SUPREME COURT OF FLORIDA

CASE NO. 86,812

DEBORAH KITCHEN,

Petitioner,

VS.

KMART CORPORATION,

Respondent.
_____/

On certified question from the Fourth District Court of Appeal

RESPONSE BRIEF OF KMART CORPORATION

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INTRODUCTION

The petitioner, Deborah Kitchen, seeks review and reversal of the October 18, 1995, opinion of the Fourth District Court of Appeal. The opinion reversed a judgment for Kitchen with instructions to enter judgment for Kmart.

The petitioner, Deborah Kitchen, was the plaintiff in the trial court and will be referred to as the petitioner, the plaintiff, or by name.

The respondent, Kmart Corporation, was the defendant in the trial court and will be referred to as the respondent, the defendant, or by name.

References to the record on appeal and the supplemental record on appeal will be designated by the letter "R". References to the transcript will be designated by the letter "T".

STATEMENT OF THE CASE AND TEE FACTS

A. Overview

Thomas Knapp, after a day-long drinking spree, in part spent with his girlfriend Deborah Kitchen, purchased a .22 caliber rifle at a Kmart store. A short while later Knapp shot Kitchen, leaving her a quadriplegic. A jury found Kmart liable for common law negligence, and returned a multi-million dollar verdict against Kmart. On appeal to the Fourth District Court of Appeal, the court reversed, concluding 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 proper use of the firearm." Kmart Corp. v. Kitchen, 662 So.2d 977 (Fla. 4th DCA 1995).

The Fourth District directed that judgment be entered in Kmart's favor, based in part on its determination that there was no direct evidence of visible intoxication. However the appellate court certified the following hypothetical question to this Court: "Can a seller of a firearm to a purchaser known to the seller to be intoxicated be held to be liable to a third person injured by the purchaser." Kitchen, 662 So.2d at 980. Both the majority and dissent also determined that plaintiff's counsel committed error in requesting and receiving a jury instruction that violation of a Kmart internal policy was evidence of negligence.

B. The Incident

On the day in question, Knapp and Kitchen did what they frequently did -- began drinking in a bar at 8:30 a.m. and drank all day and through the late evening hours, Deborah Kitchen and Thomas Knapp were violent and irresponsible. They did not have regular jobs. Although excluded from the jury, Kitchen had been previously convicted of armed robbery, drunk and disorderly conduct, and was an admitted drug user and heavy binge drinker. (T. 126-27, 131-33). Kitchen and Knapp spent much of their time drinking, and they worked only irregularly using the money to drink with. By his own estimation, Knapp consumed a fifth of alcohol and a case of beer the day he shot Kitchen.[1]

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[1] Respondent disagrees with petitioner that in this proceeding the facts should be viewed favorably to petitioner. The facts should be viewed in a light most favorable to the respondent, the prevailing party in the District Court.

The petitioner has chosen to totally recast the facts, often (continued..)

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Knapp left the bar around 8:30 p.m. and went to his mother's house, where he showered, brushed his teeth and changed clothes. (T. 296-97). He then drove to Kmart, entered the store, and purchased a .22 caliber rifle and a box of ammunition at 9:45 p.m., giving the clerk specific instructions as to the type of gun he wanted. (T. 299-300).

Knapp testified that his physical appearance was fine, that he was not stumbling or unsteady on his feet, that he was able to produce his driver's license and that he conversed with the store clerk easily. (T. 301-2, 309, 313). This was confirmed by the Kmart clerk and the police, who promptly arrested and interviewed Knapp. (T. 248, 578-79, 594). Knapp's arresting police officer said he noticed no intoxication whatsoever. (T. 248). No blood alcohol tests were run on Knapp. No one in the entire trial actually testified that Knapp ever appeared intoxicated at the Kmart store.

This point was not lost on the Fourth District, which viewed

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[1] (. ..continued)
times in direct contradiction with the District Court's recitation of the evidence and testimony. One of the clearest examples is the statement at page 4: "He [the Kmart clerk] was unable to recall whether Mr. Knapp appeared intoxicated or smelled of alcohol (T. 576-83)." The District Court stated: "The clerk testified that Knapp did not appear to be intoxicated. . . . " The District Court's analysis of the testimony is absolutely correct. The District clerk testified that Knapp's eyes were clear and he did not smell of alcohol. (T. 579). When asked whether the clerk had an opinion as to whether Knapp had been under the influence of drugs or alcohol, he stated: "I mean, obviously, I seen the individual. I didn't feel that he was intoxicated or under the influence of drugs." (T. 590). The petitioner's brief is guilty of a gross exaggeration stating that the clerk could not recall these facts. The District Court read the transcript quite accurately.

the facts in a light most favorable to Kitchen stating: "The [Kmart] clerk testified that Knapp did not appear to be intoxicated. . . There was no direct evidence regarding Knapp's behavior in Kmart besides the testimony of the clerk." Kitchen, 662 So.2d at 977-78.

The Kmart clerk who sold the gun to Knapp testified that Knapp appeared entirely normal, that Knapp had no odor of alcohol, unsteadiness, or other symptoms; the clerk had no idea that Knapp was intoxicated. (T. 578-79, 594). The clerk testified that Knapp's handwriting on a federal Alcohol Tobacco and Firearm (ATF) form which he filled out while purchasing the gun was in part illegible. (T. 586). The "yes/no" check marks by Knapp showing he was not a drug user, convicted felon, etc. were truthful and the clerk recopied the form. (T. 587).

Knapp did not appear at trial and testified by deposition. Knapp testified he had extremely messy handwriting. (T. 301, 876). Knapp said he bought the Kmart gun as a Christmas present for his step-father and that he used a different gun to shoot Kitchen. (T. 319).

Knapp returned to the bar and continued drinking. (T. 321). Another patron then commented that he was unsteady on his feet. (T. 312). Instead of leaving with Knapp, Kitchen left with several other men, and Knapp got angry. He decided to shoot Kitchen when she left the bar with the other men. (T. 243). A car chase ensued, and after forcing Kitchen off the road, Knapp shot and almost killed her with a .22 caliber rifle.

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After his attack, Knapp was apprehended by police and confessed to the shooting. Knapp's statement to the police indicated that he decided to shoot Kitchen when he returned to the bar, after his trip to Kmart. (T. 243). Hence, the police did not really care what gun was used to shoot Kitchen. Although Knapp described going to Kmart and purchasing a rifle, he never said that he used that rifle in the shooting. (T. 245). Knapp said that he purchased the gun at Kmart as a Christmas present for his father, and that he used another gun he already had in his truck in the shooting. (T. 328). No gun or guns were ever found in connection with this shooting. (T. 220, 898, 907). The police searched Knapp's truck but found nothing.

Knapp admitted guilt and is serving a 55 year sentence for attempted murder. He chose to be unrepresented in the lower court proceeding and did not attend the trial.

C. The Pleadinss And How Thev Were Tried

Kitchen sued Thomas Knapp and Kmart. (R. 1-9). The allegations against Knapp were that he tried to kill Kitchen by shooting her. The complaint alleged both an intentional tort and negligence, and the negligence count asserted both statutory violations and common law negligence. (R. 1-9).

The allegations against Kmart concerned the sale of the .22 rifle to Knapp. Kitchen alleged that Kmart was guilty of several statutory violations under both state law and federal law, relying on section 798.17, Florida Statutes and 18 U.S.C. § 922, concerning the sale of firearms to minors and persons of unsound mind, and the

required forms to be used in such sales, respectively. The complaint also contained a general allegation of common law negligence against Kmart, but never alleged that Kmart knew or should have known that Knapp was intoxicated. (R. 1-9, 51). The trial court would eventually rule that plaintiff presented no evidence of any statutory violation. (T. 836-38).[2]

Knapp filed a single handwritten pleading where he denied all allegations of the complaint. (R. 27). Despite this denial, Knapp's testimony showed that he became angry with Kitchen when she left the bar without Knapp but with other men. (T. 322). Knapp chased them down and shot plaintiff through the neck. (T. 323-28). Knapp told police he was trying for a "head shot".

In opening statement, Kitchen's counsel told the jury that Kmart violated various federal and Florida statutes concerning the sale of firearms to an intoxicated person or a person of unsound mind. Supposedly based on the statutes, he argued Kmart has a responsibility "not to sell to those under the influence of alcohol, those who are criminals, and those who are of unsound mind." The plaintiff also argued that Kmart's literature was silent "regarding basic Florida statutes regarding the sale of guns and ammunition to people of unsound mind. It's not even mentioned in there because they do it throughout the country. They don't

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[2] The petitioner tries to suggest that Kmart admitted it owed a particular duty to this plaintiff. In reality, Kmart's answer admitted that it owed a duty to exercise reasonable care under the circumstances in order to prevent foreseeable risk of injuries to third parties. Kmart specifically denied that it owed any duty to this plaintiff on <u>these facts.</u> (R. 60-61).

even tell their clerks what sales are illegal in the State of Florida, which has some good laws that go beyond the federal laws." (T. 181-83).

Notwithstanding the evidence, the plaintiff abandoned the intentional tort allegations at the close of the case, and chose to have the case sent to the jury against Knapp solely on a negligence theory. Plaintiff refused to move for a directed verdict against Knapp, telling the judge the case should be decided by the jury on a negligence theory alone. (T. 1105). Kmart's suggestion of a directed verdict against Knapp was denied.

Plaintiff's counsel failed to adduce any testimony that Kmart violated any Florida or federal statutes. The trial court eventually ruled as a matter of law that there had been absolutely no evidence of any statutory violation. (T. 839). Despite this ruling, the trial court refused to formally direct a verdict on the statutory liability issue, and failed to advise the jury that there had been no statutory violation proven. (T. 836-38). Plaintiff's counsel then argued the federal and Florida statutes to the jury in closing argument. (T. 1148, 1158).

The Fourth District determined on appeal that the trial court's ruling constituted a directed verdict on the statutory violation claims, and the District Court noted that this ruling had not been cross-appealed by Kitchen. Kitchen, 662 So.2d at 978. As the District Court opinion found, the Florida statute prohibits sales of firearms only to minors or to persons of unsound mind, while the federal statute covers minors, convicted felons, drug

users, adjudicated mental defectives and certain other classes. It was absolutely uncontested that Knapp was not a member of any of the classes mentioned in either the Florida or federal statutes.

The case was submitted to the jury solely on a common law negligence theory against Kmart. The jury was given a modified version of the standard charge on a statutory violation as evidence of negligence. Instead of a statutory violation, the jury was told that Kmart's violation of any of its own internal policies would be evidence of negligence. (T. 1215). The plaintiff elicited testimony from a Kmart clerk that Kmart had a strong policy against selling firearms to intoxicated persons. (T. 566). The trial judge seemed taken with this "evidence" and crafted her own jury instruction on violation of internal policy. Over Kmart's objection, the trial court instructed the jury that if Kmart had violated its internal policy then this would be evidence of negligence. (T. 1215). Despite the extensive evidence and argument on the statutes, the instructions were totally silent on the effect of any statute.

D. The Full Facts

A tremendous amount of relevant and probative evidence was kept from the jury based upon the court's ruling that certain evidence of an adverse nature concerning Kitchen's past life and conduct would be unfairly prejudicial to her and would outweigh the probative effect of the evidence. (T. 142-43). It is apparent from the transcript that the trial judge had great sympathy for the

plaintiff.[3]

Curiously, the petitioner dwells on the supposed intoxication evidence, even highlighting her own expert. The record, and the District Court's opinion, make it crystal clear that there was no direct or eyewitness testimony that Knapp was visibly drunk. The onlv intoxication evidence came through the experts.

Plaintiff's primary expert witness was Dr. Werner Spitz who testified that he had been the Detroit, Michigan, Wayne County Medical Examiner for 16 years and that he had a national reputation as a forensic pathologist. (T. 365-66). Kmart attempted to cross-examine this expert witness concerning his prior unprofessional and unlawful operation of the Detroit Medical Examiner's office involving matters substantiated from federal court records. Dr. Spitz had sold body parts to fund his own private foundation, and allowed the Detroit, Michigan police department to shoot corpses as test cases. An investigation of his office and official criticism had resulted. (T. 427-31).

The trial judge seemed outraged by this attempted cross-examination, which was fully proffered and substantiated. The court excused the jury, ordered a live proffer by Kmart, and then entirely excluded the evidence without any word from plaintiff's counsel ever having been spoken. (T. 410-42).

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[3] The truest example is the trial court allowing the plaintiff to show a "Day in the Life" video that was not given to defense counsel until trial had started despite repeated requests well in advance of trial -- a classic violation of Binaer v. King Pest Control, 401 So.2d 1310 (Fla. 1981).

Knapp had been an extremely heavy alcohol user since age 14. For three or four months before the shooting, he had been drinking at least a fifth of liquor and a case of beer each and every day. (T. 307-8, 861). Every expert witness, including the plaintiff's, testified that alcoholics develop increasing tolerance to alcohol and that extreme alcoholics can imbibe tremendous amounts of alcohol without showing any apparent signs of intoxication. (T. 397-400, 510). Even a lethal blood alcohol level to a normal person may produce no visible signs in an extreme alcoholic. (T. 510). Knapp's arresting police officer said he noticed no intoxication whatsoever. (T. 248). Nothing about alcohol was noted in the police report. Kitchen's counsel carefully instructed Kitchen not to say one word about Knapp's physical appearance. (T. 140-6).

Kitchen's attorneys argued to the jury in opening statement, and throughout the case, that a Kmart lawyer had influenced Knapp to lie in his deposition about whether the Kmart gun had been used in the shooting. (T. 193, 821, 886). Kitchen presented evidence through the Knapp deposition that Kmart's counsel had talked with Knapp on several occasions. (T. 335, 821, 886).

The jury did not hear that Kitchen's attorneys had contacted Knapp and discussed the furnishing of a lawyer for him and obtaining his signature on a power of attorney form. (T. 281-83, 858). The plaintiff's lawyers objected to this evidence on the curious ground that it was a "figment" of Knapp's imagination. The record nonetheless clearly demonstrates that Kitchen's counsel made

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just such an offer. Kitchen's attorneys had asked Knapp questions in his deposition and he had responded with the evidence concerning the contacts by plaintiff's counsel, The trial court excluded the testimony notwithstanding the plaintiff's presentation of identical evidence that Kmart counsel had discussed the case with Knapp and "purportedly" influenced Knapp to lie about whether he had used the Kmart gun in a shooting. (T. 281-83, 858-86).

Kmart attempted to respond to this evidence by presenting its own evidence (also from Knapp's deposition) that Kitchen's lawyers had also directly contacted Knapp and suggested they would assist him by hiring him a lawyer before they ever sued him. They discussed the case with him and asked him to sign some kind of power of attorney form. The trial court excluded all evidence regarding contact between plaintiff's counsel and Knapp, but allowed all evidence and argument regarding contact between Kmart's counsel and Knapp. (T. 281-283, 858).

The petitioner has sought a new trial on liability only. In the event, this court orders a new trial, it should be on all issues. The trial court excluded from evidence all facts which might be adverse to plaintiff concerning her life before the shooting and even the day before. Plaintiff had a 1976 conviction for armed robbery, and a 1984-85 conviction for disorderly conduct and drunkenness. (T. 126-28). Kmart sought to present testimony from various witnesses, including the plaintiff, Knapp, and health care providers, concerning this history.

Before the jury, Deborah Kitchen was portrayed as merely the

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innocent friend of Thomas Knapp. The jury knew nothing of Kitchen's lurid background nor were they aware of any of the events of the day that led up to the shooting. Kitchen's counsel told the judge as the trial began that she would not say one word about how the shooting occurred nor about Knapp's drinking. (T. 138). The judge then ruled that Kitchen could be asked no questions whatsoever about her own prior life or drinking nor about her conduct on the day in question. (T. 140-46). The court granted the plaintiff's motion in limine to this effect. (T. 146).

Deborah Kitchen was portrayed as merely a young woman who was a devoted mother to her three children who intended to return to college and become a social worker. (T. 804-5). None of her background was admitted regarding either damages or liability. Kmart's arguments that a person's past life was relevant to their loss of future enjoyment of life were rejected. On liability, Kmart was not allowed to raise issues which the unrepresented Knapp had not specifically raised.

Kitchen accompanied Knapp to the Alamo bar and other bars on the day in question. She drank with Knapp all day long in those bars. They fought with each other, and Deborah Kitchen finally left the bar with other men. (T. 322).

The trial court ruled that absolutely nothing concerning Kitchen's prior use of drugs and liquor, including the day in question, could be mentioned to the jury in any way whatsoever. The judge strictly curtailed and warned Kmart counsel not to disclose any of these facts before the jury in any way because they

were prejudicial to the plaintiff, and Kitchen's counsel advised the court that Kitchen was not going to personally testify on the liability or intoxication of defendant Knapp. (T. 140-46). The court ruled that since Kitchen would not testify on liability or Knapp's intoxication, her own intoxication became shielded from the jury's consideration. Kmart argued that Kitchen's past life patterns and abuses plus the fact that she was drunk on the day in question would be relevant to both liability and damages. Plaintiff was seeking damages for the future loss of enjoyment of life and for the ability to work and be a mother to her children. Plaintiff's life expectancy was relevant to all of this and her past life was relevant to her lack of enjoyment of her future life. The trial court ruled that the prejudice to plaintiff outweighed the probative value of the evidence and excluded it all. The trial court even stated "testimony that alcoholics don't live as long [as normal people] is not going to be admissible." (T. 145). This concerned Kitchen rather than Knapp.

The jury never heard that Kitchen was a convicted felon. The jury never heard that Kitchen was a drug user or heavy drinker. The jury never heard that Kitchen and Knapp spent the entire day drinking together before Knapp shot Kitchen. The jury never heard about counsel solicitation of Knapp to provide him with legal representation. All this excluded testimony is highly relevant, in the event of a new trial, and amply demonstrates a need for retrial of both liability and damages.

ISSUES PRESENTED FOR REVIEW

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

SUMMARY OF THE ARGUMENT

The respondent, like the petitioner, requests the Court's indulgence in not presenting a summary of the argument, given the lengthy presentation by the petitioner.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT KMART, AS A RATTER OF LAW, DID NOT OWE A COMMON LAW DUTY OF REASONABLE CARE TO THIS PLAINTIFF.

The complaint that plaintiff went to trial on alleged that Kmart was guilty of statutory violations under both Florida and federal law, relying on section 798.17, Florida Statutes and 18 U.S.C. § 922, concerning the sale of firearms to minors or persons Of unsound mind, and the required forms to be used in such sales, respectively. The complaint also contained a general allegation of common law negligence against Kmart. The plaintiff put on no evidence that Kmart violated any statute, and on appeal the Fourth District determined that the trial court correctly ruled that there had been no evidence of any statutory violation under either statute, and that Kmart received a directed verdict on the statutory claim.[4] This left plaintiff with a simple common law

[4] Petitioner did not cross-appeal the statutory issue. In the event of a new trial, plaintiff is forever barred from raising a claim of statutory violation or even presenting evidence of purported statutory violations. Kitchen, 662 So.2d at 978.

claim for negligence.

After the statutes were rejected, the remaining issues were the classic common law questions of duty, breach, proximate cause, foreseeability, and damages. However, as correctly determined by the Fourth District, the jury should never have received this case. A retailer should not be held responsible for a **tortfeasor's** intervening criminal acts. Furthermore, common law negligence for retailers has been replaced by Florida and federal statutory liability. In this case, there was (1) no duty owed by Kmart to this plaintiff; (2) a clear intervening criminal act; and (3) no evidence that Knapp was of unsound mind, intoxicated, or under the influence of controlled substances. Judgment for Kmart is entirely correct.

There are two facets to the District Court's opinion. The first facet reveals that there is no case in Florida holding a firearm retailer liable for common law negligence in the absence of **foreseeable conduct that someone would be injured as a result** of the firearm sale. The second facet of the District Court's opinion is that this Court **has** proscribed the extension of civil liability for common law negligence where the legislature has regulated the field in which liability is sought to be imposed. A review of applicable Florida case law on **both** facets indicates the correctness of the District Court's ruling. A review of decisions from other jurisdictions will **also reveal a clear trend** away from imposing common law negligence against retailers in situations such as this.

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A. As a Matter of Law, Kmart Owed No Duty to this Plaintiff

The first facet of the Fourth District's opinion, and indeed the analysis before this Court, is predicated on the first element of a negligence action -- duty. As noted by Prosser and Keeton, duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, i.e. duty is an expression of policy considerations "which lead the law to say that the plaintiff is entitled to protection." Prosser & Keeton, Torts (5th ed.) § 53.

"Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon the defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." Kaisner v. Kolb, 543 So.2d 732, 735 (Fla. 1989). 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." McCain v. Florida Power Corp., 593 So.2d 500, 503 (Fla. 1992). Foreseeability is not, however, the only measure of duty. "Whether a retailer has a duty to protect a member of the general public from the criminal act of a customer depends on the relationship between the parties, the nature of the foreseeability of the risk, and any other considerations that may be relevant on the issue." Buczkowskiv, McKay, 441Mich. 96, 490 N.W.2d 330, 334 (1992)

The plaintiff and this defendant have no direct relationship.

They are tied only by the defendant/customer who criminally injured another using a product purchased from the retailer.

The certified hypothetical question of the Fourth District incorrectly framed the issue before this Court, where there was no direct evidence of visible intoxication. The question to be determined by this Court on these facts should be restructured. The question is not whether it is foreseeable that an intoxicated customer may injure another with a commercial product, but whether a retailer in the market setting should be liable for a clerk's failure to foresee a customer's criminal purpose. "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." Id. at 334-35. In the absence of a statutory violation, retailers should have no liability for the criminal acts of their customers.

As commented on by the Fourth District, there is only one case in Florida in which the seller of a firearm has been held subject to liability for common law negligence. In Angell v. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 2d DCA 1978), the plaintiff filed a two-count complaint alleging a statutory cause of action under section 790.17, Florida Statutes, which forbids the sale of weapons to minors or persons of unsound mind and a further cause of action based on common law negligence. A woman entered a firearms store to purchase a rifle. Her eyes were glazed and her conduct was erratic. She wanted to buy a rifle and began hugging and kissing the store clerk whom she did not know. She then repeatedly aimed

the rifle at the clerk's head and pulled the trigger. She talked of shooting and burying the clerk, She demanded ammunition and repeatedly attempted to load the rifle. The clerk was so frightened that he called the sheriff, who told him that he did not have to sell the woman the gun. The clerk sold the rifle to the customer anyway, despite the sheriff's advice, and a short while later the customer shot and killed someone.

The Angell court held that the complaint did not state a statutory cause of action, but that based on the conduct of the customer, the store should have foreseen that the customer might shoot someone. Implicitly, Angell would not have imposed liability against the retailer had the customer simply acted in a normal fashion, which is exactly what occurred in the present case.

In all of the other Florida cases relied on by petitioner it was undisputed that the action was based on negligent entrustment, and that the criminal party acted in a violent, irrational, angry or visibly and obviously dangerous manner. Furthermore, in the majority of petitioner's cases, there was an ultimate determination of no duty.[5] The law of this State has developed that a shooting

[5] See William v. Bumpass, 568 So.2d 979 (Fla. 5th DCA 1990) (violent, angry, and screaming adult who engaged in fight); Foster v. Arthur, 519 So.2d 1092 (Fla. 1st DCA 1988) (violent murderer who was life parolee); Sixty-Six, Inc. v. Finley 224 So.2d 381 (Fla. 3d DCA 1969) (known armed, unlicensed security guard who was allowed to drink on the job); Brien v. 18925 Collins Ave. Corp., 233 So.2d 847 (Fla. 3d DCA 1970) (no duty owed as a matter of law for owner of real property for harm caused by negligent discharge of firearm by an employee of independent contractor security corporation); Heist v Lock & Gunsmith, Inc., 417 So.2d 1041 (Fla. 1st DCA 1992) (no duty owed where no notice of violation of section 790.17), rt.review denied, 427 So.2d 236 (Fla. 1983).

victim does not have a cause of action against a retailer for negligence where a criminal act has been committed in the absence of a statutory violation, or abnormal and demonstratively erratic behavior on the part of the criminal defendant.

There is no evidence or testimony in this record demonstrating that any Kmart employee had actual notice that Knapp displayed abnormal, erratic behavior while inside the store. Absent evidence to the contrary, the retailer was entitled to proceed on the assumption that the purchaser would obey the criminal law. As stated by Prosser and Keeton:

> There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.

Prosser & Keeton, Torts (5th ed.) § 33.

There were four eyewitnesses to Knapp's condition on the night in question; Knapp, Kitchen, the store clerk, and the police. Knapp himself stated that despite his intake of liquor, his appearance was entirely normal. He did not stumble or slur his words. He was accustomed to drinking this amount and could do so and still function normally. Both parties' experts testified that excessive alcoholics like Knapp could continue to function normally and not appear to be intoxicated despite the fact that they drank extreme amounts of liquor. Even a lethal blood alcohol level to a

normal person might be undetectable in an extreme alcoholic, according to plaintiff's expert Dr. Spitz. (T. 510). Dr. Spitz agreed that alcoholics can "mask" the effects of drinking and that the more they drink, the less likely it is that they will show signs of drinking. Such alcohol tolerance is a physical fact among alcoholics. Knapp's statement that he appeared to be perfectly normal was completely consistent with plaintiff's expert's testimony.

The clerk at the Kmart store testified that he observed Knapp and smelled no odor of alcohol nor did he notice anything strange or irregular about his appearance. Knapp had just showered, changed clothes, and brushed his teeth at his mother's home. The clerk testified that Knapp had no difficulty asking for the firearm that he wanted and that, other than filling out the form in an illegible fashion, there was nothing at all out of the ordinary about the transaction, (T. 578-90, 594). In fact, the clerk testified that many people from the "poor to lower class" neighborhood around this Kmart location could not write well and needed assistance in filling things out. (T. 589, 595).

The police who arrested and questioned Knapp later that evening saw nothing out of the ordinary concerning Knapp's appearance. Knapp was being arrested for attempted murder, and the police officer testified that he would have definitely been alert to signs of intoxication and would have noted them in his report had there been any. This officer saw absolutely nothing out of the ordinary in Knapp's appearance. (T. 248). The police interviewed

the Kmart clerk the next day; there were no suggestions or reports of intoxication. Of the three eyewitnesses who testified in this case, not one gave the first hint that Knapp appeared to be intoxicated. Each said he appeared entirely normal. Kitchen herself gave no testimony on Knapp's appearance when he left the bar -- a carefully planned trial tactic.

Plaintiff's expert, Dr. Spitz gave his opinion that Knapp probably looked drunk when he bought the gun but did not look drunk when he was arrested, despite the fact that he continued drinking in the bar after buying the gun. Dr. Spitz testified extensively concerning Knapp's illegible handwriting on the ATF form. Knapp himself said that he had horribly messy handwriting and that it was illegible. (T. 301, 330, 876). According to Dr. Spitz, the illegible handwriting by itself proved absolutely nothing and it was only the handwriting plus the "history" (a fifth of liquor and a case of beer) which indicated that Knapp should have looked and acted intoxicated. (T. 471,521). Of course, Kmart was not aware of Knapp's history of drinking that day. Plaintiff's own expert conceded that the handwriting alone did not show visible intoxication.

There simply was no other evidence presented in this entire trial as to the physical appearance of Knapp. According to plaintiff's expert, extreme alcoholics such as Knapp could drink extreme amounts of alcohol and not give the slightest appearance of intoxication. Knapp would eliminate alcohol from his body twice as fast as a normal person. (T. 397-400). The jury would have been

guessing and speculating to conclude that Knapp actually appeared intoxicated in the face of the unimpeached direct eyewitness evidence.

Here there was simply no evidence that Kmart had a duty to Kitchen regarding the sale of the firearm to Knapp. Kmart had an internal store policy against selling firearms to visibly intoxicated individuals, but common law liability simply cannot be based upon the violation of that internal store policy. Peek v. Oshman's Sporting Goods, Inc., 768 S.W.2d 841 (Tex. Civ. App. 1989). The Buczkowski court specifically reached that conclusion in holding that it would be against public policy to impose liability based upon such a store policy.

Numerous other jurisdictions have held, similar to Florida courts, that in the absence of a statutory violation or conduct and behavior that would make it foreseeable that someone would be injured by the sale of a firearm, there can be no common law negligence claim. In Buczkowski v. McKay, 490 N.W.2d 330, 335 (Mich. 1992), the Michigan Supreme Court was "persuaded . . . by the rationale underlying the decisions of courts that have refused to hold firearms manufacturers and retailers liable for the criminal acts of their customers, absent violation of a state or federal firearms statute."

In Buczkowski a customer, McKay, engaged in a day-long drinking spree and then went to a Kmart store where he purchased shotgun shells and then intentionally shot at the plaintiff's car. McKay testified that he did not recall if he showed any signs of

intoxication but assumed he looked a mess after his day-long beer drinking activities. The trial court and the intermediate appellate court imposed liability on Kmart based on common law negligence on the theory that Kmart should have foreseen that the intoxicated customer would be a danger to the general public. The Michigan Supreme Court reversed holding that a retailer had no duty to protect a member of the general public from the criminal acts of a customer.

In Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (3d Cir. 1979), the court rejected a claim for statutory violations and common law negligence. Applying Delaware law, the court held that "[w]hen a legislature has enacted regulations which define the standard of care to be exercised in a particular situation, an individual's compliance with the statute normally absolves him of any need to take additional precautions absent any special circumstances or dangers." Id. at 531.

In Bennett v. Cincinnati Checker Cab Co., Inc., 353 F.Supp. 1206 (E.D. Ky. 1973), the court held a firearms dealer was entitled to summary judgment on a claim for violation of the Gun Control Act of 1968, and common law negligence that is was foreseeable that a criminal would have used the weapon. The court adopted the well reasoned rule concerning foreseeability of a subsequent criminal act set forth by Prosser and Keeton that an actor may reasonably proceed upon the assumption that others will obey the criminal law. Bennett, 353 F.Supp. at 1210.

In Robinson v. Howard Bros. of Jackson, Inc., 372 So.2d 1074

(Miss. 1979), the Mississippi supreme Court rejected a claim based on violation of the Federal Gun Control Act of 1968 and a Mississippi statute. The court held that a store was not liable for the death of a woman by its sale of a pistol. The court used the same rationale as Bennett, and held that there was no foreseeability, and the murder committed in that case was an independent intervening act which superseded the negligence of the defendants.

In Hulsman v. Hemmeter Development Corp., 65 Haw. 58, 647 P.2d 713, 719 (1982), the Supreme Court of Hawaii wrote that "a negligence action, whether based on a statutory violation or on common law requires the existence of a duty owed by the defendant to the plaintiff." In interpreting 18 U.S.C. § 922(d), the court stated that "[o]ur reading of the statute and legislative history does not reveal an intent to create civil liability for injuries sustained in firearms misuse." Id. at 720.

The court also rejected a common law negligence claim. "The concept of foreseeability is a limitation on the right to recover on an actionable claim." Id. The conduct of the purchaser of the rifle would not lead a reasonable seller, exercising ordinary care, to anticipate or foresee that the purchaser would misuse the rifle. The actions of the purchaser were not foreseeable. Furthermore, the proximate cause of the plaintiff's injury was not the seller's negligence, but the criminal act of the purchaser which broke any causal connection between the seller's alleged negligence and the injury sustained by the plaintiff.

In pulsebosch v. Ramsev, 435 S.W.2d 161 (Tex. Civ.App. 1968) the court held that summary judgment was properly granted and that the seller of a rifle was not liable to third parties for injuries sustained. The court stated:

> We have carefully considered the undisputed facts of this case in relation to the summary judgment granted by the trial court, and we are of the opinion that the appellee sellers of the rifle and ammunition are not liable to the third party appellants under the facts by reason of the independent negligent acts of the purchaser of the rifle. Neither are we unmindful of the serious nature of the injuries received by young Hulsebosch, nor the fact that he was injured through no fault of his own. But in an action by the injured third party against the seller of a rifle, when a parent had permitted the sale of the rifle to the sixteen-year old minor as a Christmas gift to his father, no liability for damages can arise on the part of the sellers in the absence of a statute creating such liability.
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> * * *
>
> Under these circumstances we cannot hold that the clearly negligent acts of young Taylor in aiming the rifle at plaintiff and pulling the trigger or some similar act ought to have been foreseen by appellees, or that appellees failed to exercise ordinary care in the sale of the rifle and ammunition.

Ramsev, 435 S.W.2d at 163; see Peek v. Oshman's Sporting Goods, Inc., 768 S.W.2d 841 (Tex. Civ. App. 1989) (no duty owed where defendant appeared nervous, uptight and in a hurry but not manifestly insane, irrational, mentally incompetent or impaired).

What becomes clear from these cases is that claims against retailers for a customer's criminal misuse of a firearm have been recognized **only** where the seller violated a state or federal

firearm statute. In those cases, courts reason that where a legislature identifies certain classes of persons as incompetent to possess weapons, it is foreseeable that such persons will commit crimes if allowed access to weapons in violation of the statute. The question of foreseeability is important in this case because there is less reason to anticipate premeditated, malicious and intentional acts, as opposed to acts that are merely negligent.'

In all of the Florida cases relied on by plaintiff it was undisputed that the vendors violated the Federal Gun Control Act, Kmart Enters. of Fla., Inc. v. Keller, 439 So.2d 283 (Fla. 3d DCA 1983)[7], and Coker v. Wal-Mart Stores, Inc., 642 So.2d 774 (Fla. 1st

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[6] The petitioner cites a number of cases from other jurisdictions that she believes establish a common law duty for a retailer not to sell a firearm to an intoxicated person. Every case cited by petitioner involved a corresponding statutory violation involving a manifestly insane, irrational, mental defective, incompetent or impaired person, except Cullum & Boren-McCain Mall v. Peacock, 592 S.W.2d 442 (Ark. 1980), where the customer stated to the clerk, that he wanted a weapon to "blow a big hole in a man." Cullem is essentially this state's version of Ansellv. F. Avanzini Lumber Co., 363 So.2d 571 (Fla. 3d DCA 1978), which has already been completely distinguished.

The only other authority cited by petitioner, Bernethy v. Walt Fa lor's Inc., 97 Wash.2d 929, 653 P.2d 285 (1982), is distinguishable. In that case, there was a statutory violation and unequivocal evidence that the criminal defendant was intoxicated. In that case, the court reasoned that when a legislature identifies certain classes of persons as incompetent to possess weapons, it is foreseeable that such persons will commit crimes if allowed access to weapons in violation of the statute. Beyond the class identified in the statute, there is no duty owed by the retailer to discover other potential incompetent persons or foresee the criminal acts of others, absent special circumstances.

[7] In Kmart Enters. of Fla., Inc. v. Keller, 439 So.2d 283 (Fla. 3d DCA 1983), get. for review denied, 450 So.2d 487 (Fla. 1984), a person bought a rifle from a Kmart store, The purchaser then lent the rifle to his brother who ultimately used it in a (continued...)

DCA 1994), review denied, 651 So.2d 1197 (Fla. 1985), 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). Kitchen, 662 So.2d at 978. The same result applies to petitioner's cited authority from other jurisdictions.

In Trespalacios v. Valor Corp., 486 So.2d 649 (Fla. 3d DCA 1986), a mad gunman killed eight people with a riot shotgun. Suit was brought against the seller, the distributor, and the

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[7] (. ..continued)
hostage/shooting incident. The Third District Court of Appeal wrote an extensive opinion analyzing liability for the sale of firearms under 18 U.S.C. § 922 (1976). An ATF form required an inquiry of the customer regarding felony charges and drug use. The Kmart employee did not ask that the form be filled out and instead simply checked "no" to these inquiries. The purchaser testified that he had a felony charge pending, was a drug user, and that he would have responded truthfully had he been asked those questions.

The Keller court held, and Kmart conceded, that failing to follow the federal act constituted nealisence per se in the sale of a firearm. The court then analyzed the question of whether Kmart was insulated from liability based upon the intervening and unforeseeable criminal act which occurred when the possessor of the gun took hostages and shot a police officer. The court held that the entire question of foreseeabilitv was answered by the federal statute in which Congress had "specified the type of harm for which a tort feasor is liable." The Keller court found that the particular type of harm was "within the risk" designed to be prevented by the federal act -- the misuse of a firearm by an irresponsible purchaser.

There is a vast difference between Keller and this case. The trial court in this case specifically found that there was no evidence of a violation of precisely the same federal act. Indeed, Knapp truthfully answered "no" to both questions concerning felony charges or drug usage on the ATF form. There is no question but that Keller would have been decided in Kmart's favor had there been no statutory violation. In the present case, Kmart complied with the public policy enunciated in the statute and, as a matter of law, Knapp's attempt to murder Kitchen was unforeseeable.

manufacturer on theories of negligence and strict liability. The court held that no duty had been breached by the distributor to support a cause of action for negligence. The court noted that the sale had not violated state law or the Federal Gun Control Act and that neither "the manufacturer nor distributor had a duty to prevent the sale of handguns to persons who are likely to cause harm to the public." Trespalacios, 486 So.2d at 651; see Riordan v. International Armament Corp., 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill, Dec. 765 (1985); Linton v. Smith & Wesson, 127 Ill.App.3d, 469 N.E.2d 339, 82 Ill. Dec. 805 (1984).

The Trespalacios court also distinguished its decision in Keller based upon the statutory violation of the Federal Gun Control Act which occurred in Keller. Again, in the absence of a statutory violation, the intervening criminal act in the form of an intentional murder by a madman did not entail liability against the seller of the firearm who complied with all applicable gun statutes.

The trend of the current case law on firearm sales liability against retailers is based upon statutory standards unless there are extreme factual situations entailing actual notice of specific risks to the retailer. Even in the presence of such special circumstances, the standards established by statute are the guiding principles.

B. The Legislature has not Created Criminal or Civil Liability for the Sale of a Weapon to an Intoxicated Person

The District Court relied on Bankston v. Brennan, 507 So.2d

1385 (Fla. 1987), in choosing not to expand the common law. Both the Florida Legislature and U.S. Congress have specifically regulated the field of firearms sales. Based on such statutes, the courts of this state have recognized a civil right of action arising out of a statutory violation. However, the Florida legislature has not proscribed the sale of a firearm to a person who is know to be intoxicated, as some states have. See, e.g. Miss.Code Ann. § 97-37-13 (1972).[8] In the absence of any statutory prohibition, the courts cannot create a cause of action. "The legislature is best equipped to resolve the competing considerations implicated by such a cause of action." Bankston, 507 So.2d 1387.

The petitioner's brief suggests that Bankston was misunderstood. Other than expressing disagreement and displeasure with Bankston, petitioner gives the case no real analysis. Bankston's similarities are in fact, quite striking. Bankston involved the furnishing of liquor to a minor by a social host, while the present case involved a gun purchased by an individual who did not appear to be intoxicated despite a substantial amount of alcohol. In both cases, it was determined that there was absolutely no statutory violation, and in both cases the plaintiffs

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[8] The petitioner erroneously relies on sections 790.151 - 790.157, Florida Statutes, which make it unlawful for a person to use a firearm while under the influence of alcohol. These statutes, as correctly noted by the Fourth District, were not enacted until 1991, several *years* after this incident. Kitchen 662 So.2d at 979. Still, however, the Florida lesislature has not prohibited the sale of a firearm to a person who is known to be intoxicated.

were left solely to existing common law remedies. Again, in both cases, the legislature had chosen to extensively regulate the conduct in question -- the sale of alcohol and the sale of firearms. These statutory standards became extremely important to both courts.

In Bankston this Court refused to accept a plaintiff's invitation to create a new cause of action notwithstanding the absence of any statutory violation. This is precisely what petitioner asked the District Court to do and the court refused to "extend the common law liability of a [firearm] vendor under the circumstances of this case". Kitchen now again asks this Court to extend the common law, but neglects the common law rule that an intervening criminal act breaks the chain of causation even if there was negligence in the initial act, which is certainly not admitted here.

We again point out that there was absolutely no statutory violation here. At the end of the plaintiff's evidence, Kmart moved for a directed verdict making specific argument on the statutory violation issue. The trial judge agreed and specifically asked plaintiff's counsel to detail and list the supposed evidence of a statutory violation. Plaintiff's counsel suggested only that alcohol should be considered a "drug" and that the ingestion of this substance had resulted in Knapp being of "unsound mind". The trial judge rejected both suggestions ruling this simply was not a statutory violation case, and the Fourth District Court of Appeal clearly ruled that this constituted a directed verdict on the issue

of statutory violations despite the fact that the trial judge chose not to actually instruct the jury that she had already foreclosed these issues. Just as in Bankston involving the sale of liquor, both the Florida Legislature and the U.S. Congress have specifically dealt with the sale of firearms. The Florida courts have consistently adopted both the federal and state statutes as the standard of care.

Again, Buczkowski is specifically applicable. The Michigan Supreme Court held that a retailer such as Kmart, had no duty to protect a member of the general public from the criminal acts of a customer. The court stated the issue as: "[w]hether a retailer in the supermarket setting should be liable for a clerk's failure to foresee a customer's criminal purpose." The Michigan Supreme Court was "persuaded . . . by the rationale underlying the decisions of courts that have refused to hold firearms manufacturers and retailers liable for the criminal acts of their customers, absent violation of a state or federal firearms statute." Buczkowski, 490 N.W.2d at 335. The Michigan Supreme Court concluded that its legislature had enacted many statutes concerning use and sale of firearms and that such matters were best resolved by the legislature.

This is precisely what this Court had ruled in Bankston and what the Michigan Supreme Court ruled in Buczkowski. Thus, it is no surprise that the Fourth District applied both cases. The principle that an intervening criminal act breaks the chain of causation is firmly established in Florida's common law and this

principle would have to be abrogated in order to create or extend common law liability herein. Again, we note that the plaintiff tried this case primarily on the theory that Kmart had violated several statutes. This was the plaintiff's main theme in opening statements, and presentation of evidence. Indeed, plaintiff was even allowed to argue statutory violations to the jury in closing argument despite the fact that the trial court had already ruled that there had been no statutory violations. This was the theme of the plaintiff's entire case throughout the trial.

The Bankston decision was correctly applied -- a new common law remedy would have been error. The District Court listed all of the cases relied upon by Kitchen and distinguished each based on a purchaser's "erratic behavior" (threats to shoot the clerk) or violations of the Federal Gun Control Act, the Florida Statutes or a local ordinance. Obviously, there were no such conditions in this case.

This Court's analysis in Horne v. Vic Potamkin Chevrolet, Inc., 533 So.2d 261 (Fla. 1988), which followed Bankston is also directly applicable to this case, and responsive to petitioner's argument, Horne rejected application of Restatement (Second) of Torts § 390, pertaining to liability of a seller of a chattel, to impose liability on the seller of an automobile who knows that the purchaser is incompetent and intends to operate the vehicle. Imposing a duty on a retailer to protect members of the general public from the criminal misuse of the products it sells also implicates the economic repercussions of protecting bystanders from

"defective" customers. See Horne, 533 So.2d at 562. The creation of such a duty effectively requires independent investigation to establish each buyer's fitness to use each product, leaving negligent commercial transactions open to unlimited expansion tantamount to imposing a fiduciary duty on the retailer for the benefit of unknown third parties. See Bell v. Smitty's Super Value. Inc., 183 Ariz. 66, 900 P.2d 15 (1995) (requiring ammunition retailer to protect others from defendant's illegal behavior would require retailer to take a precaution that is clearly unreasonable); see also Note, The negligent commercial transaction tort: Imposing common law liability on merchants for sales and leases to "defective customers", 1988 Duke L.J. 755, 781-782; 18 U.S.C. §922(b)(1). "Such a rule would be inconsistent with the proposition that '[a] basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships."' Horne, 533 So.2d at 262, quoting Muller v. Stromberg Carlson Corp., 427 So.2d 266, 270 (Fla. 2d DCA 1983).

C. As a Matter of Law, Knapp's Intervening Criminal Act Broke the Chain of Causation

Since there was no statutory violation in the sale of the rifle to Knapp, the proximate cause chain had been broken by the subsequent criminal act of the customer, and liability against Kmart could not be imposed as a matter of law. The element of proximate cause can be determined as a matter of law. See Ruiz v. Westbrooke Lake Homes, Inc., 559 So.2d 1172 (Fla. 3d DCA 1990). Nothing that Kmart did can logically be said to have caused this

Plaintiff's injuries.

"Generally, proximate cause means that the wrong of the defendant caused the damage claimed by the plaintiff." McDonald v. Florida Dep't of Trans., 655 So.2d 1164, 1168 (Fla. 4th DCA 1995). A defendant's negligence is not a proximate cause of a plaintiff's injury unless the defendant's actions cause harm that is a natural and probable consequence of those actions and, in cases in which an intervening action contributes to the harm, unless the intervening action is reasonably foreseeable. The proximate cause of an injury has been defined as that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred. Jones v. Utica Mut. Ins. Co., 463 So.2d 1153 (Fla. 1985).

The Restatement (Second) of Torts § 448 summarizes the legal effect of intervening or superseding criminal acts in this way:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

In Florida, it is well established that independent criminal acts may intervene to supersede and break the chain of causation between the defendant's acts and injury to another. See Angell v. F. Avanzini Lumber Co., supra; Walker v. National Gun Traders, Inc., 116 So.2d 792 (Fla. 3d DCA 1960); Heist v. Lock and Gunsmith,

Inc., 417 So.2d 1041 (Fla. 1st DCA 1982), pet. for review denied, 427 So.2d 736 (Fla. 1983); Goodel v. Nemeth, 501 So.2d 36 (Fla. 2d DCA 1986); Everett v. Carter, 490 So.2d 193 (Fla. 2d DCA), rev. denied, 501 So.2d 1281 (Fla. 1986) (subsequent murder committed by gun purchaser was an independent and intervening causes which broke the chain of causation between illegal delivery of the handgun by violation of federal statute and the death. The court reasoned that it was not unlawful for a 19-year-old to possess the weapon and that only the initial delivery had been prohibited); see also Hulsman v. Hemmeter Develop. Corp., 65 Haw. 58, 647 P.2d 713 (1982) (no common law negligence action for the sale of a rifle where it was held that the criminal act of the purchaser broke any causal connection between alleged negligence in the sale and the injuries to plaintiff); Robinson v. Howard Rros. of Jackson, Inc., 372 So.2d 1074 (Miss. 1979) (customer's conduct in purchasing a firearm was not sufficient to enable a reasonable seller to foresee criminal misuse of the weapon and the criminal act of murder was an independent intervening cause insulating the defendant from negligence); Phillips v. Kmart Corn., 588 So.2d 142 (La. App. 1991) (retailer was not liable under 18 U.S.C. § 922 for sale of ammunition to a mentally incompetent minor where there was no violation of state law and store clerk testified that he observed the customer during the transaction and saw nothing to suggest mental instability).

Here, the intentional acts of Knapp buying a gun, driving back to the bar, ramming Kitchen with his truck and firing the gun at

her, constituted intervening and superseding causes which cut off any causal relationship with Xmart. The dealer who sold Knapp his truck is also not liable for the use of the truck as a weapon in the attempted murder.

Florida should not adopt a theory which in essence would hold that whenever someone is injured there must be someone also answerable in damages.[9] From the retailer's perspective, it is simply not foreseeable that a purchaser of a firearm will engage in a criminal act and criminally misuse the product. The question in this case is whether Xmart acted unreasonably in selling a firearm to Knapp on these facts. The resounding answer is no. Even if the

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[9] The words of the Seventh Circuit Court of Appeals are apt. "One is reminded, if the contention of the [petitioner was] carried to its logical conclusion, of a figmental, perhaps allegorical, nation called Litigatia described in the article by Paul B. Horton, How Lawsuits Brought the World's Greatest Nation to Ruin, Medical Economics, February 21, 1977, 142:

> Throughout the economy, new ventures disappeared. New factories were not built, since no locations could be found where it was legally possible to build them. In 1998, the U.S. Supreme Court promulgated the "omnia culpa@@ doctrine (Lipshitz v. General Motor Corp.), which in plain language meant that whenever a person suffered injury through use of a product, all persons or corporations who had any contact with the product, from raw material to delivery van, were equally liable to damage claims. It soon became very difficult to get anyone to make or sell anything, and most people went back to the ancient art of making things for themselves.

Id. at 149 (emphasis in the original). Hopefully, the dire though expressed is not prophetic for our jurisprudence." Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984) (criminal misuse of handgun is not a foreseeable consequence of gun manufacturing).

certified question were answered in the affirmative, the case must be determined in Kmart's favor.

II. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT A DIRECTED VERDICT HAD BEEN ENTERED BY THE LOWER COURT.

The petitioner's 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. Although the lower court did not formally grant a directed verdict on statutory violations for Kmart, the District Court concluded that "the trial court directed the verdict for K-Mart on the statutory claims (which [was not] cross-appealed). . . ." Kitchen, 662 So.2d at 978. Petitioner's preservation argument is based on an issue that petitioner should have cross-appealed, but did not. Hence, preservation is petitioner's problem, not respondent's.

Petitioner makes three arguments contending that Kmart "waived" entitlement to judgment: First, that Kmart admitted it had a duty to this plaintiff; second Kmart's directed verdict motions at trial did not address judgment in its favor; and third, that Kmart did not file a post-verdict motion for judgment in accordance with a directed verdict. The record completely and thoroughly contradicts and refutes petitioner's argument.

As previously demonstrated by Kmart, it did not admit it owed a common law duty to this plaintiff on these facts. Kmart's answer admitted that it owed a duty to exercise reasonable care under the circumstances in order to prevent foreseeable risk of injuries to third parties. Kmart specifically denied that it owed any duty to

this plaintiff on these facts (R. 60-61). Issue preserved.

Second, the trial transcript elucidates Kmart's lengthy argument in support of a directed verdict on the lack of evidence of statutory violation and that Kmart should not foresee a customer's criminal purpose, i.e. no duty. (R. 823-834). The trial judge correctly ruled that there had been no evidence of any statutory violation under either section 790.17, Florida Statutes, or the Federal Gun Control Act, 18 U.S.C. §922, as alleged by Kitchen. At the end of plaintiff's evidence, Kmart moved for a directed verdict because no evidence whatsoever of any statutory violation had been offered. The trial court agreed and asked plaintiff's counsel to detail the supposed evidence of a statutory violation. The plaintiff's counsel suggested only that alcohol should be considered a "drug" and that drinking had resulted in Knapp being of "unsound mind." The court correctly rejected both suggestions, but would not instruct the jury to ignore the existence of or possible application of any statute. (T. 836-38).

The trial court did not formally grant Kmart's motion for the sole and singular reason that the plaintiff's complaint had listed the statutory violations within the same count for common law negligence rather than in a separate count. (T. 836-37). For this reason alone, the trial court refrained from instructing the jury that plaintiff had put on no evidence of a statutory violation.

Kmart also argued that it had no common law duty to this plaintiff, and even cited the trial court to this Court's decision in Horne. Again, the issue was well preserved.

Third, Kmart did not need to file a post-trial motion for judgment in accordance with prior motion for directed verdict, 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.

Despite repeated attempts by Kmart during trial, the trial **court** made it abundantly clear that it was not going to instruct the jury that plaintiff failed to put on any evidence of a statutory violation, The trial judge concluded that plaintiff did not have separate claims for statutory violations and common law negligence. The plaintiff had only one theory -- common law negligence.

A post-trial motion to have a verdict entered in **Kmart's** favor would have been a clear exercise in futility. Simply put, the trial court, at plaintiff's urging, was not going to enter judgment in **Kmart's** favor on any issue. When the trial court determined that statutory violations were not separate from common law negligence, yet plaintiff had put on no evidence of statutory violations, this left a single issue; as a matter of law, did Kmart owe a common law duty to this plaintiff.

The District Court correctly determined that judgment should be entered for Kmart on the common law claim. With only a **one-**issue complaint, and a subsequent determination of no duty as a matter of law, the only result can be judgment for Kmart. The District Court's decision did not leave any issue or claim to be tried. When an appellate court determines that a defendant has no

legal duty to a plaintiff, and there are no other causes of action, the only results from the appellate court can be directions for the trial court to enter judgment for the defendant.

Finally, petitioner contends that federal case law suggests that a post verdict motion must be made. The rationale supporting that proposition is not well taken. Fla.R.Civ.P. 1.480(b) provides for a motion for directed verdict as a matter of law which may be made any time before submission of the case to the jury. The motion enables the trial court to determine whether there is any question of fact to be submitted to the jury and whether any finding other than the one request would be erroneous as a matter of law. It is conceived as a device to save the time and trouble involved in a lengthy jury determination.

Rule 1.480(b) allows the court to reserve the decision of this question of law until after the case has been submitted to the jury and the jurors have reached a verdict or are unable to agree. If the court decides that the initial motion for directed verdict as a matter of law should have been granted, it may set aside the verdict of the jury to enter judgment as a matter of law. The rule gives the trial court a last chance to order the judgment that the law requires.

While a bare majority of the Supreme Court held, in 1952, that an appellate court could not order judgment for a defendant when the defendant had not moved for verdict for judgment in its favor under Fed.R.Civ.P. 50(b), Johnson v. New York, New Haven & Hartford R.R. Co., 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952), that

decision has been soundly criticized by lower appellate courts, and is meaningless where the only result on appeal can be a judgment for the defendant. See cases and commentary collected in Wright & Miller, Federal Practice and Procedure: Civil 2d § 2537 nn. 30-31. There is no reason for this court to adopt such a rule that clearly promotes form over substance.

The directed verdict issue was a clear feature of trial, and under the District Court's decision, the only result for this case. The issue was not waived in the underlying proceedings.

III. THE FOURTH DISTRICT CORRECTLY DETERMINED THAT KMART WAS ENTITLED TO A NEW TRIAL BASED ON THE TRIAL COURT'S ERROR IN INSTRUCTING THE JURY THAT A VIOLATION OF KMART'S INTERNAL POLICY WAS EVIDENCE OF NEGLIGENCE.

Contrary to petitioner's misguided perception, neither the Third or Fourth District Courts of Appeal, nor Professor Wigmore, misunderstand the effect or impact of equating a violation of an internal rule with the standard of care. The established, and well reasoned authority, stands correct in holding that petitioner is not entitled to the instruction sought.

The evidence at trial showed that Kmart had an internal policy that it would not sell a firearm to a visibly intoxicated person, and over Kmart's objection, the trial judge instructed the jury that "[v]iolation by a K-mart employee of a K-mart internal policy or procedure is evidence of negligence. . . ." (T. 1215). As clearly recognized by both the majority and dissenting opinions of the Fourth District, the instruction was improper. The dissent even castigated petitioner's trial counsel: "It is unfortunate

that the discussion in Steinberg v. Lomenick, 531 So.2d 199 (Fla. 3d DCA 1988), 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." Kitchen, 662 So.2d at 980 (Glickstein, J. dissenting). The trial court committed reversible error by giving this instruction because the trial court impermissibly elevated a purported internal rule to a standard of care.

A. Internal Rules do not Establish the Standard of Care.

There is no Florida case that stands for the proposition that a plaintiff is entitled to an evidence of negligence instruction where the defendant violated its own rule of conduct. "Rules made by a defendant to govern the conduct of employees are relevant evidence of the standard of care." Metropolitan Dade County v. Zapata, 601 So.2d 239, 244 (Fla. 3d DCA 1992). A party's internal policies and procedures are admissible as some evidence of the appropriate standard of care. Marks v. Mandel, 477 So.2d 1036 (Fla. 3d DCA 1985). However, the policies or rules are not the standard of care, and a plaintiff is not entitled to a jury instruction that a defendant's violation of its internal rule is evidence of negligence.

In Steinberg v. Lomenick, 531 So.2d 199 (Fla. 3d DCA 1988), rev. denied, 395 So.2d 476 (Fla. 1989), the court held that it would be improper to instruct a jury that a violation of such a rule is evidence of negligence. A plaintiff is not entitled to a jury instruction that a violation of the defendant's internal rule

is evidence of negligence tantamount to a violation of the standard of care.

In Steinberg, a school, and its insurer, were sued by the parents of a minor child when the child fell while climbing on a tree. In its case-in-chief, the plaintiff introduced the school's own "rules for staff", which set forth procedures for staff supervision of children. At the charge conference, the plaintiff requested that if the jury found that the defendant violated any of its rules of staff such would be evidence, but not conclusive evidence of negligence. The plaintiff relied on Fla. Std. Jury Instr. (Civ.) 4.11. The trial court refused to give the instruction.

On appeal, the Third District Court of Appeal affirmed the decision of the lower court, and concluded that it would have been erroneous to instruct the jury as the plaintiff had requested. "No case cited by the respondents [plaintiffs] even remotely stands for the proposition that a plaintiff is entitled to an evidence-of-negligence instruction where the defendant violates its own ruleg of conduct." Steinberg, 531 So.2d at 200 (emphasis in original). The court noted that while a party's internal policies and procedures are admissible as some evidence of the appropriate standard of care, it is erroneous to elevate such facts to a standard of conduct in substantive law. Id.; See Miami Free Zone Corp. v. Electronics Trade Ctr., 586 So.2d 1279 (Fla. 3d DCA 1991); Argas v. Allstate Ins, Co., 541 So.2d 739 n. 1 (Fla. 3d DCA 1989) (operator's manual does not fix standard of care); Doctors Memorial

Hosp., Inc. v. Rvans, 543 So.2d 809 (Fla. 1st DCA 1989); Nesbitt v. Community Health of S. Dade, Inc., 467 So.2d 711, 715 (Fla. 3d DCA 1985); 2 J. Wigmore, Evidence § 461 at 593 ("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."),

In Buczkowski v. McKay, 441Mich. 96, 490 N.W.2d 330, 332 n. 1 (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.

See also Steinberg, 531 So.2d at 201 (Baskin, J. concurring).

As recognized by the Fourth District, "[r]ather 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.'" Kitchen, 662 So.2d at 979, quoting Steinberg, 531 So.2d at 200; Roberson v. Duval County School Board, 618 So.2d 360 (Fla. 1st DCA 1993); Nesbitt v. Community Health of S. Dade, Inc., 467 So.2d 711, 715 (Fla. 3d DCA 1985).

The instruction given by the trial court over the defendant's objection was patterned after Fla. Std. Jury Instr. (Civ.) 4.11, which provides that a "[v]iolation 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." While the instruction states that the violation is not conclusive evidence of negligence, it was not designed or drafted for internal rules, as established under the Steinberg decision. Standard instruction 4.11 specifically mentions statutes and ordinances, The Third District and Fourth District, and of course Professor Wigmore, have gone to great lengths to state the obvious -- an ordinance or statute is not the same as an internal rule. The instruction given in this case is flawed because it elevates an internal rule or policy to the legal standard of care.

Use of the instruction was also erroneous because it equates violation of an internal rule with violation of an ordinance or statute. However, the two are not the same and cannot be given equal weight. The instruction used in this case erroneously elevated the alleged violation of Kmart's internal policy to a violation of a statute or ordinance, There is a world of difference.

In this Court, the petitioner argues that its jury instruction was rather harmless, and that this Court should embark on a new era equating violation of an internal rule as the standard of a care. The petitioner maintains that internal rules and guidelines should be lumped into the same category of negligence evidence as traffic

regulation type statutes and industry standards. The petitioner writes off as semantic, the difference between an instruction containing the phrase "not conclusive evidence of negligence" and one containing the phrase "does not the fix or establish the standard of care." Again, there is a world of difference.

The flaw in petitioner's argument is an attempt to change the standard by which negligent conduct is measured. Those who are negligent are measured by a reasonable man standard which is a matter of substantive law. Evidence of internal policy and rule, or for that matter conduct, is not necessarily the same as the reasonable man standard, What 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." Texas & Pac. Ry. Co, v. Behvmer, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903).

By allowing an internal policy or rule to be admitted with the simple instruction that it is evidence of negligence but not conclusive evidence of negligence will no doubt leave the jury wondering what standard of conduct, or care, should govern. Without the express instruction that the internal rule or policy does not fix or establish the standard of care, or conduct, the jury can mistakenly apply a higher standard than the reasonable man standard. Given the emphasis placed on the violation of an internal policy by a good plaintiff's lawyer, the court must take the necessary precaution of telling the jury that such a violation does not establish the standard of conduct or care by which the

jury must measure the defendant's conduct. Anything less than Professor Wigmore's rule, as articulated in Steinberg and Kitchen, changes the substantive law by which the defendant's conduct is measured.

The petitioner's citation to cases discussing traffic regulation type statues and industry standards are ultimately irrelevant to this discussion. As a first, and obvious point, neither category is involved in this case. Instead, the jury was asked to consider only an internal rule. As a second point, the traffic regulation type statutes and industry standards are set by someone or body other than the alleged negligent defendant. A determination of policy by a legislative body or industry group is vastly different than a voluntarily set individual goal or rule.

There are obvious differences between a self made or individual policy, and one which has the benefit of some form of legislation or industry knowledge. The petitioner's suggestion that this Court simply fill in the blank, and elevate an internal rule to admissible but not conclusive evidence of negligence, is completely contradictory to the substantive standard by which a defendant's negligent conduct is measured -- the reasonable man standard.

There was nothing "harmless" about the trial court's jury instruction, as clearly noted by both the majority and dissenting opinion of the Fourth District. This non-standard jury instruction was crafted by the trial judge on her own initiative. The Fourth District, which routinely reviews jury instructions, determined

that the jury instruction was erroneous. The First, Third and Fourth District Courts of Appeal have correctly analyzed the issue of admissibility of internal rules, and held that a limiting instruction advising the jury that a violation of the internal rule does not establish the standard of care.

B. If a New Trial is Awarded it Must be on All Issues

In the event this court determines that judgment should not be entered in Kmart's favor, a new trial on all issues is manifest. The petitioner's suggestion that liability is the only issue contradicts the record on appeal and petitioner's counsel's conduct at trial. Furthermore, the District Court's decision is not limited to liability.

Plaintiff had a 1976 conviction for armed robbery, and a 1984-85 conviction for disorderly conduct and drunkenness. (T. 126-28). Kmart sought to present testimony from various witnesses, including the plaintiff, Knapp, and health care providers, concerning this history.

This testimony is obviously relevant to plaintiff's life expectancy, loss of enjoyment of life, future earning capacity and medical treatment, and since plaintiff had been drinking with Knapp, beginning early in the morning on the day of the incident, was relevant to Knapp's state of mind. The jury was entitled to hear all the circumstances surrounding the shooting to make an adequate determination as to whether Knapp acted negligently or intentionally.

Plaintiff's history of drug and alcohol abuse and drinking on

the day of the incident is directly relevant to the issue of damages, because a jury should consider a plaintiff's characteristics and habits, including sobriety or intemperance, which may be of assistance with regard to estimating her life expectancy, Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); Atlantic Coast Line R.R. Co. v. Ganey, 125 So.2d 576 (Fla. 3d DCA 1960); Fla. Std. Jury Instr. (Civ.) 6.9a, issues affecting life expectancy. Issues of plaintiff's health and physical condition, both before and after the injury, the issue of her loss of capacity for enjoyment of life in the past and the future, plaintiff's claims for pain and suffering damages, the extent of complications that were presented in plaintiff's recovery as a result of plaintiff having suddenly stopped drinking are all highly relevant. Furthermore, Kmart's defense of this claim, because Kmart denied liability for the sale of the rifle to Knapp, was pretermitted by the lower court's ruling, and Kmart was denied the right to fully establish the defense of intervening cause by the exclusion of this testimony.

The record makes it clear that a new trial, if one is awarded, should be on all the hotly contested issues.

CONCLUSION

Based upon the foregoing rationale and authorities, the respondent, Kmart Corporation, respectfully requests this Honorable Court to answer the certified question in the negative and that the District Court's opinion be affirmed in all respects. If a new trial is required, it should be on all issues.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of March, 1996 to: RICHARD A. KUPFER, ESQ., Richard A. Kupfer, P.A., The Forum, Tower C, Suite 810, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401, counsel for Plaintiff/Petitioner; JOHN BERANEK, ESQ., MacFarlane, Ausley, Ferguson & McMullen, 227 S.Calhoun Street, Tallahassee, FL 32302, counsel for Defendant/Respondent; EDWARD M. RICCI, ESQ., Ricci, Hubbard & Leopold, P.A., 1645 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401, counsel for Plaintiff/Petitioner; GREGORY STINE, ESQ., Portner & Stine, P.C., 165 N. Woodward Avenue, Birmingham, Michigan 48009, counsel for Plaintiff/Petitioner; ROBERT GARVEY, ESQ., Thomas, Garvey, Garvey & Sciotti, 24825 Greater Mack, St. Clair Shore, Michigan 48080, counsel for Plaintiff/Petitioner; RAYMOND EHRLICH, ESQ., Holland & Knight, 50 North Laura street, Suite 3900, Jacksonville, Florida 32202, counsel for Plaintiff/Petitioner; JOEL D. EATON, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 W. Flagler Street, Suite 800, Miami, FL 33130, counsel for Plaintiff/Petitioner; ARTHUR JOEL BERGER, ESQ., Suite 506, 9200 South Dadeland Boulevard, Miami, Florida, 33156, counsel for Amicus Center to Prevent etc.; MARE POLSTON, Center to Prevent Handgun Violence, 1225 Eye Street, N.W. Suite 1100, Washington, D.C. 20005, Counsel for Amicus; JACK WILLIAM SHAW, ESQ., Brown Obringer Shaw Beard & Decancio, 12 East Bay Street, Jacksonville, Florida 32202, Counsel for Amicus.

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