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IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,916

Florida Bar No. 184170

WAL-MART STORES, INC.,
a foreign corporation,

Petitioner,

vs.

SANDRA COKER, as personal representative of THE ESTATE OF BILLY WAYNE COKER,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

WAL-MART STORES, INC.,
a foreign corporation

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(305) 940-7557 - Dade

and

Jeffrey P. Gill, Esquire
BRIDGES, GILL & HOLMAN
Pensacola, FL

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LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 · TEL. (305) 940 7557

TABLE OF CITATIONS

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
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LAW OFFICES RICHARD A. SHERMAN, P. A..
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5865
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SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

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REFERENCES

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

POINTS ON APPEAL

I, THE DISTRICT COURT ERRED IN REMOVING THE INTENTIONAL TORTFEASORS FROM THE VERDICT FORM TO HOLD THE NEGLIGENT TORTFEASOR STORE 100% VICARIOUSLY LIABLE FOR THE MURDERER'S ACTS AND THE DECISION BELOW MUST BE QUASHED UNDER § 768.81, FABRE, AND STELLAS AND A NEW TRIAL ORDERED.

II. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL; WHERE THE VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; AND THERE IS CASE LAW CLEARLY AUTHORIZING A NEW TRIAL.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL OR REMITTITUR WHERE THE JURY'S EXCESSIVE VERDICT WAS OBVIOUSLY AND SUBSTANTIALLY AFFECTED BY PASSION, SYMPATHY OR PREJUDICE REQUIRING THE GRANTING OF A NEW TRIAL.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT OR J.N.O.V.; WHERE THE NEGLIGENT SALE OF AMMUNITION TO A MINOR COULD NOT BE A LEGAL CAUSE OF DEATH AS THE CRIMINAL ACT OF BONIFAY WAS AN UNFORESEEABLE, SUPERSEDING, INTERVENING CRIMINAL ACTION AND THE VERDICT MUST BE REVERSED AND ENTERED FOR WAL-MART,

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940• 7557

INTRODUCTION

The Appellant, Wal-Mart Stores, Inc., a foreign corporation will be referred to as "Wal-Mart" or "Defendant."

The Appellee, Sandra Coker, as personal representative of the Estate of Billy Wayne Coker will be referred to as "Plaintiff" or "Coker."

The Record on appeal will be designated by the letter "R."

The Trial Transcript supplemented to the record on appeal will be designated by the letter "T."

The Hearing Transcript on post trial motions supplemented to the Record will be designated by the letter "H."

All emphasis in the Brief is that of the writer unless otherwise indicated.

LAW OFFICES RICHARD A, SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940- 7557

STATEMENT OF THE FACTS AND CASE

A. Overview

A disgruntled employee, Archer, hired his teenage cousin, Bonifay, to execute a revenge killing against the man who had him fired from his job (T 91; 129; 213). Bonifay wanted to kill somebody so he agreed and enlisted the help of two other teenagers, Fordham and Barth (T 91; 129-130; 210-214). After planning the crime on Thursday, the trio went to the auto parts store, where Archer had worked, but the robbery/murder attempt was thwarted when Wells, the intended victim, heard Bonifay cock the gun, so Bonifay took off (T 131-133; 196-199). The next night Bonifay decided to buy more ammunition and Fordham, who was 18, told him he was old enough to buy it; so they first went to K-Mart which was out of the .32 ammunition Bonifay wanted (T 90-92; 125-127).

Around 8:30 p.m. Bonifay and Fordham went to Wal-Mart, where they purchased the .32 ammunition and then went to pick up the third teenager, Barth (T 127-129). Barth and Bonifay robbed the auto parts store, Bonifay shot and killed Coker, an employee filling in for Wells, with Fordham being the get-away driver (T 129-130; 221-223; 216). Barth and Bonifay came running out of the store giggling and laughing, with Fordham observing "who said crime doesn't pay" (T 130; 211).

Mrs. Coker sued Wal-Mart for selling the ammunition to 18-year old Fordham and incredibly the jury not only found Wal-Mart liable, but also found Wal-Mart more guilty than

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 TEL. (954) 525 - 5685
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 TEL. (305) 940-7557

premeditated murderer, Bonifay (T 723). The trial judge found that no reasonable jury could find Wal-Mart more liable than Bonifay, who shot Coker four times, but believed that there was no case law allowing her to order a new trial just based on percentages of liability (H 5-6). Wal-Mart appealed as the jury verdict was contrary to the manifest weight of the evidence; where Plaintiff's counsel even told the jury that more liability had to be assessed against Bonifay, the murderer, than Wal-Mart and the jury totally ignored the Plaintiff and the evidence, which is a valid legal basis for reversal of a verdict and the granting of a new trial.

The First District followed its own precedent in McDonald, infra, and took the intentional tortfeasors off the verdict form, in a 2-1 opinion and held that Wal-Mart had to pay all the damages even though it was only 35% liable. Wal-Mart Stores, Inc. v. Coker, 22 Fla. L. Weekly D1561 (Fla. 1st DCA June 23, 1997)(Coker II)(A1-2). The court certified the same two negligent security questions to this Court, that it did in McDonald and noted direct conflict with the Third District in Stellas, infra; Coker II, D1561.

B. Specific Facts

Robin Archer and Daniel Wells worked at a Trout Auto Parts store. Archer, who apparently was dealing drugs, was fired in early 1990, based on Wells' suggestion (T 102; 104; 193-195). The disgruntled Archer then arranged for or ordered the murder of Wells, during a robbery of the Trout store (T 91; 102; 213).

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

Archer hired his cousin, Patrick Bonifay, a 17-year old, to kill Wells and he used Bonifay because Bonifay wanted to kill somebody (T 129-130; 539-540). Bonifay then enlisted the help of two other teenagers, Edward Fordham and Cliff Barth (T 214-215). On Thursday, January 24, 1990, Bonifay called Barth to discuss the robbery of the auto parts store and Bonifay obtained a gun from his cousin Archer, who apparently got the gun from another teenager, David Bland (T 95; 205-206; 208-209). The gun had one bullet in it and Bonifay and Barth decided to execute the crime on Friday, January 25, 1990 (T 215). They tried to talk George Wynn into driving the getaway vehicle and when he refused they got Eddie Fordham to drive instead (T 215). Fordham decided to use his father's truck, as his Mustang was very recognizable and Fordham said he chose the truck over the Mustang, because the truck was more reliable (T 146). Fordham gave Bonifay a ski mask (T 145). That Friday night Bonifay told at least Barth and perhaps Fordham that he was going to shoot the clerk (Wells) at the Trout Auto Parts store (T 147; 210; 213).

The trio drove to the Trout Auto Parts store that Friday evening and Bonifay got out of the Fordham vehicle and walked up to the customer service window at the shop (T 131-132; 196-197). It was five minutes before midnight and Wells, the intended victim, was closing out the store (T 196-197). Wells was concerned because it was so late; he wanted to go home; and he was a little spooked, because he had been at the store when it had been robbed with someone using a sawed-off shotgun (T 196-

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANWREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 • 7557

198). Wells just pretended to look up the parts Bonifay had been told to ask for, saying that he did not have the parts, that they were in a different store and that he would check on them in the morning (T 198). Bonifay said that was alright and that he would be back in a minute; and then Wells heard what he believed was a gun being cocked, which scared him even more (T 198). Wells was standing to the side of the window, which he knew he could shut if something was going to happen, so he turned completely to look at Bonifay and Bonifay just walked off telling Fordham and Barth that he could not go through with the crime because Wells had heard him cock the gun (T 197-198; 210).

On Saturday, January 26, 1990, Wells was out sick with the flu and Wayne Coker agreed to cover his shift at that auto parts store (T 190-191; 196). Fordham drove over and picked up Bonifay and on the way over to Barth's house, Bonifay asked Fordham, as they passed a K-Mart, if he was old enough to buy ammunition and since he was 18, Fordham believed he was (T 125; 128). Fordham had gone with his father on prior occasions to buy ammunition for the guns they kept at home (T 151-152). Bonifay told the K-Mart clerk that he needed .32 ammunition and the clerk told him that he was out of it, but that it would cost around $14; but Bonifay did not have enough money (T 126). The two left K-Mart and drove over to Barth's house to get money from Barth and to pick him up, but Barth was not ready to go, and apparently gave Bonifay money for the ammunition (T 126-127). Bonifay told Barth they would be back to get him and then Fordham and Bonifay drove over to the

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5865
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 'TEL. (305) 940-7557

Wal-Mart around 8:30 p.m. that evening to buy some more ammunition (T 127; 162). Bonifay told the clerk he needed .32 ammunition. Bonifay handed the cash to Fordham and Fordham handed the cash to the clerk who rang it up, put the box of bullets in the bag and gave it to Bonifay (T 127; 162). According to Fordham, the clerk at Wal-Mart never asked for any type of identification and Wal-Mart was the only place they could have purchased the bullets that late at night (T 131).

Fordham and Bonifay eventually drove back to Barth's house, Bonifay loaded the gun in Fordham's truck and the bullets spilled out; the trio took off for the Trout Auto Parts store, approximately at 11:30 p.m. that evening (T 129; 216). Bonifay told Fordham to park the truck on the side of the store and sit there and wait until he and Barth got back (T 129-130). Bonifay and Barth climbed through the parts window of the auto store and Bonifay shot Coker four times, while Coker was pleading and begging for the boys not to kill him, telling them about his wife and children (T 85; 216). Bonifay and Coker then went through the cash drawers, cleaned out the wall safe and then left the store (T 85-86). Bonifay and Barth jumped back into Fordham's truck, about four minutes after they left, laughing and giggling, telling Fordham to drive off, as they pulled out a lot of money and started counting it (T 130; 211). Fordham made some comment along the line of "who said crime doesn't pay" and the three split the money, each receiving between $600 and 700 dollars (T 211; 217). Bonifay and Archer were convicted of premeditated

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940• 7557

first-degree murder and grand theft and sentenced to death and Fordham and Barth were sentenced to life in prison (T 124; 208; 542).

When Mrs. Coker, on behalf of the estate and beneficiaries, sued Wal-Mart, for negligence in violating a Federal law prohibiting the sale of pistol ammunition to anyone, a licensed dealer "knows or has reasonable cause to believe is less than 21-years of age" (R 1-4; 23-27; 85-90). Wal-Mart moved to dismiss the Complaint on the basis that Coker failed to state a cause of action for negligence, because as a matter of law, the intervening criminal act of premeditated murder was unforeseeable and the Motion to Dismiss was granted (R 73). The Plaintiff appealed and the court reversed on the basis that the intervening criminal act was foreseeable, in light of the reasons for the Congressional enactment of the Federal Gun Control Act; therefore the seller was not insulated from liability, adopting several out-of-state cases and rejecting other out-of-state cases which had held the opposite, Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774 (Fla. 1st DCA 1994), review denied, 651 So. 2d 1197 (Fla. 1995)(Coker I). Since the issue of proximate cause was one to be resolved by the trier of fact, the court was unwilling to hold that, as a matter of law, a violation of the Federal statute could not be found to be the proximate cause of an injury or death, caused by the purchaser's intentional or criminal act. Coker I, 778. Therefore, the case went to trial. At the close of the Plaintiff's case, Wal-Mart moved for directed verdict on

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

liability, again raising proximate causation etc.; and for a directed verdict on economic damages, as Wayne Coker had no money left to distribute to his beneficiaries; and all the Motions were denied (T 496-500).

In closing, the Plaintiff's attorney told the jury that Wal-Mart was negligent in violating the Federal law, by selling the pistol ammunition to Bonifay, who was only 18 and not 21; and that the issue on causation was that Coker would have been alive had Wal-Mart not made this sale (T 619-629). The Plaintiff told the jury: "Bonifay, the man executed somebody. He should be the most responsible" (T 637). Again the Plaintiff told the jury that Wal-Mart and Bonifay should be the most liable as the verdict form contained all the intentional tortfeasors, as well as Wal-Mart; but that the real issue for the jury was "compensation" (T 641). The Plaintiff also told the jury not to consider what was going to happen with the money and that they should not be afraid to award the amount of money that Mrs. Coker might blow, or the children might blow after the money got out of guardianship (T 651-652). The Plaintiff's attorney summarized his view of Wal-Mart's position in the case, that Wal-Mart had done the family a favor by killing Coker and that Wal-Mart wanted to be rewarded for his death (T 688-689). The jury returned a verdict finding Wal-Mart 35% liable; but Bonifay, who committed the premeditated murder, only 25% liable (T 723). In addition, the jury found the other two participants in the crime only a total of 15% liable and Robin Archer, who hired Bonifay to commit

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

the murder, 25% liable (T 723-724). No liability was assessed against Bland who gave Bonifay the gun (T 724). The jury awarded $2,166,275 to the Coker family (T 725-727).

Wal-Mart filed post-trial Motions for Judgment Notwithstanding the Verdict, Remittitur and New Trial, again asserting the lack of causation as a matter of law; the fact that no reasonable jury could have found Wal-Mart more liable for selling ammunition than the acts of the premeditated first-degree murderer, Bonifay; that the verdict was obviously a result of passion, sympathy or prejudice, especially where Plaintiff's counsel was crying during closing argument; and that the acts of the murders were the superseding, intervening cause of the Plaintiff's injury and again Wal-Mart was entitled to a verdict in its favor (R 101-162).

All post-trial Motions were denied; and Wal-Mart appealed, especially where it did cite cases to the judge that allowed the granting of a new trial on the basis that the assessment of liability was contrary to the manifest weight of the evidence (R 1124). In Coker II, supra, the First District affirmed all issues on appeal and noted that proximate causation was a jury question in this case. The court, on cross-appeal, found that the judge erred in allowing the intentional tortfeasors to be on the verdict form as Fabre, infra, defendants and reversed to hold Wal-Mart 100% liable. Coker II, D1561. It certified the following negligent security questions under Fabre to this Court:

> Is an action alleging the negligence of the defendants in failing to employ reasonable

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 · 5.385
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 · TEL. (305) 940-7557

security measures, with said omission resulting in an intentional, criminal act being perpetrated upon the plaintiff by a non-party on property controlled by the defendants, an "action based upon an intentional tort" pursuant to section 768.81(4)(b), Florida Statutes (1993), so that the doctrine of joint and several liability applies?

In such action, is it reversible error far the trial court to exclude an intentional, criminal non-party tortfeasor from the verdict form?

Coker II, D1561;
Wal-Mart Stores, Inc. v. McDonald,
676 So. 2d 12, 23 (Fla. 1st DCA 1996)
rev. pending, Case Nos. 88,324
& 88,776 (Consolidated).

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

SUMMARY OF ARGUMENT

Archer hired his cousin, Bonifay, to rob his former employer and kill Wells, who had him fired. Bonifay enlisted the aid of two other teenagers, Fordham and Barth; collected wire cutters, ski masks, the getaway vehicle, and a gun; and attempted the crime on Friday, January 25, 1990. After botching the job, Bonifay and Fordham went to K-Mart to buy some more ammunition the next night, but they did not have enough money and allegedly K-Mart did not have the right kind of bullets. Bonifay and Fordham then went to Barth's house, got some more money and then drove to a Wal-Mart around 8:30 p.m. on Saturday evening. They purchased the .32 ammunition, went back and picked up Barth, drove to the auto parts store; where Barth and Bonifay committed the robbery and Bonifay shot and killed Coker, who just happened to be filling-in for Wells that evening. Laughing and giggling and observing that crime did pay, the trio took off in Fordham's truck and split the $2,000 they stole. Bonifay and Archer were convicted of premeditated first-degree murder and sentenced to death and Fordham and Barth were sentenced to life in prison.

Wal-Mart was found more liable than any individual participating in the murder of Coker and the judge found that this was contrary to the manifest weight of the evidence; but believed there was no case law allowing her to grant a new trial, so she denied it.

The First District affirmed the verdict but reversed the assessment of fault against the intentional tortfeasors and held

LAW OFFICES RICHARD A. SHERMAN. P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525-5885
SUITE 207, BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

that Wal-Mart was 100% vicariously liable for the murderer's act. The appellate court relied on its prior decision in McDonald and certified two Fabre questions regarding negligent security cases again to this Court. While Coker II is not a case where the defendant had a duty to employ reasonable security measures, it is a negligent sale case; the certified questions still must be answered "yes" § 768.81 does apply. Any exception to the statute should, at most, be limited to premise liability cases for negligent security like McDonald; however, defendants should not unilaterally be held vicariously liable for everything an intentional tortfeasor does. Coker II makes every defendant an insurer for the acts of intentional tortfeasors. There should be no exception to the comparative fault statute for intentional tortfeasors; or if there is, it should only be in negligent security cases.

The jury verdict in Coker II shows that juries do not let businesses off "scott free" by finding the shooter 99% liable. They do weigh the fault of each defendant; but in Coker II the jury was misled to find the negligent tortfeasor store more liable than the premeditated murderer. To affirm Coker II and McDonald would mean that in a three-car accident where one driver intentionally smashed into another car and another driver is negligently driving, the negligent driver pays for everything. A social host will be vicariously liable for a guest who gets mad and punches another guest in the face; as insurer of the intentional tortfeasor. There is no legal or public policy

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW5 AVE.. FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 • 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

reason for such results and the Third District's decision in Stellas, infra, and Judge Ervin's opinion in McGhee, infra, should be adopted and § 768.81 enforced.

Florida law clearly supports the granting of a new trial under these circumstances, based on the percentage assessment of liability by the jury, when it is contrary to the manifest weight of the evidence. No reasonable jury could have found Wal-Mart more liable than the premeditated murderer in this case, especially where Bonifay knowingly shot the wrong person four times, as Coker was begging for his life; and where Plaintiff's counsel repeatedly told the jury that the most responsibility for the crime was with Bonifay. Under established Florida law, the verdict in this case is undisputedly contrary to the manifest weight of the evidence, as the judge found, and must be reversed for a new trial.

In this case, not only did the jury allow its collective emotions to control its determination of the percentage of liability attached to each alleged tortfeasor, but also the excessiveness of the verdict was not supported by the manifest weight of the evidence and can only be explained as having resulted from the jury being improperly influenced by passion or prejudice. No economic expert was present at trial to provide an evidentiary basis for the awards of past and future damages. Mr. Coker was chronically unemployed and the family was barely existing on welfare for years, including just before Mr. Coker began working at Trout's. In closing the Plaintiff's attorney

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5685
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

told the jury to use $10,000 as the annual income and to just double that for services, with no evidentiary basis whatever (T 645-646). The jury speculated and picked its own totally different numbers; again with no evidentiary basis whatever; and this requires reversal or at least a remittitur.

Wal-Mart was entitled to a J.N.O.V. in its favor on the issue of intervening superseding cause. Coker I holds that, for purposes of a Motion to Dismiss, it cannot be said as a matter of law that the actions of the murderer were unforeseeable. However, under any analysis of the facts as presented at trial, this murder was not the natural and probable consequence of the sale of the bullets to persons under the age of 21. Because it was not foreseeable under the probable cause analysis of foreseeability, liability with regard to Wal-Mart is cut off by this criminal, intervening act and Wal-Mart cannot be held liable. Furthermore, policy considerations mandate that the liability for subsequent criminal acts, such as these, not be extended to a prior negligent party in circumstances such as appear in the instant case. Again, to go to such great lengths to hold Wal-Mart liable for the premeditated murder committed by Patrick Bonifay, without any factual basis to sustain a finding that this murder was reasonably foreseeable by Wal-Mart, at the time it sold the bullets, is to go far beyond what was ever intended by the legislature in enacting the relevant portions of the Gun Control Act. Therefore, Wal-Mart was entitled to a J.N.O.V. in its favor on this issue and the verdict must be reversed, and a Judgment entered for Wal-Mart,

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

ARGUMENT

I. THE DISTRICT COURT ERRED IN REMOVING THE INTENTIONAL TORTFEASORS FROM THE VERDICT FORM TO HOLD THE NEGLIGENT TORTFEASOR STORE 100% VICARIOUSLY LIABLE FOR THE MURDERER'S ACTS AND THE DECISION BELOW MUST BE QUASHED UNDER § 768.81, FABRE, AND STELLAS AND A NEW TRIAL ORDERED.

The Florida Supreme Court should hold that the fault of an intentional tortfeasor should be treated the same as the fault of a negligent tortfeasor, and reduce the liability of the joint tortfeasors. Alternatively, if there is to be an exception, it should only be for negligent security cases, when a business is being held liable for not preventing the act itself, and not apply to other situations involving other types of negligence.

Bonifay, at the suggestion of his cousin, killed Coker, a clerk in an auto parts store, in a botched plan to rob the store and kill the manager Wells who had his cousin fired. Bonifay knew he was shooting the wrong man but did it anyway because he always wanted to kill someone. The First District held Wal-Mart 100% liable for this murder, as it sold Bonifay the bullets, There are many legitimate reasons to sell and buy ammunition in this country. This is not a negligent security case where the Defendant was sued for not providing adequate police-type protection. In McDonald, supra, the defendants were sued for not having one more security guard patrolling the parking lots--the classic negligent security cases. In Coker II, Wal-Mart was sued for selling ammunition to 18-year old Bonifay, a negligent act

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

because it violated the federal gun law. Negligent sale is a far cry from negligent security, yet the First District made no distinction and held all defendants vicariously liable for the acts of intentional tortfeasors, § 768.81, Fla. Stat. (1991) should be applied to all negligence cases and if any exception is made it should only be in premise liability cases alleging negligent security. Coker II must be quashed and a new trial ordered applying § 768.81 so that the Defendant is only liable for its percentage of fault as the legislature mandated.

This Court has spoken clearly on this issue in Fabre v. Marin, 623 So. 2d 1182, 1185 (Fla. 1993), holding that "[c]learly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."

Permitting allocation of all at-fault entities, including those acting intentionally, is consistent with Florida law, not only as expressed in Fabre, but also in connection with Florida's contribution statute. § 768.31(3), Fla. Stat. (1991) provides that:

> **(3) Pro rata shares.** --In determining the pro rata shares of tortfeasors in the entire liability:
>
> (a) Their relative degrees of fault shall be the basis for allocation of liability.

Thus, the statute provides that there is no right of contribution in favor of intentional tortfeasors, but permits contribution

LAW OFFICES RICHARD A. SWERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

against them, in favor of negligent tortfeasors. Finally, § 768.81, expressly provides that "for cases to which this section applies, the court shall enter judgment against such party on the basis of such party's percentage of fault."

In the present case, the First District reversed based on its decision in McDonald, because the perpetrator's act was intentional, so § 768.81 did not apply. Rather vicarious liability was used instead, allegedly because the Plaintiff's wrongful death claim was based on an intentional tort. Coker II, D1561. The statute reads:

> 768.81 Comparative fault.--
>
> . . .
>
> (3) APPORTIONMENT OF DAMAGES.--In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.
>
> (4) APPLICABILITY.--
>
> (a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.
>
> (b) This section does not apply...to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 • 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 TEL. (305) 940 - 7557

> liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

However, § 768.81(4)(b) just confirms that an intentional tortfeasor cannot reduce his or her damages by the fault of negligent tortfeasors; just as they could not under the contribution statute.

The statute repeatedly speaks in terms of percentages of fault, not in terms of percentages of negligence. This clearly signifies that the Legislature intended the statute to be applicable where some form of fault, other than negligence, is involved. As this Court stated in Fabre:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss.
>
> Fabre, 1187, quoting, Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 874 (1978).

The application of § 768.81, in the present case, continues Florida's long-standing trend of equating the extent of liability with the extent of fault; which the Third District agreed was the "backbone" of § 768.81. Stellas v. Alamo Rent-A-Car, Inc., 673 So. 2d 940, 942 (Fla. 3d DCA 1996). This principle is founded on

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5865
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 - 7567

fundamental considerations of fairness. As this Court noted, there is nothing fundamentally fair about a defendant who is 10% at fault paying 100% of the loss. Fabre, 1187. Certainly there is nothing fair about compelling a "negligent" Defendant to pay more that its share of the loss, because another entity committed an intentional tort, which contributed to causing the loss. The inequity of this is graphically illustrated in this case, where the jury found Wal-Mart 35% liable and the First District held it was 100% liable for the fault of the murderers.

In Fabre, this Court made it clear that § 768.81 requires the jury to consider the fault of all at-fault entities in reaching its apportionment of liability. Under Fabre, that is true even if the other at-fault entity is a spouse, a governmental agency, a hit-and-run driver who cannot be located, a bankrupt manufacturer, an employer who enjoys immunity from tort liability under § 440.11, Fla. Stat., or an entity who has not been made a party to the suit for any other reason. Fabre, 1186-1187. This is equally true when the other "at-fault" entity is an intentional tortfeasor.

In the instant case, it is clear that the substance of the Plaintiff's claim against Wal-Mart was a negligence case within the meaning of § 768.81. The Defendant was in no way charged with any intentional wrongdoing, but rather was charged with negligence in failing to check out the age of Bonifay and Fordham before it sold them the bullets. It was the perpetrators, Bonifay and Fordham, who are the intentional wrongdoers in this

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTW ANDREW5 AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207, BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 -TEL. (305) 940- 7557

case. The negligent party, and not the intentional tortfeasor, is the party seeking to invoke the provisions of § 768.81, limiting its liability to its percentage of fault. That was the express intent of the 1986 Tort Reform Act. The First District has abrogated this in favor of an interpretation that imposes a higher standard of care and financial responsibility on defendants involved in intentional tort/negligence cases. There is no legislative or judicial basis for the imposition of such a heightened standard and increased financial responsibility. Wal-Mart's liability tripled because of the premeditated murder by a robber. Plaintiffs in Florida just want joint and several liability back and since the legislature has repeatedly refused to accommodate them, they are relying on the courts to step in and change the statute, like the First District has done. That is not the function of the judicial system.

The Plaintiff's recovery against the Defendant, was because it was found negligent, not because it committed any intentional tort. It was the assailants who could not rely on § 768.81(3), not the Defendant; just as the Plaintiff had no entitlement to increase the liability of the Defendant under § 768.81(4)(b).

Other jurisdictions have concluded that the intentional tortfeasor should be included on the verdict form. Blazovic v. Andrich, 124 N.J. 90, 590 A.2d 222 (1991); Martin v. U.S., 984 F.2d 1033 (9th Cir. 1993); Weidenfeller v. Star and Garter, 2 Cal. Rptr.2d 14 (Cal.App 4 Dist, 1991). It is interesting to note that in Blazovic, the court dealt with exactly the same type

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5665
SUITE 207, BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

of negligent security case like McDonald; where the plaintiff was shot in a shopping center parking lot as he exited his car to go into a Wal-Mart. That is, the plaintiff was assaulted while leaving a restaurant and sued the restaurant for negligently failing to provide security. In Martin and Weidenfeller, the California courts held that California's Fair Responsibility Act, which like § 768.81, speaks of liability of tortfeasors in relation to their percentage of fault, applied to cases in which one tortfeasor acted intentionally and the other negligently.

In addition, Florida trial courts, even in the First District, have permitted intentional tortfeasors to be placed on the verdict form. Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995) approved, 666 So, 2d 140 (Fla. 1996). The concurring and dissenting opinion in Coker II, by Judge Joanos, also calls for the adoption of Stellas and McGhee as the correct expression of Florida law under § 768.81:

> ... My view is that the law on this issue should be in accord with that stated in ***Stellas v. Alamo Rent-A-Car, Inc.,*** 673 So. 2d 904, 942-943 (Fla. 3d DCA), ***review granted,*** 683 So. 2d 485 (Fla. 1996), and by Judge Ervin of our court in his concurring and dissenting opinion in ***Department of Corrections v. McGhee,*** 633 So. 2d 1091, 1099-1101 (Fla. 1st DCA 1995). That view is that the fault of both negligent and intentional tortfeasors should be apportioned as a means of fairly distributing the loss, based upon the percentage of fault of each tortfeasor contributing to that loss. To interpret section 768.81, Florida Statutes, otherwise would appear to have been the legislature's intent to limit a negligent defendant's liability to that defendant's percentage of fault.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5.385
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940- 7557

> Needless to say, I concur in the majority's certification of the same questions certified in *McDonald,* 676 So. 2d at 22-23, and notation of the conflict between the decision in this case and *Stellas.*
>
> Coker II, D1561-1562.

McGhee involved the murder of the plaintiff by two escaped prisoners. The plaintiff sued the Department of Corrections for having inadequate security to prevent the escape of prisoners. The trial court permitted the two intentional tortfeasors to be placed on the verdict form. On appeal, while the First District's opinion was not based on this issue, Judge Ervin wrote a dissenting opinion which contained a well reasoned and supported analysis of all the aspects of why the intentional tortfeasor should be included on the verdict form.

> After considering the arguments by counsel and the authorities cited, I would affirm as to this issue. It is clear that plaintiff's *action* against the DOC was based on negligence, and the comparative fault statute specifically applies to actions for negligence. § 768.81(4), Fla.Stat. (1989). No action was brought by appellee on the theory of intentional tort. In reaching my conclusion, I am greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in *Blazovic v. Andrich,* 124 N.J. 90, 590 A.2d 222 (1991), which appears to be in harmony with the spirit of Florida's comparative negligence law. In *Blazovic,* the court explained that early cases had distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory-negligence bar, under the view that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5865
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7567

Additionally, under common law, joint tortfeasors could not seek contribution from each other. With the passage of contribution law, joint tortfeasors could recover their pro rata share of the judgment from the other joint tortfeasors, thereby limiting their liability. Intentional tortfeasors could not seek contribution, however, and such prohibition was intended to deter future wrongdoing; the same theory advanced vis-a-vis a plaintiff and an intentional tortfeasor. *Id.* at 228-29.

With the advent of comparative negligence, the all-or-nothing result of contributory negligence was eliminated and recovery was allowed based on a percentage of the parties' negligence. Moreover, under the comparative fault statute, joint tortfeasors were no longer liable for a pro rata share, but were liable in proportion to their percentage of fault. In the court's view, the application of the law in such manner results in greater fairness to both moderately negligent plaintiffs, as well as joint tortfeasors. *Id.* at *230.*

The court further observed that some courts had refused to apportion negligence to intentional tortfeasors, but it was unpersuaded by those cases. It found the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors, because it distributes the loss according to the respective faults of the parties causing the loss. *Id.* at 231.

The reasoning of the court's opinion in *Blazovic* appears to me to be consistent with the Florida courts' general interpretations of section 768.81 in that the statute clearly requires a jury's consideration of each individual's *fault* contributing to an injured person's damages, even if such person is not or cannot be a party to a lawsuit. *See Fabre v. Marin, 623* So.2d 1182 (Fla.1993); *Allied-Signal,* Inc. *v.* Fox, 623 So.2d 1180 (Fla. 1993). *As* observed in *Marin:* "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

> entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." 623 So.2d at 1185.
>
> I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.

McGhee, 1101 (Footnote omitted).

The First District in Coker II completely **ignored** the opinion of two of its own judges and McGhee is mentioned nowhere in the 7 page McDonald decision, nor in the majority opinion **below,**

On the other hand, the Third District adopted Judge Ervin's analysis of this issue in Stellas, "as though it were [their] own opinion". Stellas, 942. The court in Stellas added several observations to Judge **Ervin's** reasoning:

> The unmistakable intent of 768.81(3) is to limit a negligent defendant's liability to his percentage of fault. The whole fault, of which a negligent defendant's acts are but a part, is broad enough to encompass an intentional tortfeasor's acts. One dictionary defines fault as follows: "With reference to persons: Culpability; the blame or responsibility of causing or permitting some untoward occurrence; the wrongdoing or

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 -TEL. (954) 525 5665
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 *TEL. (305) 940-7557

> negligence to which a specified evil is attributable." 4 ***The Oxford English Dictionary*** 104 (1933)....Alamo, as a negligent defendant, is entitled to have its liability limited to its percentage of fault.
>
> Stellas, 942.

Based on this analysis, the court held that the trial court did not err in allowing the jury to apportion fault between the negligent and intentional tortfeasors.

In Stellas, the Third District expressly disagreed with the Fourth District's opinion in Slawson v. Fast Food Entertainment, 671 So. 2d 255 (Fla. 4th DCA 1996), creating direct conflict; as Slawson held that fault cannot be apportioned between a negligent tortfeasor and a criminal actor. Specifically, the Stellas court noted, "[Slawson] simply fails to give effect to the previously discussed clear legislative intent to limit a ***negligent*** defendant's liability to its percentage of fault." Stellas, 943. In effect, the Fourth District attempted to judicially amend § 768.81, through its decision in Slawson. Stellas, 943. That is exactly what this First District has done in McDonald and Coker II as well.

In the instant case, the First District relied on McDonald, which relied on Slawson, in reversing the trial court's inclusion of the perpetrators on the verdict form. The court agreed with McDonald's argument that simple negligence is different in kind from intentional wrongdoing and therefore, the two types of fault cannot be compared. Florida courts, however, have consistently rejected that argument, permitting the application of the

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 . 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI. FLA. 33130 'TEL. (305) 940 - 7557

doctrine of comparative negligence to reduce a claim for recovery, even where the defendant's conduct has been willful and wanton. American Cyanamid Company v. Roy, 466 So. 2d 1079 (Fla. 4th DCA 1984); Tampa Electric Company v. Stone and Webster Engineering Corporation, 367 F.Supp 27 (M.D. Fla. 1973).

Obviously, if willful and wanton misconduct can be compared with simple negligence for the purpose of determining the relative degree of fault between plaintiff and defendant in a comparative negligence situation, there is no reason why that same comparison of simple negligence with more aggravated forms of misconduct cannot similarly be made for purposes of the allocation of fault called for by § 768.81. There can be no principled justification for increasing a negligent defendant's liability, because some other party behaved even more egregiously than the defendant. Furthermore, the application of § 768.81 in the manner suggested by Slawson and McDonald results in a disparate treatment of even negligent security defendants, from all other negligence defendants in Florida and undisputedly is a violation of equal protection under the law. There is no justification for making every defendant in Florida an insurer for the acts of intentional tortfeasors. That is especially true where the Defendant is being sued for ordinary negligence and not even gross negligence, let alone an intentional tort.

All persons, including defendants, are presumed equal and are entitled to equal protection of the laws. Art. I, § 2, Fla. Const.; Art. I, § 2, Amendment XIV 81, U.S. Const. In order to

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33316 TEL. (954) 525 - 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 7557

comply with the requirements of the equal protection clause, a statutory classification must be reasonable and non-arbitrary and all persons in the same class must be treated alike. Laskv v. State Farm Insurance Company, 296 So. 2d 9 (Fla. 1974); Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Association, Inc., 225 So. 2d 557 (Fla. 3d DCA 1969). When a statute includes certain parties and excludes others, it violates equal protection, unless the classifications bear a substantial relationship to a legitimate legislative purpose. Laskv, 18; Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971).

According to the First and Fourth Districts, § 768.81(3) on its face applies to all negligence defendants, except those whose negligence is based on a failure to prevent a crime. § 768.81 would clearly violate equal protection, if it did create such a discriminatory classification. In addition, such a distinction in defendants would be totally arbitrary and unreasonable, where the express purpose of the Tort Reform Act was to limit the liability of all negligence defendants to their percentage of fault; not just certain negligence defendants.

Consequently, this Court should uphold the statute, the legislative intent, follow Fabre and Stellas and quash the First District's Decision and require the inclusion of the perpetrators on the verdict form. This Court should hold that § 768.81 entitles a defendant to have the jury determine the fault of all tortfeasors, and to have judgment entered in accordance with the statutory plan of proportionate liability. Coker II must be

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI. FLA. 33130 • TEL. (305) 940 • 7557

reversed and a new trial ordered; or in the alternative to a new trial, reinstatement of the original verdict.

Any Exception Created Should Only Apply to Negligent Security Cases

Alternatively, if this Honorable Court were to create an exception to the comparative fault statute, it should only apply to negligent security cases, and not cases involving other types of intentional conduct. It makes no sense when someone negligently runs a stop sign for him to become the insurer of a co-defendant who intentionally collided with someone; nor for someone who negligently does not trim the bushes on his property to become the insurer of a criminal who hides in the bushes and murders or rapes someone; nor for someone who has a party and is found negligent for serving alcohol to be the insurer of a guest who becomes drunk and viciously beats someone. Even if there is a logic for an exception in negligent security cases, there is no logic for an exception in other cases involving intentional acts.

Therefore it is submitted that there should be no exception in any cases for intentional acts; or alternatively if this Court did carve an exception for neglilgent security cases, there should be no exception for other types of cases involving intentional tortfeasors.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WeST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

11. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL; WHERE THE VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE; AND THERE IS CASE LAW CLEARLY AUTHORIZING A NEW TRIAL.

The verdict was contrary to the manifest weight of the evidence where a Wal-Mart employee negligently sold bullets to a minor, but Wal-Mart was found more at fault that each of the people who performed a contract killing and are on death row.

Archer hired his cousin, Bonifay, to rob his former employer and kill Wells, who had him fired. Bonifay enlisted the aid of two other teenagers, Fordham and Barth; collected wire cutters, ski masks, the getaway vehicle, and a gun; and attempted the crime on Friday, January 25, 1990. After botching the job, Bonifay and Fordham went to K-Mart to buy some more ammunition the next night, but they did not have enough money and allegedly K-Mart did not have the right kind of bullets. Bonifay and Fordham then went to Barth's house, got some more money and then drove to a Wal-Mart around 8:30 p.m. on Saturday evening. They purchased the .32 ammunition, went back and picked up Barth, drove to the auto parts store; where Barth and Bonifay committed the robbery and Bonifay shot and killed Coker, who just happened to be filling-in for Wells that evening. Laughing and giggling and observing that crime did pay, the trio took off in Fordham's truck and split the $2,000 they stole. Bonifay and Archer were convicted of premeditated first-degree murder and sentenced to death and Fordham and Barth were sentenced to life in prison.

Mrs. Coker sued Wal-Mart for violation of the Federal Gun

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 TEL. (954) 525- 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 TEL. (305) 940- 7557

Control Act, which prohibits the sale of pistol ammunition to anyone the sales clerk knows or has reason to believe is under 21. The jury found Wal-Mart 35% liable for the death of Coker and the premeditated, first-degree murderer, Bonifay, only 25% liable. The accomplices, Fordham and Barth, were only found 7 and 8 percent liable, respectively, while Archer, who set the entire crime in motion, was also only 25% liable.

Wal-Mart was found more liable than any individual participating in the murder of Coker and the judge found that this was contrary to the manifest weight of the evidence; but believed there was no case law allowing her to grant a new trial, so she denied it. However, Florida law clearly supports the granting of a new trial under these circumstances, based on the percentage assessment of liability by the jury, when it is contrary to the manifest weight of the evidence. No reasonable jury could have found Wal-Mart more liable than the premeditated murderer in this case, especially where Bonifay knowingly shot the wrong person four times, as Coker was begging for his life; and where Plaintiff's counsel repeatedly told the jury that the most responsibility for the crime was with Bonifay. Under established Florida law, the verdict in this case is undisputedly contrary to the manifest weight of the evidence, as the judge found, and must be reversed for a new trial.

The only reason the judge denied the new trial in this case was because she thought she had no case law authority to reverse the jury verdict, based on its assessment of the percentages of

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 - 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 - 7557

negligence. The judge was legally incorrect and had she granted a new trial it certainly would not have been a gross abuse of judicial discretion and would have been upheld on appeal.

Under the Florida judicial plan when a verdict is contrary to the evidence it is the duty of the courts to correct it by new trial. This Court reiterated this rule of law that the courts are invested with the dutv to grant a new trial when the verdict is against the evidence in Baptist Memorial Hospital, Inc. v. Bell, 384 So. 2d 145 (Fla. 1980). In that case the plaintiff received a verdict for $450,000 and the trial court granted a new trial. The court of appeal reversed the trial court, and this Court reversed the court of appeal and reinstated the trial judge's orders granting a new trial.

Since the judge is empowered and should grant a new trial, if the verdict is contrary to the manifest weight of the evidence, the judge's perception that she was barred by case law from granting a new trial, where Wal-Mart was found more liable for the shooting death of Coker than the premeditated murderer, this legal error supports reversal of the verdict in this case and the granting of a new trial. Smith v. Brown, 525 So. 2d 868, 870 (Fla. 1988)(the judge is empowered and should grant a new trial if the verdict is contrary to the manifest weight of the evidence).

In evaluating whether the verdict was contrary to the manifest weight of the evidence, the trial court simply had to determine whether a jury of reasonable persons could have

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940- 7557

returned the verdict in question and she found that they could not. There was absolutely no evidentiary basis whatsoever to find more fault for the sale of ammunition to Fordham, than the cold-blooded premeditated murder of Coker through the actions of Bonifay, who plotted the crime for three days, assembled everything that he needed to commit the crime, enlisted aid in committing the crime; as the obtaining of ammunition was simply one factor that led to the tragic murder of Mr. Coker. Therefore, where the trial court determined that a jury of reasonable persons could not have returned the verdict in question, it was legally required for the judge to grant a new trial, something that she thought that she could not do. Stapleton v. Bisignano, 605 So. 2d 1010, 1011 (Fla. 4th DCA 1992).

Once the judge determined that the verdict was contrary to the manifest weight of the evidence; which was understandable especially where Plaintiff's counsel told the jury that Bonifay was the most responsible party for Coker's death; the fact that there was some evidence to support finding Wal-Mart liable, does not substantiate the judge's refusal to grant a new trial. This is especially true where the stated reason for not granting a new trial was simply that the judge did not have a case directly on point allowing her to do this. Brown, 870. Again, when the trial judge believes that the verdict is against the manifest weight of the evidence, it is the judge's duty to grant the new trial, even if the moving party's motion for a directed verdict

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 58.35
SUITE 207, ❑ ISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 340 7557

has been denied. Pyms v. Meranda, 98 So. 2d 341, 343 (Fla. 1957).

The fact that the judge had not only the right, but the duty to grant a new trial, where Wal-Mart was found more liable than the intentional tortfeasor, is not only established under these Florida cases but is further established in cases upholding the right to grant a new trial based on the percentages of liability being contrary to the manifest weight of the evidence. These are the cases that the trial court believed did not exist, probably because older case law seemed to indicate that if a new trial was granted based on percentages of negligence, this would simply be a situation of the trial judge substituting his or her judgment for that of the jury.

However, it has always been the right and duty of the trial judge to grant a new trial if the verdict is contrary to the manifest weight of the evidence and if this is demonstrated in the improper assessment of the percentages of liability, this clearly supports the granting of a new trial, as announced by this Court more than a decade ago:

> When the percentages of liability are contrary to the manifest weight of the evidence, the trial court must treat this defect as an error in the finding of liability itself. The only remedy is to order a new trial on all issues affected by the error.
>
> Rowlands v. Sisnal Construction co., 549 So, 2d 1380, 1383 (Fla. 1989); See also, Florida East Coast Railway Co. v. Griffin, 566 So, 2d 1321 (Fla. 4th DCA 1990); Tomsey v. Stone, 568 So. 2d 1335 (Fla. 4th

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 · 5.985
SUITE 207, BISCAYNE BUILDING. 19 WEST FLAQLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 · 7557

DCA 1990); Currie v. Palm Beach County, 578 So. 2d 760 (Fla. 4th DCA 1991).

Therefore, it is clearly established that where the assessment of percentages of liability is contrary to the manifest weight of the evidence it is proper to grant a new trial. Florida East Coast, supra, (trial court's conclusion that the jury's finding that the deceased child was only 20% negligent was contrary to the manifest weight of the evidence and thus trial court was required to order a new trial on liability); Tomsev, supra, (jury's assessment of percentages of negligence to the parties is an automobile case finding the plaintiff 40% comparatively negligent, when coupled with an award of damages that was also contrary to the manifest weight of the evidence, required reversal and remand for a new trial on all issues; reversing the trial court's denial of the appellant's motion for new trial); Currie, supra, (in an action for the wrongful death of a motorcycle passenger who was killed in a collision, the trial court did not abuse its discretion in granting a new trial on the ground that finding the motorcycle driver only 15% negligent was contrary to the manifest weight of the evidence).

While the holding in Rowlands was that an apportionment of liability contrary to the manifest weight of the evidence could not be corrected by granting a remittitur on the damages awarded; this Court was careful to point out that the trial court must still treat any defect in the assessment of the percentages of liability, which are contrary to the manifest weight of the

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 . TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940- 7557

evidence, with the remedy of ordering a new trial on all issues affected by this error. Rowlands, 1383.

The Court pointed out that a new trial could not be granted merely because the judges disagreed with the percentages "but only because the percentages are against the manifest weight of the evidence." Rowlands, 1383.

In the present case, no reasonable jury could have found Wal-Mart more liable than the cold-blooded murderer, as the judge observed. Under Rowlands alone it was clear that contrary to what the judge thought, she did have the legal authority to grant a new trial where the assessment of the percentages of negligence was contrary to the evidence.

It is not surprising that the jury was influenced by passion and prejudice in this case; where the Plaintiff's attorney in closing told the jury that Wal-Mart was responsible for correcting juvenile crime in the United States; was responsible for the dramatic increase in juvenile crime; and what Wal-Mart was willing to do to save a dime was inadequately training its employees who were too young to evaluate the age of customers; and then he asked for millions of dollars in damages with tears in his eyes.

However, in spite of these comments in closing, the Plaintiff still told the jury to find Bonifay more responsible for the shooting and it ignored, not only Plaintiff's closing argument but the evidence at trial, as the judge properly observed. Therefore, the judge's assessment that the percentages

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW9 AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 -TEL. (305) 940 • 7557

of liability were contrary to the manifest weight of the evidence; was not because the trial court just disagreed with the percentages; but was a finding that no reasonable jury could have found Wal-Mart more liable than the murderer of Coker. Rowlands, 1383.

In the instant case, the jury found Wal-Mart 35% negligent and the murderer only 25% negligent. It then sprinkled the remaining 40% among the other conspirators in the premeditated murder of Mr. Coker. As in the case of Florida East Coast, supra, no reasonable evaluation of the evidence would support a finding that Wal-Mart was more negligent than the individual, who over a period of several days plotted and carried out a contract murder. In the Florida East Coast case, the court ordered a new trial when the jury (after hearing facts involving a 13-year old child who ran out onto the railroad tracks in front of an oncoming train and was killed) found that the child was 20% negligent, the engineer 30% negligent and the railroad 50% negligent. Under the facts of the case the court found it unreasonable for the jury to apportion less than 50% negligence to the deceased child, but thought the law did not permit him to grant a new trial. Florida East Coast, 1323. The trial judge below recognized that the facts in the instant case, involving premeditated murder, strongly supported the need for a new trial, as the jury's apportionment of liability was so strongly against the weight of the evidence, but she too thought she had no legal right to grant a new trial. The trial judge was wrong and the verdict must be reversed, just as it was in Florida East Coast and Tomsey, supra, for a new trial.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525-5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940-7557

111. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL OR REMITTITUR WHERE THE JURY'S EXCESSIVE VERDICT WAS OBVIOUSLY AND SUBSTANTIALLY AFFECTED BY PASSION, SYMPATHY OR PREJUDICE REQUIRING THE GRANTING OF A NEW TRIAL.

Not only was the jury's apportionment of liability in this case against the manifest weight of the evidence, it was obviously affected by the jury's sympathy and/or passion for Mrs. Coker's plight. Not only did Plaintiff's counsel display an inordinate amount of emotion in his closing argument, but he exhibited tears during his closing argument and was visibly wiping his eyes and nose in the presence of the jury (R 1001-1062; T 713; H 4-5). Furthermore, immediately after the verdict was announced, the members of the jury hugged and consoled Mrs. Coker commenting that "[i]t is going to be alright now." (R 1001-1062). The jury just picked an arbitrary amount of money as a reward to Mr. Coker for sticking with his family, through his inability to support them and through all the mental, emotional and physical problems; apparently accepting Plaintiff's counsel's argument that Wal-Mart's theory was that it should be thanked and applauded for ensuring that Mr. Coker was murdered, because the family did so well afterward.

In this case, not only did the jury allow its collective emotions to control its determination of the percentage of liability attached to each alleged tortfeasor, but also the excessiveness of the verdict was not supported by the manifest weight of the evidence and can only be explained as having

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 - 7557

resulted from the jury being improperly influenced by passion or prejudice. No economic expert was present at trial to provide an evidentiary basis for the awards of past and future damages. Mr. Coker was chronically unemployed and the family was barely existing on welfare for years, including just before Mr. Coker began working at Trout's. In closing the Plaintiff's attorney told the jury to use $10,000 as the annual income and to just double that for services, with no evidentiary basis whatever (T 645-646). The jury speculated and picked its own totally different numbers; again with no evidentiary basis whatever; and this requires reversal or at least a remittitur.

It is well settled that the trial court is invested with the power to grant a remittitur. This power and duty was affirmed by the Florida Supreme Court in the case of Adams v. Wright, 403 so. 2d 391 (Fla. 1981). In 1986, the Florida Legislature passed the remittitur/additur statute, for non-auto tort actions and it requires:

> 768.74. Remittitur and additur
>
> (1) In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.
>
> (2) If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur, as the case may be.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 . 5885
SUITE 207. EISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

(3) It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive.

(4) If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.

(5) In determining whether an award is excessive ox inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:

(a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;

(b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

(6) It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302.1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 7557

> However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of this state.

It has been held that this statute gives the trial court even more discretion to reduce a jury award than existed under the original law applying to motor vehicle cases. § 768.043 Fla. Stat. (1977); Veterans Auto Sales and Leasing Company, Inc. v. Poole, 649 So. 2d 264 (Fla. 5th DCA 1994) reversed on other grounds, 668 So. 2d 189 (Fla. 1996).

Therefore, where the liability assessment was contrary to the manifest weight of the evidence, as was the excessive damage award, the trial judge did have the power and duty to grant a new trial or remittitur. Retv v. Green, 546 So. 2d 410 (Fla. 3d DCA) rev. denied, 553 So. 2d 1165 (Fla. 1989); Nash v. Winn Dixie Montgomery Inc., 552 So. 2d 944 (Fla. 1st DCA 1989)(New trial warranted where amount of damages awarded could not be sustained by any view of the evidence and apparently resulted from jury being improperly influenced by passion or prejudice due to over emotional closing argument.) See also, Sacred Heart Hospital of Pensacola v. Stone, 650 So. 2d 676 (Fla. 1st DCA) rev. denied, 659 So. 2d 1089 (Fla. 1995); Baptist Hospital Inc. v. Rawson, 674 So. 2d 777 (Fla. 1st DCA 1996). Therefore, Wal-Mart is entitled to a new trial on this ground.

No reasonable jury could have returned a verdict finding Bonifay, who shot Coker four times, as he was begging for his

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANOREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940 7557

life, less liable than Wal-Mart and awarding almost two million dollars in damages; where the only evidence was that Coker made $10,000 a year or less. At the very least, a new trial must be granted.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525- 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940 - 7557

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT OR J.N.O.V.; WHERE THE NEGLIGENT SALE OF AMMUNITION TO A MINOR COULD NOT BE A LEGAL CAUSE OF DEATH AS THE CRIMINAL ACT OF BONIFAY WAS AN UNFORESEEABLE, SUPERSEDING, INTERVENING CRIMINAL ACTION AND THE VERDICT MUST BE REVERSED AND ENTERED FOR WAL-MART.

When this action was originally dismissed at the pleading stage, the judge held that a vendor of ammunition to an 18 year old is not civilly liable to a later victim of a shooting, where the criminal act was an independent, intervening cause, which was not within the realm of reasonable foreseeability on the part of the vendor, relying on Everett v. Carter, 490 So. 2d 193 (Fla. 2d DCA 1986). On appeal, the court found it was "... unwilling to hold as a matter of law in ruling on a motion to dismiss that an ammunition vendor's violation of 18 U.S.C. § 922(b)(1) cannot be found to be the proximate cause of injury or death caused by the purchaser's intentional or criminal act." Coker I, 778. However, after all the evidence was presented at trial, it was clear that the original judge's analysis was correct:

> The fact of negligence per se resulting from a violation of a statute does not mean that there is actionable negligence. Among other things, it must be shown that the violation of the statute was a proximate cause of the injury.

Stanage v. Bilbo, 382 So. 2d 423, 424 (Fla. 5th DCA 1980) (Emphasis in original) citing, de Jesus v. Seaboard Coast Line Railroad Company, 281 So. 2d 198 (Fla. 1973).

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANOREWS AVE., FORT LAUDERDALE, FLA. 33316 . TEL. (954) 525 . 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940- 7557

> . ..[F]oreseeability relates to duty and proximate causation in different ways and to different ends. The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others.... The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold legal requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are opened.

McCain v. Florida Power Corporation, 593 So. 2d 500, 502 (Fla. 1992)(Emphasis supplied in part).

The First District found that the Federal Gun Control Act created a duty on the part of Wal-Mart not to sell pistol ammunition to underage consumers. Coker I, *775.* However, it is the more specific inquiry into foreseeability as it relates to proximate causation and not duty that must be examined in this instance. The court in Coker II just found that it was a proper jury question, without analyzing the evidence at trail. Coker II, D1561, This analysis must necessarily include the concept of independent intervening cause.

> . ..[A] defendant is not liable for injuries resulting to a plaintiff when there is an independent intervening cause, unless that independent intervening cause is a foreseeable and probable consequence of the wrongful actions of the defendant....[W]hen the loss is not a direct result of the negligent act complained of . . . but is merely a possible, as distinguished from a natural and probable,

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 • 5.985
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

result of the negligence, recovery will not be allowed.

Guice v. Enfinger, 389 So. 2d 270, 271-272 (Fla. 1st DCA 1980).

In order to establish liability for negligence in Florida a plaintiff must allege and establish each of the four requisite elements of the cause of action in negligence those being: a duty owed by the actor to the injured, breach of that duty, a causal connection between the breach and the injury and damage suffered by the plaintiff. Reinhart v. Seaboard Coast Line Railroad Company, 422 So. 2d 41 (Fla. 2d DCA 1982).

The causation requirement is described in terms of proximate cause and foreseeability. Bryant v. Jax Liquors, 352 So. 2d 542 (Fla. 1st DCA 1977). Probable cause is not possible cause and foreseeability is not what might possibly occur. Goode v. Walt Disney World, Co., 425 So. 2d 1151 (Fla. 5th DCA 1982).

Proximate cause means that the wrong of the defendant caused the damage claimed by the plaintiff. Bornstein v. Raskin, 401 So. 2d 884 (Fla. 3d DCA 1981). The mere fact that a defendant may have created a passive or static condition, which made the injury possible, is not enough to establish liability. General Telephone Company of Florida v. Choate, 409 So. 2d 1101 (Fla. 2d DCA 1982); Banat v. Armando, 430 So. 2d 503 (Fla. 3d DCA 1983).

The "proximate cause" element of a negligence action embraces, at the very least, a causation in fact test. Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3d DCA 1983). In other words, the defendant's negligence must be a cause in fact

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5685
SUITE 207, BISCAYNE BUILDING. 19 WEST FLAGLER STREET. MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

of the plaintiff's claimed injuries to be actionable. Tampa Electric Company v. Jones, 138 Fla. 746, 190 So. 26 (1939).

So, as a matter of law, if the original negligence only furnishes the occasion for the injury, it is not the proximate cause of it. Whitehead v. Linkous, 404 So. 2d 377 (Fla. 1st DCA 1981). To constitute proximate cause there must be such a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said that "but for" the act the injury would not have occurred. Fellows v. Citizens Federal Savings & Loan Association of St. Lucie County, 383 So. 2d 1140 (Fla. 4th DCA 1980). Hohn v. Amcar, Inc., 584 So. 2d 1089 (Fla. 5th DCA 1991).

In Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987), this Court stated that even if one assumed the DOT was negligent in allowing a pooling of water on the highway next to a railroad track, which resulted in stalling of the plaintiff's vehicle, the action of another motorist losing control and colliding with the back of the truck while plaintiffs were attempting to restart it, constituted an independent, efficient, intervening cause of the plaintiff's injuries, which clearly broke any chain of causation between the state's alleged negligence and the Plaintiffs injuries.

In Everett, susra, the court found that, even though the defendant sold a revolver to Carter, who was under the age of 21, in violation of the Gun Control Act, his later criminal act of killing Everett was an independent intervening cause and not

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 ▪ 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 . TEL. (305) 940· 7557

within the realm of reasonable foreseeability on the part of the defendant. In its analysis, the court quoted from Prosser on the issue of foreseeability:

> 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.
>
> Everett, 195.

In order for a plaintiff to recover for a negligent injury, it must not only be shown that such negligence was the proximate cause of the injury, but that it was also a reasonably foreseeable consequence of the alleged negligence. Tuz v. Burmeister, 254 So. 2d 569 (Fla. 1st DCA 1971); Crosby v. Manley Construction Company, 193 So. 2d 11 (Fla. 2d DCA 1966); Stahl, supra. What is foreseeable is not gauged by what might possibly occur, but by what could have been anticipated as a probable result, without the intervention of an independent cause. Crown Liquors of Broward, Inc. v. Evenrude, 436 So. 2d 927 (Fla. 2d DCA 1983); Leahy v. School Board of Hernando County, 450 So. 2d 883 (Fla. 5th DCA 1984). Foreseeable consequences are those by which a person by a prudent foresight can be expected to anticipate as a likely not possible result. Leahv, supra; Crown Liquors, supra.

The Florida courts have drawn a distinction between

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 5885
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

proximate cause of an injury and the condition or occasion of an injury. If a defendant has only created a passive static condition which made the damage possible, than that defendant shall not be liable. General Telephone, supra. The injury sustained must be one such that it resulted in the ordinary natural sequence from defendant's alleged negligence not as merely possible result of simple negligence of someone else. Tampa Electric, supra. Even if negligent, a party will not be liable for damages suffered by another when some separate force or action is the active and efficient intervening cause. Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980).

Proximate cause must not have been severed by an independent efficient cause which intervened between the act of the defendant and the resulted injury. Dunn Bus Service v. McKinley, 178 So. 865 (Fla. 1938). Where some separate force or action is the act of an efficient intervening cause, it is the sole proximate cause and the party which may have been negligent is not liable for such damages. DWL, Inc. v. Foster, 396 So. 2d 726 (Fla. 5th DCA 1981).

The court in Coker I adopted the rational of the Third District in Keller, infra, that all lawlessness and violent crime is foreseeable since the Gun Control Act was passed to prevent these crimes. Coker I, 777. This takes McCain and turns it on its head, for now the foreseeable zone of risk creating a duty, becomes simultaneously the foreseeability necessary to establish proximate cause. That means any time there is a duty of care,

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 'TEL. (954) 525 • 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7567

such as one created by a statute, any injury is automatically foreseeable. The Plaintiff argued to the jury that Wal-Mart had a duty to reduce juvenile crime in this Country (while Congress refuses to ban hand gun sales and sales of ammunition). The First District imposed a per se rule of liability, if the Gun Control Act is involved; holding all violence and crime foreseeable, if the Plaintiff is covered by the Act. It justified the result by stating that it was all just a jury question. Coker I, supra; Coker II, D1561. Now there is an irrebuttable presumption of negligence that attaches to each and every ammunition or gun sale, making the seller strictly liable. Formally, if a harm occurred that a statute especially was designed to prevent, that meant a per se violation, some evidence of negligence, but not strict liability. de Jesus, supra. Coker II has expanded the law to justify the imposition of a public policy decision to reduce juvenile crime by imposing strict liability against sellers, like Wal-Mart. There is no legal or factual basis to do this.

Furthermore, what distinguished K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. 3rd DCA 1983), from Everett was nat only that it is not unlawful for a minor to possess a handgun or the ammunition, but also, and more importantly, that the portion of the Gun Control Act which was violated in Keller, was the part which forbade the transfer of firearms to persons who were known felons and/or known users of illegal drugs. The harm that is sought to be prevented by that

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (954) 525 5885
SUITE 207. BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

portion of the Gun Control Act is different than the harm that is sought to be prevented by the portion disallowing the **sale** of handguns and ammunition to persons who appear to be under the age of 21. Minors cannot be placed in the same category, as a group, with known felons and drug abusers.

Contrary to the claims of the Plaintiff, it is not reasonable to assume that a minor in possession of a hand gun and/or pistol ammunition is going to commit murder. The situation in the instant case is exactly the type of policy consideration discussed in Anglin, supra, which would disallow the extension of liability to Wal-Mart in this case. There must come a point where liability is cut off, and the concept of intervening cause is one such point. The issue of foreseeability in the context of probable cause, as well as in the context of the foreseeability of an intervening independent act, goes to the specific proof of the case that would show that it was a natural and probable consequence of Wal-Mart selling pistol ammunition to individuals under the age of 21, that those individuals would commit a premeditated, cold-blooded murder plotted days before, several hours after buying the ammunition. This is a leap the legislature did not intend and one which is not supported by the evidence. Since there are no facts in evidence in this case to indicate that the premeditated murder of Mr. Coker by Bonifay was anything more than a mere possibility, a finding of probable cause based on the foreseeability of the independent intervening criminal act cannot be sustained; especially just based on the

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302. 1777 SOUTH ANDREW6 AVE., FORT LAUDERDALE, FLA. 33316 *TEL. (954) 525 5865
SUITE 207, BISCAYNE BUILDING, 19 WEST PLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

reason for the existence of a Gun Control Act and the case must be retried.

Wal-Mart was entitled to a J.N.O.V. in its favor on the issue of intervening superseding cause. Coker I holds that, for purposes of a Motion to Dismiss, it cannot be said as a matter of law that the actions of the murderer were unforeseeable, However, under any analysis of the facts as presented, this murder was not the natural and probable consequence of the sale of the bullets to persons under the age of 21 as held in Coker II. Because it was not foreseeable under the probable cause analysis of foreseeability, liability with regard to Wal-Mart is cut off by this criminal, intervening act and Wal-Mart cannot be held liable. Furthermore, policy considerations mandate that the liability for subsequent criminal acts, such as these, not be extended to a prior negligent party in circumstances such as appear in the instant case. Again, to go to such great lengths to hold Wal-Mart liable for the premeditated murder committed by Patrick Bonifay, without any factual basis to sustain a finding that this murder was reasonably foreseeable by Wal-Mart, at the time it sold the bullets, is to go far beyond what was ever intended by the legislature in enacting the relevant portions of the Gun Control Act. Therefore, Wal-Mart was entitled to a J.N.O.V. in its favor on this issue and the verdict must be reversed, and a Judgment entered for Wal-Mart.

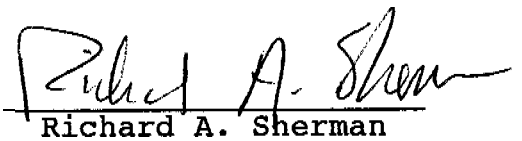
LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 -TEL. (954) 525 5665
SUITE 207, BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940 • 7557

CONCLUSION

The decision below must be quashed as it was legal error to void the intentional tortfeasors' liability, as determined by the jury and a new trial must be granted; or at least, the original verdict reinstated.

The trial court erred in failing to grant a new trial or remittitur; for the verdict was contrary to the manifest weight of the evidence and excessive. Where the trial court had the legal power to grant the new trial, it was reversible error to deny it and/or the remittitur. Wal-Mart is entitled to a directed verdict or J.N.O.V. as a matter of law, where the superseding intervening negligence of the murders severed any chain of causation and any negligence on the part of Wal-Mart was not a proximate cause of the injury. Therefore, the verdict must be reversed and a judgment entered for Wal-Mart; and, in the alternative, a new trial granted or the original verdict reinstated.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(305) 940-7557 - Dade
and
Jeffrey P. Gill, Esquire
BRIDGES, GILL & HOLMAN
Pensacola, FL

By: 
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of August, 1997 to:

Jeffrey P. Gill, Esquire
Bridgers, Gill & Holman
121 Palafox Place - Suite A
Pensacola, FL 32501

Martin H. Levin, Esquire
LEVIN, MIDDLEBROOKS, MABIE,
THOMAS, MAYES & MITCHELL, P.A.
316 South Baylen Street
Pensacola, FL 32501

Louis K. Rosenbloum, Esquire
LOUIS K. ROSENBLOUM, P.A.
One Pensacola Plaza, Ste. 212
Post Office Box 12443
Pensacola, FL 32582-2443

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Suite 302
1777 South Andrews Avenue
Fort Lauderdale, FL 33316
(954) 525-5885 - Broward
(305) 940-7557 - Dade

and

Jeffrey P. Gill, Esquire
BRIDGES, GILL & HOLMAN
Pensacola, FL

By: Richard A. Sherman
Richard A. Sherman