal acts, it did *not* argue that it owed the plaintiff no duty of care with respect to the

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sale of a firearm to a purchaser known to be intoxicated. Indeed, consistent with the admission contained in its answer, it conceded 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. And because K-Mart's only response to our argument on the second of its three waivers is simply not true, our argument stands unrebutted, and therefore essentially conceded.

To our contention that the issue was waived a third time when K-Mart failed to file a Rule 1.480(b) motion after trial, K-Mart responds that it "did not need to file a post-trial motion . , , where (a) to do so would have been utterly and totally futile, and (b) the issue should have been raised by petitioner and not respondent" (respondent's brief, p. 39). With respect to the second contention, K-Mart remains badly confused. We are not challenging the trial court's conclusion that we failed to prove our alleged "statutory violations"; we are challenging the district court's reversal of the plaintiff's judgment on the ground that K-Mart was entitled to judgment as a matter of law. Surely the *plaintiff* had no obligation to move for judgment in ***K-Mart's*** favor after trial; that obligation plainly belonged to K-Mart -- and K-Mart's failure to move for judgment in its favor in the trial court just as plainly prevented the district court from ordering entry of a judgment in its favor on appeal.

With respect to K-Mart's "futility" argument, if K-Mart means that a post-trial motion would have been futile because, right or wrong, the trial court would have denied it, we would ask, how can it be so certain? After all, the appellate courts of this state have often admonished trial courts to deny or reserve ruling upon motions for directed verdict made at the close of the evidence, even when it appears they should be granted, and then direct a verdict after trial -- in order to obtain a verdict obviating the need for an entire retrial in the event that the directed verdict is declared erroneous on appeal.[15/]

[15/] ***See, e.g., Glenn v. Florida Unemployment Appeals Comm.,*** 516 So.2d 88 (Fla. 3d

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Indeed, Rule 1.480(b) is written to encourage that practice, since it expressly declares that any ruling on a motion for directed verdict made at the close of the evidence, other than a grant of the motion, is deemed to be a reservation of decision on the motion, subject to being resolved on a post-trial motion for judgment in accordance with the prior motion. Since both the decisional law and the rule encourage trial courts to deny motions for directed verdict made at the close of the evidence, even when they should be granted, it is impossible that any litigant could ever legitimately predict that a post-trial Rule 1.480(b) motion would be futile, and we therefore respectfully submit that the failure to file such a motion can never be excused in an appellate court on the ground of predicted "futility. "

K-Mart also asks the Court to disagree with the United States Supreme Court's construction of Rule 50(b), which is identical to Rule 1.480(b), pointing out that a handful of lower courts have criticized the construction (for a reason which is not implicated in this case, as we explained at p. 33, n. 12, of our initial brief), Frankly, we think the three U.S. Supreme Court decisions announcing the construction are authority enough for the point, so we will spare the Court a rebuttal to K-Mart's passing swipe at the legal acumen of the highest court in the land.

Finally, K-Mart contends that our argument elevates form over substance -- that an appellate court ought to be permitted to order entry of a judgment in an appropriate case, even if the defendant failed to move properly for a directed verdict in the trial court. In effect, K-Mart is arguing that the requirements of Rule 1.480 should be ignored

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DCA 1987); *Mabrey* ***v. Carnival Cruise Lines,*** 438 So.2d 937 (Fla. 3d DCA 1983); ***Dysart*** v. ***Hunt,*** 383 So.2d 259 (Fla. 3d DCA), ***review denied,*** 392 So.2d 1373 (Fla. 1980); Keyes Co. v. *Arvida* ***Corp.,*** 360 So.2d 427 (Fla. 3d DCA), ***cert. denied, 365*** So.2d 713 (Fla. 1978); ***Freeman v.*** *Rubin,* 318 So.2d 540 (Fla. 3d DCA 1975); *Ditlow* ***v. Kaplan,*** 181 So.2d 226 (Fla. 3d DCA 1965).

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altogether in favor of a policy which would allow appellate courts to declare a jury verdict "fundamental error." Whatever wisdom such a policy might have (and it has little, as the U. S. Supreme Court carefully explains in the trilogy of decisions which K-Mart has asked the Court to ignore), the fact remains that this Court has rejected the argument on several prior occasions. It is thoroughly settled in this Court that, the "fundamental error" doctrine notwithstanding, the failure to move for a directed verdict at the close of the evidence is a waiver of any entitlement to entry of a subsequent judgment contrary to a jury verdict. See the decisions cited at p. 30 of our initial brief. No good reason suggests itself why the failure to file the post-trial motion required by Rule 1.480(b) should be treated any differently. In short, not one of K-Mart's justifications for its triple waiver below has any merit at all.

ISSUE C. In our initial brief, we demonstrated that the district court erred in concluding 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." K-Mart and its amici respond by ***conceding*** the initial steps of our argument -- specifically, they concede that a defendant's own "safety rules" and internal policies ('just like traffic regulations and "industry standards") are admissible as ***evidence*** of the standard of care, and that (just as a jury must be instructed on the legal consequences of the admission of traffic regulations and "industry standards") the legal consequences of the admission of such evidence should be explained to the jury with an appropriate instruction. But, despite the fact that K-Mart's counsel told the jury in closing argument that "a violation of an internal procedure at K-Mart , . . can be some evidence of negligence . . . . " (T. 1203), they part company with ***us*** on the ***language*** which the instruction should contain. According to K-Mart and its amici, the ***only*** appropriate instruction which can be given is that "the existence of an internal rule does

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not itself fix the standard of care, but is merely evidence of the standard of care." Most respectfully, as we demonstrated in our initial brief, the difference between the two instructions is purely semantic; both of them say exactly the same thing.

Apparently we did not make the point clearly enough in our initial brief. In an effort to nail the point down, we will briefly revisit the language of Florida's standard jury instructions. The phraseology proposed by K-Mart and its amici would be appropriate, we submit, if a jury were instructed as a preliminary matter that the "standard of care" is that degree of care which a reasonably careful person would use under like circumstances, and that negligence is the failure to conform to that "standard of care. " If the definition of "negligence" were phrased in that manner, then a jury could appropriately be told, without confusing it, that "the existence of an internal rule does not itself fix the standard of care, but is merely evidence of the standard of care." The problem is that the drafters of Florida's standard jury instructions eschewed use of the phrase "standard of care" altogether. The phrase appears nowhere in the standard negligence instructions; it is undefined; and use of it in F.S.J.I. 4.11 simply would not mesh with the language which the drafters chose for the standard instructions.

In F. S. J. I. 4.1, negligence is *not* defined as the failure to conform to a "standard of care. " It is defined by *stating what the appropriate standard* of *care is,* without reference to the phrase itself, as follows:

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

And when this definition of the word is plugged into F. S. J.I. 4.11 wherever the word "negligence" appears, as it must be, the language chosen by the drafters for expression

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of the concept in issue here makes perfect sense:

> Violation of this [statute, ordinance, industry standard or internal policy] is evidence of negligence [-- that is, evidence that the defendant failed to use that degree of care which a reasonably careful person would use under like circumstances]. It is not, however, conclusive evidence [that the defendant failed to use reasonable care]. If you find that a person alleged to have been negligent violated such a traffic regulation [etc.], you may consider that fact, together with the other facts and circumstances, in determining whether such person [failed to use reasonable care].

Most respectfully, given the manner in which "negligence" is defined in F. S . J.I. 4.1 -- where the lay concept of "reasonable care" is substituted for the legal concept of "standard of care" -- that is the only appropriate way to express the concept in issue here. To express it in terms of the "standard of care" would clearly confuse the jury with an undefined term which appeared nowhere else in the instructions, and which would be inconsistent with the language chosen to define the concept of "negligence. " In short, the language of F.S. J.I. 4.11 is dictated by the language chosen for F.S. J.I. 4.1 -- and given the language of F.S.J.I. 4.1, F.S.J.I. 4.11 could not have been drafted in any other way. We therefore respectfully insist once again that the difference between the variant of F. S . J.I. 4.11 declared erroneous by the district court, and the instruction proposed as a proper substitute for it, is purely semantic -- that the two instructions say, in substance, exactly the same thing. And if we are correct about that, and we remain confident that we are, then it is simply undeniable that the district court erred in declaring the variant of F. S. J.I. 4.11 given by the trial court to be reversible error.

We should also point out that, if the Court were to accept the district court's conclusion that the instruction should have been phrased in terms of the "standard of care, " rather than in terms of "evidence of negligence, " then F. S. J.I. 4.11 will have to be rewritten in the same fashion where traffic regulations and "industry standards" are

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concerned, because neither of these categories of admissible evidence "fixes the standard of care" either. However, that would be inconsistent with this Court's prior approval of the language of F. S. J.I. 4.11 in ***Seaboard Coastline Railroad Co. v. Addison, 502*** So.2d 1241 (Fla. 1987). K-Mart and its amici attempt to draw a distinction between the instruction required in ***Addison*** and the instruction given in the instant case by arguing that internal policies are "different" than traffic regulations and "industry standards. " Of course they are "different" things, but there is no relevant difference between them at all in the particular context under discussion. Because all three categories of evidence are admissible ***for the same purpose*** -- as evidence of reasonable care under the circumstances, but not conclusive evidence of reasonable care -- and if (upon proof of a violation) an "evidence of negligence, but not conclusive evidence of negligence" instruction is required where traffic regulations and "industry standards" have been admitted into evidence, then it simply must follow that the same instruction is proper where internal policies have been admitted as evidence of reasonable care.

The remainder of the arguments addressed to this issue are simply confused, for the same reasons that the district court was confused. We have already addressed that confusion at length in our initial brief, to which the Court is referred for the remainder of our reply. One loose end remains to be tied -- K-Mart's response to fn. 17 of our initial brief, which is a "right for the wrong reason" argument in support of the district court's conditional grant of a new trial on all issues, rather than on the issue of liability alone. It is important that the Court note the limited nature of the argument. If the Court agrees with us that the trial court did ***not*** commit reversible error in giving the jury instruction which is the subject of this issue on appeal, then it will have determined that the district court ***erred*** in ordering a new trial on any issue. In that event, the Court need not reach K-Mart's argument that the new trial was properly ordered on all issues. K-

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Mart's "right for the wrong reason" argument will become relevant here ***only*** if the Court rejects our position, and approves the district court's conclusion that the trial court committed reversible error. At that point, the Court will have to determine whether a new trial should have been ordered on all issues, or on the issue of liability alone.

If that point is reached, we respectfully submit that the trial court did not even arguably abuse its discretion in excluding evidence of the plaintiff's pre-incident alcohol and substance abuse.[16/] To begin with, this contention is an afterthought of appellate counsel which was not preserved for review in the trial court. During a lengthy discussion of the point at the outset of trial (T. 130-46), the trial court recognized that, because Ms. Kitchen was rendered quadriplegic by the shooting, her pre-incident habits were largely irrelevant to her post-incident damages; that the proposed evidence had little, if any, relevance to the issues to be tried; and that K-Mart's real purpose in offering it was to tarnish the plaintiff's "verdictworthiness" by suggesting that she had "bad character" before she was rendered quadriplegic -- a purpose which is generally impermissible (T. 130-46).[17/] It therefore ruled "provisionally" that the prejudicial value of the proposed evidence would outweigh its probative value, but made it clear to

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[16/] K-Mart complains about the exclusion of other evidence as well, but its complaint should properly be limited to exclusion of the evidence of the plaintiff's pre-incident alcohol and substance abuse. Its claim that it was precluded from showing that Ms. Kitchen had been drinking on the day of the incident is simply not true. The evidence reflected that Ms. Kitchen and Mr. Knapp lived together, and that they spent nearly the entire day together, drinking in two bars (T. 286-95, 321-22, 864-66, 916). The evidence of the plaintiff's convictions was properly excluded for the reasons explained in fn. 4, *supra* -- and in any event, this ruling was not challenged in the district court, so it is unavailable as a "right for the wrong reason" argument here.

[17/] See §§ 90.404, 90.608, 90.609, Fla. Stat.; ***Edwards v. State,*** 548 So.2d 656 (Fla. 1989); ***Porter v. Vista Building Maintenance Services, Inc.,*** 630 So.2d 205 (Fla. 3d DCA 1993), ***review denied,*** 640 So.2d 1109 (Fla. 1994); ***Ellis*** v. ***Hum,*** 462 So.2d 28 (Fla. 3d DCA 1984); Ehrhardt, ***Florida Evidence*** §§ 403.1, 404.3, 404.9 (1996 Ed.).

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K-Mart's counsel that it would reconsider the ruling at any point in the trial at which K-Mart thought the proposed evidence had gained significant relevance, and that the evidence should be proffered at that time (T. 143-46).

Subsequently, when the reading of Mr. Knapp's deposition came up for discussion, K-Mart insisted upon reading portions of the deposition relating to the plaintiff's pre-incident alcohol abuse (T. 273-79). The plaintiff then withdrew her claim for past lost wages and future impairment of earning capacity, to which K-Mart's counsel responded, "That's fine, Judge. I don't want it in as long as they've agreed to drop it" (T. 278-79). The subject was not broached again, and the excluded evidence was never proffered. Indeed, K-Mart's counsel told the jury in closing argument, "You're right, we didn't contest the damages in this case. The damages are horrible , . . . " (T. 1198).

Given this state of the record, it should come as no surprise that the district court declined to reverse the trial court for its exclusionary ruling. In addition, it is settled that, "[w]here a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." *Sims v. Brown, 574* So.2d 13 1, 133 (Fla. 1991). And because the scattershot which K-Mart has directed at the ruling here comes nowhere close to demonstrating the requisite "clear abuse of discretion," we respectfully submit that K-Mart's "right for the wrong reason" argument is without merit, If a new trial *is* to be ordered here, it plainly should be limited to a retrial of the liability issue alone. See the decisions cited at p. 50, n. 17, of our initial brief.

III. CONCLUSION

The disposition requested in ial brief remains appropriate.

By: RAYMOND EHRLICH

By: JOEL D. EATON

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 8th day of April, 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. Kupfer, P.A., The Forum, Tower C, Suite 810, 1655 Palm Beach Lakes Blvd., West Palm Beach, Fla. 33401; Mark Polston, Esq., Suite 1100, 1225 I Street N.W., Washington, D.C. 20005; and to Jack W. Shaw, Jr., Esq., Brown, Obringer, Shaw, Beardsley & DeCandio, P.A., 12 East Bay Street, Jacksonville, Fla. 32202-3427.

By: Joel D. Eaton
JOEL D. EATON