SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

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

Respondent.

CASE NO. 90,916

DISTRICT COURT OF APPEAL
FIRST DISTRICT,
NO. 96-02416

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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Wal-Mart Stores, Inc., a foreign corporation, will be referred to herein as "Wal-Mart" or "Petitioner." Respondent, Sandra Coker, as personal representative of the Estate of Billy Wayne Coker, will be referred to as "Coker" or "Plaintiff."

The following designations will be utilized in this brief:

R Record on appeal

T Trial transcript

PB Petitioner's Brief on the Merits

A Transcript of the post-trial hearing dated May 20, 1996

AA Transcript of the post-trial hearing dated April 25, 1996

STATEMENT OF THE CASE AND FACTS

Wal-Mart's statement of the case and facts is incomplete. Plaintiff submits the following recitation of facts which are necessary to resolve the issues on appeal.

In 1990, Robin Archer worked for Trout Auto Parts in Pensacola, Florida. (T-II 194). Archer's job performance was unsatisfactory and he was ultimately fired at the suggestion of a co-employee, Dan Wells. (T-II 195-96). Thereafter, Archer decided to have Wells killed, and on Thursday, January 24, 1991, Archer persuaded and/or forced his cousin, Patrick Bonifay, to perform the killing. (T-II 211, 213-14; T-IV 540-41). Bonifay was seventeen years old at the time. (T-I 88).

Archer planned for Bonifay to go to the Trout Auto Parts store on "W" Street in Pensacola just before midnight. Bonifay was to approach the outside service window and ask the sales clerk for a 1985 Nissan truck clutch disc. This would require the clerk to go to the back of the store to determine if this particular part was in stock. When the clerk left the counter, Bonifay was to climb through the service window, shoot the clerk, and rob the store. The killing/robbery was to occur at midnight on Friday, January 25, 1991, or on Saturday, January 26, 1991, because the person Archer wanted killed (Wells) would be working during those times. (T-I 84; T-II 196-200). There was some indication that Archer may have threatened to kill Bonifay's family if Bonifay did not perform the killing/robbery. (T-IV 540-41).

Bonifay decided to perform the killing/robbery. However, Bonifay did not have a gun, a motor vehicle or a driver's license, and thus needed assistance. (T-I 124, 209, 215-16). Bonifay borrowed a pistol from Kelly Bland, an eighteen-year old friend, and Bonifay happened to have one bullet which fit in the gun. (T-I 95; T-II 212, 215). Bonifay then persuaded Cliff Barth, age seventeen, to assist in the robbery, and Eddie Fordham, age eighteen, to drive Bonifay and Barth to the Trout Auto Parts store. (T-II 124, 214-15).

On Friday, January 25, 1991, Fordham, Barth and Bonifay drove to the Trout Auto Parts store on "W" Street. It was close to midnight and Wells was working. Bonifay approached the outside service window as planned, but Wells immediately became suspicious because Bonifay kept looking over his shoulder and was wearing gloves and a coat, even though it was not cold outside. Bonifay asked Wells for a 1985 Nissan truck part, but Wells decided not to leave the counter. Instead, Wells opened a catalog, pretended he was looking for the part, and told Bonifay the part was not in stock. Bonifay then left. (T-II 196-200).

The next night, Saturday, January 26, 1991, Bonifay decided to attempt the killing/robbery again. (T-I 84). At approximately 8:00 p.m., Fordham picked Bonifay up at Bonifay's home. As the two were traveling to Barth's home, Bonifay asked Fordham if he was old enough to buy ammunition, and Fordham (age eighteen) said yes. Bonifay and Fordham thought a person could purchase pistol ammunition at eighteen years of age. Bonifay and Fordham attempted to purchase .32 pistol ammunition at K-Mart on

Mobile Highway, but the sales clerk said the store did not have any in stock. Fordham asked how much the ammunition would have cost, and the clerk stated approximately fourteen dollars. Bonifay stated he did not have enough money, and Bonifay and Fordham proceeded to Barth's home. (T-II 125-28).

When Bonifay and Fordham arrived at Barth's home, Barth was getting dressed. (T-II 126). Bonifay and Fordham told Barth that they did not have any ammunition for the gun, that they needed to go to Wal-Mart on Highway 29 to purchase some, and asked to borrow money.[1] (T-II 126, 150, 215–16). Bonifay and Fordham arrived at the Wal-Mart store at approximately 8:35 p.m. The two minors went to the gun counter and Bonifay asked the clerk for .32 pistol ammunition. (T-II 127). The clerk on duty that night was Ken Powell. (Plaintiff's Trial Exhibit 5). Powell was twenty-two years of age at the time, had been selling ammunition for only seven months, and had very limited training in ammunition sales. (T-II 233-35, 238-39). Bonifay asked for the ammunition and handed the money to Fordham. Powell got the ammunition and went to hand it to Fordham, but Fordham told Powell to hand the ammunition to Bonifay and Powell complied. (T-II 127).

After Fordham and Bonifay purchased the ammunition, they returned to Barth's home. Barth got into Fordham's vehicle and noticed that Bonifay possessed a new box of ammunition. Barth

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[1] It is unclear what happened to the single bullet Bonifay had in the gun on Friday night, but there was a strong indication at trial that Bonifay shot the remaining bullet out of Fordham's car window after leaving Trout Auto Parts on Friday night. (T-II 133-34, 148, 212-13).

watched Bonifay take ammunition out of the box and fully load the pistol. (T-II 216). Approximately three hours later, the minors drove to Trout Auto Parts on "W" Street. That night, however, Billy Wayne Coker was substituting for Wells who was sick. Coker would not have been working at the "W" Street store any other night, as Coker was assigned to a Trout Auto Parts store at a different location. (T-II 190-92).

Upon arriving at Trout Auto Parts, Bonifay walked up to the service window while Coker was on the phone talking with a customer. (T-I 84-85). Bonifay shot Coker in the back. Bonifay and Barth then climbed through the service window and Bonifay shot Coker again, this time in the chest. Bonifay and Barth robbed the store of approximately $2,100 and on the way out Bonifay shot Coker in the head two more times. (T-I 85; T-II 178-79, 211, 216-17). The last two shots caused Coker's death. The first two shots were survivable. (T-II 178-79). Before Bonifay shot Coker in the head, Coker begged for his life, pleading that he had a wife and two young children. (T-II 216-17).

Approximately two weeks after the killing/robbery, Bonifay, Barth and Fordham were arrested. (T-I 88). When Fordham was arrested, he immediately gave a statement to the police stating that he and Bonifay went to Wal-Mart on Saturday, January 26, at approximately 9:00 p.m., and bought the ammunition. Fordham said the Wal-Mart store was located on Highway 29 in Pensacola and the ammunition cost approximately fifteen dollars, which he paid for with cash. (T-I 90-91). Based on this information, the state

attorney went to Wal-Mart and retrieved a cash register receipt which confirmed the sale of .32 automatic pistol ammunition at 8:39 p.m. on Saturday, January 26, by a sales clerk named Kenneth Powell, paid for with fifteen dollars cash. (Plaintiff's Trial Exhibit 5; T-II 188). The cash register receipt specifically confirmed that the ammunition sold was .32 auto pistol ammunition manufactured by Federal Cartridge Company which matched the exact caliber and brand of ammunition used to kill Coker. (Plaintiff's Trial Exhibit 5; T-I 96; T-II 188).

The following evidence was unrefuted at trial: (i) Bonifay and Fordham did not possess any ammunition on Saturday, January 26, 1991, before going to Wal-Mart (T-II 215-16); (ii) Bonifay and Fordham were alone when they purchased the ammunition at Wal-Mart on Saturday, January 26, 1991, at 8:39 p.m. (T-II 127, 161, 226); (iii) Bonifay and Fordham appeared well under the age of twenty-one at the time they purchased the ammunition at Wal-Mart (Plaintiff's Trial Exhibit 4; T-V 663); (iv) the Wal-Mart sales clerk never asked Fordham or Bonifay their ages and never asked for identification; neither minor possessed false identification (T-I 93-95; T-II 128, 131, 161, 216, 226); (v) had Wal-Mart not sold the ammunition to Bonifay and Fordham, the minors would have been unable to obtain the ammunition that night in time to arrive at the Trout Auto Parts store before the store closed, and Coker would not have been working at the store any other night (T-II 131, 190-92, 216, 226; T-IV 535, 543); and (vi) Coker was a totally innocent man who was simply in the wrong place at the wrong time (T-II 217; T-IV 542-43).

As a result of her husband's death, Sandra Coker filed the instant lawsuit against Wal-Mart alleging that Wal-Mart was negligent in violating 18 U.S.C. § 922(b)(1), a federal criminal statute which prohibits the sale of pistol ammunition to persons under the age of twenty-one. (R-I 1-4, 23-27, 85-89). Wal-Mart moved to dismiss the complaint on the ground that Bonifay's act in killing Coker was an intervening criminal act and was unforeseeable as a matter of law. (R-I 29-62). The motion to dismiss was granted, and Coker appealed the trial court's dismissal to the District Court of Appeal, First District. (R-I 73-75, 93-112). The district court reversed and specifically concluded that 18 U.S.C. § 922(b)(1) was enacted to prevent the exact type of harm which occurred in this case, and that Wal-Mart could not be heard to complain that the harm actually occurred. Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774 (Fla. 1st DCA 1994) ('Coker I"). The district court further held that the issue of proximate causation was an issue for the jury and remanded the case for trial. Wal-Mart unsuccessfully sought review of the district court's decision in this court. Wal-Mart Stores, Inc. v. Coker, 651 So. 2d 1197 (Fla. 1995).

Upon remand, plaintiff filed a pre-trial motion in limine to prevent the names of the non-party intentional tortfeasors from being placed on the verdict form.[2] (RI-114; A 7). In an attempt to avoid a retrial on Fabre comparative fault issues, the parties stipulated that all possible names would be placed on the verdict

[2]At the time the motion was filed, Bonifay was a party. Bonifay was voluntarily dismissed as a defendant before the trial began. (R-VI 745).

form, but that plaintiff retained the right to appeal the intentional tortfeasor issue. (R-V 668, A 7). In anticipation that Wal-Mart would argue, post-judgment, that the jury could have concluded that some of the non-party wrongdoers were negligent tortfeasors, plaintiff submitted to the court a proposed verdict form which listed special interrogatories designed to determine whether the non-party wrongdoers were intentional or negligent tortfeasors. (R-VI 774-78; A 7-8, 14). Wal-Mart objected to this proposed verdict form and requested a verdict form which simply asked whether the non-party wrongdoers were legally at fault for the death of Coker. (A 8, 14). Wal-Mart's verdict form was submitted to the jury. (T-V 707-11; R-VI 843-47; AA 14-15).

Concerning apportionment of responsibility among Wal-Mart and the non-party wrongdoers, six names were placed on the verdict form--Wal-Mart, Archer, Bland, Barth, Bonifay and Fordham. (T-V 707-11; R-VI 843-47). Plaintiff pointed out to the jury that in order for Coker to have been killed, three things were required--a gun, ammunition and a person willing to pull the trigger. Bland supplied the gun, Wal-Mart supplied the ammunition and Bonifay pulled the trigger. Therefore, plaintiff asked the jury to first analyze the responsibility of these three wrongdoers. (T-V 636).

In regard to Bland, there was no evidence that Bland knew of the possible killing, nor was there any evidence that Bland violated any law by giving Bonifay the gun. In fact, during deliberations the jury posed a question to the court as to

whether there was any evidence against Bland, other than evidence that Bland supplied Bonifay with the gun. The court appropriately informed the jurors they needed to rely on their collective memory of the evidence presented. (T-V 719-22).

In regard to Wal-Mart, the evidence showed that Wal-Mart operated over 1,500 stores selling ammunition in January of 1991 and was possibly the largest retailer of ammunition in the country. (T-II 231-32). Wal-Mart, however, had no requirement regarding the background of its ammunition sales personnel, other than that the sales clerks had to be twenty-one years of age or older. There was no requirement for past firearm or ammunition experience. (T-IV 509). Wal-Mart's ammunition sales training was limited to a training video and a pamphlet outlining federal regulations governing firearms and ammunition. Wal-Mart instructed its sales personnel that a person had to be eighteen years of age or older to purchase rifle ammunition and twenty-one years of age or older to purchase pistol ammunition and that the sales clerks reserved the right to request identification. (T-II 234, 238-39; T-IV 513-22). However, Kenneth Powell, the probable sales clerk in this case, had not even seen the training video. (T-II 235).

Wal-Mart provided no documentation to its sales clerks to help them distinguish between pistol and rifle ammunition. Consequently, clerks frequently were unable to determine whether ammunition was for a pistol or a rifle. (T-II 242-45; T-IV 527). Therefore, the clerks were sometimes incapable of knowing how old the purchaser was required to be under federal law to purchase

various types of ammunition. (T-II 242-45). In fact, Janice Lawson, Wal-Mart's firearm and ammunition sales trainer at the subject store, thought 9 mm ammunition was rifle ammunition. (T-IV 501-03, 523). In actuality, 9 mm ammunition is primarily pistol ammunition, and therefore a person should be twenty-one years of age or older to purchase the ammunition. (T-II 255-56).

In regard to Fordham's and Barth's responsibility, Fordham denied he knew a murder was going to be committed. (T-II 126, 130). Barth testified that he was told that there was going to be a robbery, and possibly a shooting if necessary, and that Bonifay was the person who shot Coker. (T-II 211, 214-15).

Concerning the issue of foreseeability, the jury heard the testimony of Dr. Dewey Cornell, a clinical psychologist and associate professor at the University of Virginia where he teaches classes on juvenile violence, In the course of his profession, Dr. Cornell has conducted a series of studies and research on juvenile homicide. Dr. Cornell has read hundreds of articles on juvenile violence and written a dozen or more articles and reports on juvenile homicide. He has testified in court regarding both juvenile and adult violence on numerous occasions. (T-III 273-77). Dr. Cornell testified that national statistics reveal that approximately 1,000 juveniles nationwide were arrested for homicide in 1984, with the number rising to 2,600 by 1991, and that this information was highly publicized before 1991. (T-III 279-81). Dr. Cornell testified that efforts should be taken to keep guns and ammunition out of the hands of minors because minors are impulsive and irresponsible and lack

the maturity to deal with the peer pressure and emotions which arise from possession of a pistol. Minors gain a sense of power and intoxication by handling a gun and desire to prove themselves. (T-III 285-86).

The final issue for the jury was compensation. On this issue, the evidence showed that Billy Wayne Coker was born and raised in Waynesboro, Mississippi. (T-III 330). When he was nine years old, his mother died in an automobile accident. (T-III 331) . Sandra Faye Coker was raised in the Pensacola area. In the late 1970's, Mrs. Coker moved to Jackson, Mississippi, where she met Mr. Coker, who was working as a deputy for the Jackson City Police Department. The two were married one month later. (T-III 326-29).

Approximately one year after their wedding, Mr. and Mrs. Coker's first child, Christopher, was born. (T-III 331-32). Shortly thereafter, Mr. Coker's father had a stroke and began living with Mr. and Mrs. Coker. At the same time, Mr. and Mrs. Coker's second child, Michelle, was born. (T-III 332-33). Next, Mr. Coker fell ill and underwent colon surgery. Unfortunately, the Coker family was unable to afford the full surgery, and from that point to the time of his death Mr. Coker lived with a colostomy bag attached to his side, (T-III 332-33). Because of the foregoing circumstances, Mr. and Mrs. Coker began having financial problems. Mrs. Coker also was having difficulty coping with the responsibility of marriage, children, her father-in-law's health, and finances, and she developed a devastating nervous condition. (T-III 334-37). As a result, Mr. and Mrs.

Coker began experiencing marital problems which resulted in many arguments and occasional physical altercations. (T-III 334-38). Mr. and Mrs. Coker's problems began interfering with Mr. Coker's job and he was asked to resign from the police force in 1983. (T-III 338).

For the next several years, times were very tough for the Coker family. By 1989, Mr. Coker was not holding steady employment and the Cokers were devastated financially. (T-III 338-43). Chris Coker was extremely hyperactive and required the use of the drug Ritalin. (T-III 333-34, 400-01). Mrs. Coker was experiencing severe panic attacks. She could no longer drive or ride over bridges or overpasses or in tunnels or on elevators or escalators, and she did not like to leave the home. (T-III 336-37; Defendant's Trial Exhibit 8). The family was moving from motel to motel. They were relying on help from numerous social organizations, such as the Salvation Army, the United Way and Catholic Social Services. They frequently went without electricity and, on occasion, had to sleep in their car. (T-III 323, 342-43; T-IV 545, 557-60; Defendant Trial Exhibits 3, 4, 14-16).

Finally, approximately one year before his death, Mr. Coker obtained a full-time job with Trout Auto Parts earning approximately $10,000 per year. (Plaintiff's Trial Exhibits 21 & 23). He also was the rock of the family. He had to help control Chris, who had an I.Q. less than 80 and who was hyperactive. (T-III 333-34; T-V 612). He had to drive the family wherever they needed to go because Mrs. Coker could not drive. He was

responsible for the grocery shopping, paying the bills and taking the family to regular doctor appointments and school functions, and he was responsible for helping Mrs. Coker cope with her panic attacks and nervous condition. (T-III 353-54).

Throughout trial, Wal-Mart emphasized the Cokers' troubled past and made the family's unfortunate plight the centerpiece of its defense. In fact, Wal-Mart attempted to convince the jury that Mr. Coker was an adulterer, a spouse and child abuser and was chronically unemployed. (T-II 205; T-III 388-08, 415-40; T-IV 544-49, 552-60, 566-73). Wal-Mart's attorney even told the jury that the Coker family was better off with Mr. Coker dead, even though Wal-Mart's appellate counsel now wishes to claim that plaintiff's counsel made this statement.[3] (T-I 79-80).

Plaintiff countered each of Wal-Mart's accusations against Mr. Coker and emphasized the positive side of the Coker family. (T-III 325-87; T-IV 447-51, 549-50, 560-62; T-V 641-46). For example, plaintiff's counsel acknowledged that Mr. and Mrs. Coker had been through very tough times. They had been jobless, homeless and hungry. (T-III 323, 338-43). Yet, no matter how bad things became, they never divorced and only separated once, and that was eight years before Mr. Coker's death and only for three months. (T-III 337). Moreover, despite all the physical and mental problems Mrs. Coker and Chris Coker experienced, Mr. Coker never gave up on his family. He did not leave his family

[3]In opening statement, Wal-Mart's attorney said: "We submit to you that the overwhelming evidence on that issue [damages] will be that the Coker's situation has improved dramatically since Mr. Coker's death. And that's a sad thing to say, but that's what the evidence will show." (T-I 79-80).

and he did not turn to crime, drugs or alcohol. (T-IV 447, 559-61). In fact, the evidence overwhelmingly demonstrated that Mr. Coker was a good-hearted person and an exemplary employee who maintained a close and meaningful relationship with his family. (T-II 193, 201-02, 206-07; T-III 288-89, 352-53; T-IV 463-79, 485-92; T-V 606-17; Plaintiff's Exhibit 22).

At the time of his death, Mr. Coker was thirty-six, Mrs. Coker was forty-three, Chris Coker was eleven and Michelle Coker was nine. (T-III 330-32, 336). In 1990, Mr. Coker earned $9,835.86. (Plaintiff's Trial Exhibits 21 & 23).

During plaintiff's closing argument and rebuttal argument combined, only two objections were made by Wal-Mart, neither of which has been raised by Wal-Mart on appeal. (T-V 628-29, 687-88). During Wal-Mart's closing argument, on the other hand, the trial judge became so concerned about counsel's argument that, on her own initiative, she called Wal-Mart's counsel to the bench and informed counsel that he needed to refrain from the statements he was making. (T-V 681). While the jury was deliberating, the trial judge observed that plaintiff counsel's voice 'broke" during a discussion on damages, and again reiterated her concerns regarding Wal-Mart's closing argument, but determined that neither event had any effect on the jury. (T-V 717-18).

The jury returned a verdict finding Wal-Mart thirty-five percent legally at fault, Bonifay twenty-five percent legally at fault, Archer twenty-five percent legally at fault, Barth eight percent legally at fault, and Fordham seven percent legally at

fault. No legal fault was assessed against Bland. The jury awarded Mrs. Coker $9,000 per year in past loss of support and services, Chris Coker $3,000 per year in past loss of support and services, and Michelle Coker $2,640 per year in past loss of support and services. In regard to future loss of support and services, the jury awarded Chris $2,500 per year through age twenty-five, Michelle $2,200 per year through age twenty-five, and Mrs. Coker $7,500 per year for her life expectancy. Finally, in regard to past and future pain and suffering, the jury awarded Mrs. Coker $800,000 total and Chris and Michelle $500,000 each. (R-VI 843-47, T-IV 494).

On March 29, 1996, Wal-Mart filed a motion for new trial. (R-VI 851-54). On April 18, 1996, plaintiff filed a response thereto. (R-VII 900-10). On April 24, 1996, the day before the hearing on the motion for new trial, Wal-Mart served a memorandum in support of its motion. (R-VIII 1001-09). In its memorandum, Wal-Mart accused plaintiff's counsel of "exhibiting tears" during his closing argument and "visibly wiping his eyes and nose in the presence of the jury." Wal-Mart also claimed that the jury hugged and consoled Mrs. Coker after the verdict, commenting that "[i]t is going to be alright now." None of Wal-Mart's statements were supported by the trial transcript, affidavits or any other type of evidentiary proof, nor did Wal-Mart name the person who claimed to have first-hand knowledge of these accusations. (R-VIII 1001-09).

At the hearing on Wal-Mart's motion for new trial, plaintiff's counsel vehemently denied Wal-Mart's accusations and

challenged Wal-Mart to produce evidence to support the statements. (AA 17-19). Despite plaintiff counsel's demand, Wal-Mart's counsel did not make any statements at the hearing as to the source of the accusations, and Wal-Mart never filed any supporting evidence.

At the same post-trial hearing held April 25, 1996, the trial judge expressed concern that the jury might have been required, as a matter of law, to conclude that Bonifay was more at fault than Wal-Mart. (AA 20). The trial judge invited further briefing on this issue. As a result of the briefing, the trial judge concluded there was no case law holding, as a matter of law, that the jury was required to conclude that Wal-Mart was more responsible than Bonifay, and, therefore, the trial judge denied Wal-Mart's motion for new trial. (R-VII 934-46; A 5-6). At no time did the trial judge express an opinion or rule that the jury's apportionment of fault was against the manifest weight of the evidence.

Finally, Wal-Mart makes the following statement in its brief without supporting record citation:

> 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 train 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.

(PB 34). These statements are not only false, but also are unsupported by citations to the record. Plaintiff's counsel

never told the jury Wal-Mart was responsible for correcting juvenile crime in the United States nor did counsel state that Wal-Mart was responsible for the dramatic increase in juvenile crime. Moreover, counsel did not ask the jury for 'millions of dollars." In fact, counsel never suggested any damage figures to the jury except when discussing the amount of loss of support and services, and that figure totaled less than $1,000,000. (T-V 645-50). It was defense counsel who told the jury in opening statement that the plaintiff was seeking "millions of dollars." (T-I 71-72). Finally, as noted previously, plaintiff's counsel did not have tears in his eyes at any point during the trial, including closing argument.

SUMMARY OF ARGUMENT

I.

The names of Archer, Barth, Bonifay and Fordham, as intentional tortfeasors, should not have appeared on the verdict form, and the district court below correctly reversed the judgment apportioning fault to the intentional tortfeasors with directions to enter judgment against Wal-Mart for the full amount of the jury verdict.

II.

The issue of apportionment is moot because none of the non-party, intentional tortfeasors should have appeared on the verdict form. Moreover, the trial judge did not rule, as Wal-Mart contends, that the jury's apportionment of fault was against the manifest weight of the evidence. The trial judge ruled that there was no case law holding that an intentional tortfeasor, as a matter of law, must be found more at fault than a negligent tortfeasor. For this reason, the trial judge denied Wal-Mart's motion for new trial and effectively ruled that reasonable persons could differ on the apportionment issue. Finally, because the evidence supported an apportionment of thirty-five percent fault to Wal-Mart and a combined sixty-five percent fault attributable to the non-party wrongdoers, Wal-Mart's motion for new trial was properly denied.

III,

Plaintiff's counsel did not exhibit tears during closing argument and was not wiping his eyes and nose in the presence of

the jury as Wal-Mart contends. Likewise, members of the jury were not hugging and consoling Mrs. Coker after the verdict and telling her "[i]t is going to be alright now." While plaintiff counsel's voice apparently did "break" during a discussion on damages, this was a normal human reaction to the circumstances of this case and the trial judge expressly found that this had absolutely no impact on the jury's verdict. Moreover, Wal-Mart never objected to counsel's voice breaking until post-trial motions. Finally, the verdict was not excessive in light of the Coker family's loss.

IV.

The death of Billy Wayne Coker was clearly foreseeable in light of the fact that Wal-Mart unlawfully sold pistol ammunition on a Saturday night to two minors who appeared well under the legal age, and who had no adult supervision with them at the time of purchase. Moreover, the federal criminal law which Wal-Mart violated was specifically enacted to prevent this very act from occurring.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY REMANDED THIS CASE TO THE TRIAL COURT FOR ENTRY OF A JUDGMENT AGAINST WAL-MART FOR THE FULL AMOUNT OF THE JURY VERDICT.

In the instant case, plaintiff filed a motion in limine to prevent the names of the intentional, non-party tortfeasors from being placed on the verdict form. (R-II 114; A 7). To avoid having to retry the case on Fabre comparative fault issues, the parties stipulated that the names of all potential wrongdoers would be placed on the verdict form, with plaintiff reserving the right to challenge the issue on appeal. (R-V 668; A 7-8). Because it was foreseeable that this court could rule that the intentional, non-party tortfeasors should not have been placed on the verdict form, but negligent, non-party tortfeasors should have been included in accordance with Fabre, plaintiff submitted to the trial court a proposed verdict form which listed numerous special interrogatories to determine whether the non-party tortfeasors were intentional or negligent wrongdoers. (R-VI 774-78, A 7-8). Wal-Mart objected to the use of the verdict form, stating that it only wanted the verdict form to ask whether the non-party tortfeasors were legally at fault. (A 7-8, 14). Wal-Mart's verdict form was used. (T-V 707-11; R-VI 843-47; AA 14-15).

Subsequent to the jury rendering its verdict, the District Court of Appeal, Fourth District, held that fault should not be apportioned to non-party, intentional tortfeasors when the

intentional tort is the foreseeable consequence of the negligent tort. Slawson v. Fast Food Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996), rev. dismissed, 679 So. 2d 773 (Fla. 1997). Plaintiff immediately filed a motion to enter judgment for the full amount of the jury verdict in accordance with the Slawson decision, which the trial judge denied. (AA 6-11, 20-22). Thereafter, the District Court of Appeal, First District, issued its decision in Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996), agreeing with the Slawson decision.

Based on its decision in McDonald, the First District concluded in this case that the non-party tortfeasors (Bonifay, Archer, Fordham and Barth) should not have appeared on the verdict form and remanded the case to the trial court to enter a judgment for Coker for the full amount of the jury verdict. Wal-Mart Stores, Inc. v. Coker, 22 Fla. L. Weekly D1561, (Fla. 1st DCA June 23, 1997) ("Coker II"). It is this ruling that Wal-Mart now challenges.

The issue of whether intentional tortfeasors should be placed on the verdict form pursuant to Fabre is an issue presently pending before this court and has been well-briefed and thoroughly analyzed in the cases of Wal-Mart Stores, Inc. v. McDonald, Stellas v. Alamo Rent-A-Car, Inc., 673 So. 2d 940 (Fla. 3d DCA 1996), and Slawson v. Fast Food Enterprises. Thus, respondent will not reargue the issue in this brief. Respondent does submit, however, for the reasons that follow, that even if this court rules in the McDonald and Stellas cases that non-

party, intentional tortfeasors should appear on the verdict form, the facts of this case compel an exception to the rule.

In the instant case, Wal-Mart sold pistol ammunition to two minors at 8:39 p.m. on a Saturday night in violation of a federal criminal statute, 18 U.S.C. § 922(b)(1). As noted by the First District in Coker I, section 922(b)(1) was enacted to prevent those deemed too dangerous or irresponsible due to age, criminal background or incompetentcy from obtaining firearms and ammunition. Coker I, 642 So. 2d at 777-78.

As also stated by the United States Supreme Court in Huddleston v. United States, 415 U.S. 814 (1974):

> Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. S.Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of acre, criminal background, or incompetentcy.' S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968).

Huddleston, 415 U.S. at 824 (emphasis added). In addition, during the Senate hearings on The Gun Control Act, James V. Bennett, then Director of the Federal Bureau of Prisons, offered the following case study to vividly illustrate a situation which needed to be covered by the Act:

> 'On September 26, 1958, a 20-year-old youth shot and seriously wounded a teller during the course of a bank robbery in St. Paul; only a week previously he had bought the revolver, a .357 Smith & Wesson, in a Minneapolis sporting goods store, pawned it the same

> day, and on the day of the robbery redeemed it with money obtained from check forgeries.'

Huddleston, 415 U.S. at 826 n.7. Mr. Bennett concluded his testimony with the observation:

> 'No responsible and thoughtful citizen can, in my opinion, seriously object to measures which would discourage youngsters, the mentally ill, and criminals from coming into possession of handguns.'

Id.

Based on the foregoing, the District Court of Appeal, Third District, concluded:

> From these statements of legislative intent, it seems clear that the 'risk of harm" Congress meant to prevent [by enacting 18 U.S.C. § 922] was just the "type" of conduct which occurred in this case. The injury took place as a direct result of K-Mart's selling a "lethal weapon" to one whom Congress has determined to be incompetent to buy it just because of the dangers to "us all."

K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283, 286-87 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 487 (Fla. 1984).

Based on the foregoing, it is clear Congress enacted 18 U.S.C. § 922(b) (1) to prevent the exact type of harm which occurred in this case. Wal-Mart violated this criminal statute when it sold the pistol ammunition to two minors at 8:39 p.m. on a Saturday night. Because of the severity of the consequences of violating this criminal statute, it should be against public policy for Wal-Mart to benefit from having the non-party minors placed on the verdict form. Cf. Kitchen v. K-Mart Corp., 22 Fla. L. Weekly S435 (Fla. July 17, 1997). For this reason, even if the court rules in Stellas and McDonald that intentional

tortfeasors should be placed on the verdict, this case should be an exception.

Based on the foregoing, the district court's opinion should be approved and the trial court should enter a judgment against Wal-Mart for the full amount of the jury verdict.

II.

THE JURY'S APPORTIONMENT OF FAULT WAS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Wal-Mart contends that the jury's apportionment of thirty-five percent fault to Wal-Mart and twenty-five percent fault to Bonifay was against the manifest weight of the evidence. In fact, in its brief, Wal-Mart repeatedly asserts that the trial judge determined that no reasonable jury could have found Wal-Mart more culpable than Bonifay. (PB 2, 10, 12, 29, 31, 34-35). This is not a correct statement of the trial judge's conclusions.

The trial judge initially was concerned whether, as a matter of law, the jury was required to determine that Bonifay was more responsible than Wal-Mart because Bonifay was an intentional tortfeasor and Wal-Mart was a negligent tortfeasor. (AA 20; R-VII 934-946). The trial judge invited the attorneys to submit additional briefs on this specific issue. As a result of the supplemental briefing, the trial judge concluded there was no case law holding that, as a matter of law, the jury was required to determine that Bonifay was more responsible than Wal-Mart, and thus the trial judge denied Wal-Mart's motion for new trial. (R-VII 943-46; A 5-6). The trial judge never expressed the opinion that the jury's apportionment of fault was contrary to the

manifest weight of the evidence, and, in fact, by denying Wal-Mart's motion for new trial, the court necessarily concluded that reasonable persons could differ on the apportionment issue.

Even if Wal-Mart were correct that the jury was required, as a matter of law, to find Wal-Mart less culpable than Bonifay, Wal-Mart waived this potential error by not requesting a jury instruction on this issue. Specifically, the jury was instructed, without objection from Wal-Mart, as follows:

> If, however, the greater weight of the evidence shows that Wal-Mart Stores, Inc., Robin Archer, Clifford Barth, Kelly Bland, Patrick Bonifay and/or Larry Fordham, Jr. were at fault and that such fault contributed as a legal cause of the death of the decedent, Billy Wayne Coker, then you should determine and write on the verdict form what percentage of the total fault is chargeable to each.

(T-V 699-700). This charge did not instruct the jury to apportion a lower percentage of fault to Wal-Mart than to Bonifay. Likewise, the verdict form submitted by Wal-Mart and given to the jury did not require the jury to assign a lower percentage of fault to Wal-Mart than to Bonifay; the verdict form merely required the percentage of fault for all wrongdoers to total one hundred percent, (T-V 707-11; R-VI 843-47; AA 14-15). Therefore, if Wal-Mart is claiming that the jury had to conclude, as a matter of law, that Bonifay was more responsible than Wal-Mart for Coker's death, Wal-Mart waived its rights by failing to object to the jury instruction and verdict form. See Rosario v. Melvin, 446 So. 2d 1158, 1159-60 (Fla. 2d DCA 1984); Reeser v. Boats Unlimited, Inc., 432 So. 2d 1346, 1349 (Fla. 4th DCA 1983);

Gould v. National Bank of Fla., 421 So. 2d 798, 802 (Fla. 3d DCA 1982) .

If the issue of apportionment is not moot and Wal-Mart did not waive its rights, the issue for this court is whether the jury's apportionment of fault was against the manifest weight of the evidence. When making this determination, the court should consider that a jury verdict is cloaked with a presumption of validity, and any party seeking a new trial has a heavy burden in attempting to overturn that verdict. See Sweet Paper Sales Corp. v. Feldman, 603 So. 2d 109, 110 (Fla. 3d DCA 1992); Gould, 421 So. 2d at 802. To determine whether a jury verdict should be set aside and a new trial granted, the issue is whether a jury of reasonable persons could have returned the verdict in question. See Griffis v. Hill, 230 So. 2d 143, 145 (Fla. 1969). The trial court's decision whether to grant a new trial is reviewed by the appellate court under the familiar abuse of discretion standard. "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Baptist Memorial Hosp. Inc. v. Bell, 384 So. 2d 145, 146 (Fla. 1980).

The province of the jury should not be invaded simply because a judge would have reached a verdict which differed from that of the jury. Fetzer v. Cox, 638 So. 2d 164, 165 (Fla. 1st DCA), rev. dismissed, 649 So. 2d 232 (Fla. 1994). Stated differently, a judge is not permitted to serve as a 'seventh juror" with veto power. See McNair v. Davis, 518 So. 2d 416, 418 (Fla. 2d DCA 1988). A verdict is against the manifest weight of the evidence

only if it is "clear, obvious and indisputable that the jury was wrong." Lee v. Southern Bell Telephone and Telegraph Co., 561 SO. 2d 373, 380 (Fla. 1st DCA), rev. dismissed, 570 So. 2d 1306 (Fla. 1990).

Apportioning fault among tortfeasors, like apportioning liability between parties, is the function of the jury and is rarely an issue for the court. Rowlands v. Signal Construction. Co., 549 so. 2d 1380, 1383 (Fla. 1989) ("the apportioning of liability is a matter peculiarly within the province of the jury. Indeed, the role of the jury is of even greater importance now, since the adoption of comparative negligence. . . . [T]he new trial may not be granted merely because the trial court disagrees with the percentages."); John Sessa Bulldozing, Inc. v. Pasadosoulos, 485 So. 2d 1383, 1386 (Fla. 4th DCA 1986) (apportionment of negligence is peculiarly within the province of the jury. "The trial court's finding that appellee could have been found fifty percent negligent but not seventy percent negligent was arbitrary."); Bialek v. Lensen, 421 So. 2d 654, 656 (Fla. 1st DCA 1982); Petroleum Carriers v, Gates, 330 So. 2d 751, 752 (Fla. 1st DCA 1976).

In the instant case, the jury concluded that Wal-Mart was thirty-five percent (approximately one-third) responsible for the death of Coker and that the non-party criminal tortfeasors were a combined sixty-five percent (approximately two-thirds) responsible for the death of Coker. In regard to apportionment of fault, Wal-Mart had the burden of proof. Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262, 1264 (Fla. 1996). As to

the issue of apportionment, Wal-Mart never provided the jury with any meaningful evidence as to why Bonifay shot Coker. In fact, the jury heard several possible reasons, including that Archer threatened to kill Bonifay's family if Bonifay did not shoot the Trout Auto Parts employee. (T-IV 540–41). The jury also heard Archer assert his constitutional right to remain silent as to whether he ordered Bonifay to commit the crime. (T-IV 540). Moreover, based upon the videotape deposition which Wal-Mart introduced in evidence, the jury knew that Archer was sentenced to death for this crime, yet Archer was not present at the scene of the killing. (T-IV 538-43). Thus, Wal-Mart left the jury with the impression that Archer must have done something shockingly heinous to receive the death sentence.

Because Wal-Mart did not present the jury with any meaningful evidence as to why Bonifay killed Coker, the jury had no way to determine whether Bonifay was a cold-blooded killer or whether he was a seventeen-year old kid in fear of Archer killing his family. Based on the evidence, the jury made a logical determination-- it determined that Archer and Bonifay were a combined fifty percent at fault for the death of Coker, concluding that the combined fault of Archer and Bonifay was greater than the fault of Wal-Mart.

Wal-Mart argues that plaintiff's counsel reneatedlv recommended to the jury that Bonifay be held ‘most responsible" and that the jury was bound by counsel's recommendation. (PB 2, 7, 12, 29, 31, 34). Contrary to Wal-Mart's contention, counsel did not repeatedly make such a recommendation to the jury. In

fact, on only one occasion did counsel suggest to the jury that Bonifay 'should be the most responsible," and counsel concluded by recommending to the jury that "Wal-Mart and Bonifay should be the most liable when you determine on that verdict form how to split up damages." (T-V 641) (emphasis added). The jury essentially followed counsel's last recommendation. In any event, even if counsel clearly recommended finding Bonifay more culpable than Wal-Mart, the jury had the right to disregard counsel's recommendation and draw its own conclusions from the evidence. See Rudv's Glass Construction Co. v. Robins, 427 So. 2d 1051, 1053 (Fla. 3d DCA 1983) (jury can award more money than plaintiff's lawyer recommends); Lopez v. Cohen, 406 So. 2d 1253, 1256 (Fla. 4th DCA 1981) (same).

Moreover, based on the following facts, the jury's determination that Wal-Mart was one-third at fault in causing the death of Coker was clearly a reasonable determination. The evidence showed that Wal-Mart operated over 1,500 stores selling ammunition in January of 1991 and was possibly the largest retailer of ammunition in the country. (T-II 231-32). Wal-Mart, however, had no requirement regarding the background of its ammunition sales personnel other than that the sales clerks had to be twenty-one years of age or older. There was no requirement for past firearm or ammunition experience. (T-IV 509). Wal-Mart's ammunition sales training was limited to a training video and a pamphlet outlining federal regulations governing firearms and ammunition and simple instructions to sales personnel that a customer had to be eighteen years of age or older to purchase

rifle ammunition and twenty-one years of age or older to purchase pistol ammunition with the sales clerks reserving the right to request identification. (T-II 234, 238-39; T-IV 513-22).

Kenneth Powell, the probable sales clerk, had not even seen the training video, (T-II 235). Wal-Mart provided no documentation to the sales clerks to help them distinguish between pistol and rifle ammunition, and, therefore, inexperienced clerks were unable to determine whether ammunition was for a pistol or rifle, and clerks were sometimes incapable of knowing how old the purchaser had to be to purchase various ammunition under federal law. (T-II 242-45, 527). In fact, Janice Lawson, Wal-Mart's head firearms trainer at the subject store, thought 9 mm ammunition was rifle ammunition. (T-IV 501-03, 523). In actuality, 9 mm ammunition is primarily pistol ammunition, and, therefore, a person must be twenty-one years of age or older to legally purchase the ammunition. (T-II 255-56). The fact that Lawson was the chief trainer at the subject Wal-Mart store, and that she herself could not distinguish between pistol and rifle ammunition, was devastating to Wal-Mart on the issue of apportionment. As the trial judge stated at the post-trial hearing: "Mrs. Lawson's testimony from the court's perception was very detrimental to Wal-Mart because of her argumentative nature to Mr. Levin and because what Mr. Levin said about the 9 mm." (AA 21).

In the ultimate analysis, Wal-Mart employed a twenty-two year old sales clerk with no prior gun experience and permitted him to sell pistol ammunition on a Saturday night at nine o'clock with

no co-employee or supervisor present who was knowledgeable about the sale of firearms and ammunition. (T-II 247-49; Plaintiff's Trial Exhibit 12). The sales clerk had been working in the department for only seven months and did not know enough about ammunition to understand whether he was selling pistol ammunition or rifle ammunition.[4] Also, the evidence supported the conclusion that Lawson lied on the witness stand regarding Wal-Mart's training procedures, and Lawson clearly highlighted Wal-Mart's reckless training procedures when she testified she did not know that 9 mm ammunition could be used in a pistol. (T-II 513-23; AA 21). In addition, not only did Wal-Mart sell the ammunition to Bonifay and Fordham, but Wal-Mart sold the pistol ammunition on a Saturday at approximately 9:00 p.m. to two minors who appeared well under twenty-one years of age, and who had no adult supervision with them. (T-II 161, 226; T-V 663; Plaintiff's Trial Exhibit 4). Even more incredible, Wal-Mart handed the ammunition to Bonifay, who was seventeen years old, and thus was not old enough to purchase any type of ammunition--whether pistol or rifle. (T-II 127). Finally, Wal-Mart committed a criminal act when it violated the federal statute controlling the sale of pistol ammunition, which was specifically enacted to prevent the sale of ammunition to minors and prevent criminal acts resulting in the death of innocent persons. Coker I, 642 So. 2d at 777-78.

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[4] One version of the evidence raised the possibility that someone other than Powell sold the ammunition, and, if this occurred, the actual sales person had absolutely no training in the sale of firearms and ammunition. (T-II 247-49; T-IV 529-30; Plaintiff's Trial Exhibit 12).

Juvenile violence with firearms was, and is, one of the biggest problems facing this country. (T-II 229). Wal-Mart, as the nation's largest retailer of ammunition, had the duty to implement proper and adequate training procedures to prevent pistol ammunition from being sold to minors in its stores. Wal-Mart's policies and procedures, however, were so haphazard and incompetent that it was a virtual certainty that Wal-Mart would sell pistol ammunition to juveniles.[5] If Wal-Mart had instituted proper training procedures and had not committed a federal crime by selling pistol ammunition to two minors on a Saturday night at nine o'clock, Coker would still be alive. In fact, the evidence was unrefuted that had Wal-Mart not sold the ammunition to Bonifay and Fordham, the minors would have had no other place to obtain ammunition that night, and, therefore, Coker would still be alive, since he was simply substituting for a sick employee that one night and would have returned to his regular store the next day. (T-II 131, 190-92, 216, 226; T-IV 535, 543).

In Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996), the First District noted that:

> Reducing the responsibility of a negligent tortfeasor by allowing that tortfeasor to place the blame entirely or largely on the intentional wrongdoer would serve as a disincentive for the negligent tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring.

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[5]The trial judge granted Wal-Mart's motion in limine preventing plaintiff from mentioning the fact that other minors had been sold firearms and ammunition at Wal-Mart stores throughout the country, including the subject Wal-Mart store. (R-III 267, 388; T-V 670, 690).

Id. at 21-22. The jury understood the court's concern. In fact, based on the facts of this case, Wal-Mart should feel relieved the jury concluded that Wal-Mart's legal fault was thirty percent lower than the combined fault of the non-party criminal tortfeasors. Not only was this a reasonable decision based on the circumstances, the jury's apportionment also was more favorable to Wal-Mart than the jury's apportionment of fault in similar cases. For example, in Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), approved, 666 So. 2d 140 (Fla. 1996), the Department of Corrections was sued because it negligently permitted two inmates to escape from prison. As fugitives, the two inmates killed an innocent person. The jury found the Department of Corrections fifty percent responsible for the death and found the two murderers each twenty-five percent responsible. McGhee, 653 So. 2d at 1099 n.9. Apparently, the jury's apportionment of liability did not raise a judicial eyebrow, as the apportionment was not questioned in the majority opinion or dissenting opinion.

In addition to the McGhee verdict, there have been California cases where the jury made similar findings. In Rosh v. Cave Imasins Services Inc., 26 Cal. App. 4th 1225, 32 Cal. Rptr. 2d 136 (Cal. Ct. App. 1994), the court declined to disturb a jury's apportionment of twenty-five percent fault to an assailant who deliberately shot the plaintiff and seventy-five percent fault to a private security company which negligently failed to protect the plaintiff. The court's holding was based in part upon the circumstance that the security company was in the business of

providing protection against criminal activity and had undertaken to provide security for the plaintiff. This is similar to the instant case where the Gun Control Act imposes a duty on firearm dealers not to sell firearms and ammunition to minors because minors are too immature to deal with the emotions and pressures arising from possession of a handgun. Huddleston v. United States, 415 U.S. 814, 824 (1974).

In Scott v. County of Los Ancreles, 27 Cal. App. 4th 125, 32 Cal. Rptr. 2d 643 (Cal. Ct. App. 1994), the County of Los Angles and a case worker were sued for negligent supervision of a foster child in the home of the child's grandmother who intentionally placed the child's legs in scalding water, and for which the grandmother was imprisoned for child abuse and corporal injury to a child. The jury concluded the grandmother was one percent responsible, and the county and social worker were a combined ninety-nine percent responsible. The court reviewed the decision applying a manifest weight standard and concluded the verdict was inappropriate and resulted from a flawed verdict form. However, the court noted that it would have been willing to approve a verdict finding a greater percentage of responsibility on the negligent tortfeasors than on the intentional tortfeasor and suggested it would have approved seventy-five percent combined fault on the county and social worker and twenty-five percent fault on the grandmother. Id. at 655 & n.16.

Finally, Wal-Mart is seeking a new trial on all issues based solely on the jury's apportionment of fault. Even if the court

were to conclude that the apportionment of fault was against the manifest weight of the evidence, a new trial should be granted on the apportionment issue only and not on Wal-Mart's liability or damages. The jury in the instant case determined that Wal-Mart was legally at fault for Coker's death. This finding was clearly supported by the evidence. In fact, Wal-Mart itself admits it sold the ammunition in violation of a federal criminal statute and that the evidence supported a jury verdict of liability against Wal-Mart. (PB 1, 14-15, 28, 31). Thus, a retrial on liability or damages should not be required. See Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996) (granting a new trial on liability and apportionment only, and not damages, where a non-party tortfeasor did not appear on the verdict form); Shufflebarger v. Galloway, 668 So. 2d 996 (Fla. 3d DCA 1996) (en banc) (granting a new trial on apportionment, but not liability or damages, where court failed to place a non-party tortfeasor on the verdict form); Aymes v. Automobile Ins. Co. of Hartford, 658 SO. 2d 1246 (Fla. 4th DCA 1995) (granting a new trial on apportionment, but not liability, where court failed to place a non-party tortfeasor on the verdict form); Ashraf v. Smith, 647 so. 2d 892 (Fla. 3d DCA 1994) (granting a new trial on apportionment, but not liability or damages, where court failed to place a non-party tortfeasor on the verdict form), rev. denied, 658 So. 2d 989 (Fla. 1995); Scott, 27 Cal. App. 4th at 155, 32 Cal. Rptr. 2d at 660 (granting a new trial on

apportionment only where jury apportioned more fault to the negligent tortfeasors than to the intentional tortfeasor).

III.

THE VERDICT WAS NOT AFFECTED BY PASSION, SYMPATHY OR PREJUDICE NOR WAS THE VERDICT EXCESSIVE.

Wal-Mart claims that plaintiff's closing argument was extremely emotional. Without any supporting evidence, Wal-Mart states that counsel for plaintiff "exhibited tears" and was "visibly wiping his eyes and nose in the presence of the jury." (PB 8, 36). Wal-Mart also contends that members of the jury hugged and consoled Mrs. Coker commenting that "[i]t is going to be alright now." (PB 36). These accusations originated in Wal-Mart's post-trial memorandum of law (R-VIII 1001-09). At the hearing on Wal-Mart's motion for new trial, plaintiff vehemently denied and challenged Wal-Mart to produce evidence to support its statements. (AA 17-19). Despite plaintiff's demands, Wal-Mart's counsel did not make any statements at the hearing as to the source of the accusations and never filed any corroborating evidence. Additionally, the trial judge would not support Wal-Mart's accusations and stated on the record: "[w]ell, there's some representations made in the memorandum on that. I made my findings about what I saw [counsel's voice 'broke']. And that's--I made it as thorough as I could." (AA 22).

Wal-Mart again repeated these unsubstantiated accusations in the district court of appeal, and, incredibly, again has repeated the false allegations in this court without providing any record support. Because there is no supporting evidence in the record

other than Wal-Mart's memorandum of law, Wal-Mart's accusations of attorney impropriety should not be considered by this court. See Lanahan Lumber Company, Inc. v. McDevitt & Street Co., 611 So. 2d 591, 592 (Fla. 4th DCA 1993) ("Factual matters originating in a memorandum of law are 'unproven utterances documented only by an attorney [and] are not facts that a trial court or [appellate] court can acknowledge.'"),

Further, even if Wal-Mart's accusations were supported by the record, it is absolutely undisputed that Wal-Mart never made any type of objection during trial to the effect that plaintiff's counsel was exhibiting emotion and, therefore, Wal-Mart has waived its right to seek a new trial on this issue. See White Construction Co., Inc. v. Dupont, 455 So. 2d 1026, 1030 (Fla. 1984) (in the absence of fundamental error, new trial cannot be granted based on allegedly inflammatory closing argument when no timely objection has been made by opposing counsel); Hagen v. Sun Bank of Mid-Florida, N.A., 666 So. 2d 580 (Fla. 2d DCA 1996) (to preserve improper argument or conduct of opposing counsel for review, contemporaneous objection must be made and, if sustained, followed by a motion for mistrial); Norman v. Gloria Farms, Inc., 668 So. 2d 1016 (Fla. 4th DCA), rev. denied, 680 So. 2d 422 (Fla. 1996).

Moreover, the following remarks made by the trial judge clearly indicate that nothing occurred during trial that prevented the jury from basing its verdict solely on the evidence:

> This jury was extremely attentive. And whenever I caught one juror only possibly nodding off, and you know I did my judicial calisthenics, she came back and she was fine. And I never let it go on for more than two nods before she came back. But she was very attentive, as were all the other jurors. I never saw on any of the jurors' faces any response to the evidence other than a response that one would normally expect when we're dealing with children issues. It just is so. They smiled and all on any testimony about the children. And that, one would expect. But otherwise, I never saw any reaction that would indicate that the arguments and the approaches the attorneys were taking were having an effect on the jurors beyond what they should have.

(T-V 717-18).

More important, the jury verdict was totally consistent with the evidence, and, in fact, the trial court expressly found that 'the verdict is not extraordinary, based upon the issues." (A 5). Specifically, Mr. Coker was earning $10,000 per year at the time of his death. (Plaintiff's Trial Exhibits 21 & 23). Additionally, he provided substantial services to his family by furnishing all the family transportation, including the grocery shopping, paying the bills, taking the children to school functions, and taking the family to doctor appointments. (T-III 353-54). Also, Mr. and Mrs. Coker had been through very tough times. They had been jobless, homeless and hungry. Yet no matter how bad things were, they never divorced and only separated once and that was eight years before Mr. Coker's death and only for three months. (T-III 337). Before Mr. Coker's death, Mrs. Coker had such severe psychological problems that she could not work, drive, travel over bridges or overpasses or in tunnels or ride in elevators or on escalators. (T-III 337; Defendant's Trial Exhibit 8). Moreover, Mr. Coker's son, Chris,

was extremely hyperactive and needed to be controlled on Ritalin and had an I.Q. less than 80. (T-V 612).

Despite these adversities, Mr. Coker never gave up on his family. He did not leave his family and he did not turn to crime, drugs or alcohol. He was trying his best to make an honest living and to provide for his family. In fact, the evidence overwhelmingly demonstrated that Mr. Coker was a good-hearted person and an exemplary employee who maintained a close and meaningful relationship with his family. (T-II 193, 201-02, 206-07; T-III 288-89, 352-53; T-IV 463-79, 485-92; T-VI 606-17; Plaintiff's Trial Exhibit 22). After his death, Mrs. Coker and Chris Coker had to increase their psychological sessions, and Michelle had to see a psychologist for the first time in her life. (T-V 606; Defendant Trial Exhibits 8 & 9).

Based on this evidence, an award of $800,000 in past and future pain and suffering for Mrs. Coker and $500,000 each for Chris and Michelle Coker was clearly reasonable. In fact, each of these pain and suffering awards is less than the average verdict per survivor in a wrongful death action in Florida. See Gravson v. United States, 748 F. Supp. 854, 862-66 (S.D. Fla. 1990), rev'd in part, vacated in part, 953 F.2d 650 (11th Cir. 1992); Williams v. United States, 681 F. Supp. 763, 764-66 (N.D. Fla. 1988).

Similarly, the evidence supported the jury's conclusion that Sandra Coker's past loss of support and services totaled $9,000 per year, Chris Coker's was $3,000 per year and Michelle Coker's was $2,640 per year. Likewise, the evidence supported the jury's

conclusion that Chris's future loss of support and services is $2,500 per year through age twenty-five, Michelle's future loss of support and services is $2,200 per year through age twenty-five, and Mrs. Coker's future loss of support and services is $7,500 per year through her natural life. These awards are supported specifically by evidence indicating that Mr. Coker was earning $10,000 per year at the time of his death and was the family's sole source of transportation, including grocery shopping, paying bills, school functions, clothing shopping and doctor appointments. For example, the family's taxi bills for the five-year period after Mr. Coker's death totaled approximately $8,550 just for doctor visits, and this did not include the more than fifty doctor visits which the family missed because they could not afford a taxi, totaling approximately $1,500 more. (T-III 364-68). The trial judge herself noted that 'the economics in here are supported by the evidence." (AA 21).

During its deliberations, the jury was attentive enough to realize that no evidence was presented regarding Bland's knowledge of the murder and, in fact, submitted a jury question recognizing this point. (T-V 720-21). The jury assigned specific and individualized percentages of fault to Wal-Mart and the other participants and did not simply divide fault evenly. The jury assigned individualized amounts of loss of support and services, assigning Mrs. Coker $9,000 per year in the past, Chris Coker $3,000 per year in the past and Michelle Coker $2,640 per year in the past. Similarly, in regard to future loss of support and services, the jury assigned Chris Coker $2,500 per year

through age twenty-five, Michelle $2,200 per year through age twenty-five, and Mrs. Coker $7,500 per year through her natural life. These figures demonstrate that the jury was perceptive enough to realize that Chris Coker was in need of more support and services than Michelle Coker because of his hyperactivity and low I.Q.

Based on the foregoing, the verdict was amply supported by the evidence and the trial court correctly denied Wal-Mart's motion for new trial on damages.

IV.

THE KILLING OF BILLY WAYNE COKER WAS NOT AN UNFORESEEABLE, SUPERSEDING, INTERVENING CRIMINAL ACT.

Finally, Wal-Mart contends that Bonifay's act of killing Coker was an unforeseeable, superseding, intervening criminal act, and that Wal-Mart, therefore, was entitled to a judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict is decided on the same basis as a motion for directed verdict. In regard to these two motions, the trial court should not pass on the credibility of witnesses or weigh the evidence. The evidence and all reasonable inferences derived therefrom must be viewed in the light most favorable to the non-moving party, and all conflicts must be resolved in favor of the non-moving party. Only where there is no evidence upon which a jury could properly rely in finding for the non-moving party should a directed verdict be granted. A directed verdict, or a subsequent motion for judgment, is improper if there is any evidence to support a verdict for the non-movant. Hooper v.

Barnett Bank of West Fla., 474 So. 2d 1253, 1257 (Fla. 1st DCA 1985), approved, 498 So. 2d 923 (Fla. 1986).

Wal-Mart contends that a directed verdict should have been granted on the issue of foreseeability. However, this issue was previously addressed by the district court in this very case. In Coker I, the district court noted that 18 U.S.C. § 922(b)(1) was enacted to help prevent firearms from being easily obtained and to help curb the prevalence of violent crime. Specifically, the district court concluded that the purpose of 18 U.S.C. § 922(b)(1) was to prevent those deemed too dangerous or irresponsible due to age, criminal background or incompetency from obtaining firearms and ammunition. Coker I, 642 So. 2d at 777-78.

Quoting from previous precedent, the district court wrote:

> Since the irresponsibility and unpredictability of the recipient was the very reason that Congress forbade such a transfer of the firearm, it can make no difference that the danger was actually realized, as it almost invariably must be, in what would in other contexts be deemed an unanticipated manner.
>
> > The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.
>
> One who gives matches to a pyromaniac can hardly claim that it could not be exactly foreseen what or whom he might harm or in what strange manner or how long it might take him to light the fire.

Id. at 778 (citations omitted). Based on the foregoing, the district court ruled that Bonifay's act of intentionally killing Coker was not unforeseeable, as a matter of law, and that foreseeability was a jury issue.[6] Id.

The issue on appeal is whether Wal-Mart could reasonably have foreseen that selling pistol ammunition to two minors, without adult supervision, at nine o'clock on a Saturday night would lead to someone being shot. In McCain v. Florida Power Corporation, 593 So. 2d 500 (Fla. 1992), this court held that it is not necessary that the exact nature and extent of injury, or the precise manner of its occurrence, be foreseen. Id. at 502-03. The wrongdoer is relieved of liability only when the injury is caused by "a freakish and improbable chain of events." Id. at 503-04. Issues such as intervening cause and comparative negligence are merely questions for the fact-finder and do not relieve the defendant of its duty as a matter of law. Id. at 504.

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[6]The following is a list of other courts which have recognized a breach of duty and proximate causation when a retailer has sold a gun or ammunition in violation of 18 U.S.C. § 922(b)(1) or state statute. King v. Story's, Inc., 54 F.3d 696 (11th Cir. 1995); Decker v. Gibson Products Co. of Albany, Inc., 679 F.2d 212 (11th Cir. 1982); Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (3d Cir. 1979); Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532 (S.D. Ga. 1995); Sogo v. Garcia's National Gun, Inc., 615 So. 2d 184 (Fla. 3d DCA 1993); Rubin v. Johnson, 550 N.E.2d 324 (Ind. Ct. App. 1990); Crown v. Ravmond, 159 Ariz. 87, 764 P.2d 1146 (Ariz. Ct. App. 1988); K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. 3d DCA 1983), rev. denied, 450 So. 2d 487 (Fla. 1984); Franco v. Bunvard, 261 Ark. 144, 547 S.W.2d 91 (Ark. 1977), cert. denied, 434 U.S. 835 (1977).

Since the Supreme Court's ruling in McCain, and the district court's ruling in Coker I, this court and the district courts of appeal have decided several cases regarding the foreseeability of intentional torts. For example, in Kitchen v. K-Mart Corporation, 22 Fla. L. Weekly S435 (Fla. July 17, 1997), this court held that K-Mart could be held liable for selling a firearm to an intoxicated individual who later intentionally shot and seriously injured a third person. Similarly, in Wal-Mart Stores, Inc, v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996), the district court upheld a verdict against Wal-Mart for the foreseeable, intentional shooting of a customer in a negligently secured parking lot. Also, in White v. Whiddon, 670 So. 2d 131 (Fla. 1st DCA 1996), the district court held that a minor's intentional act of committing suicide while detained in the back of a police vehicle was not an independent intervening cause as a matter of law. The court noted that the act was not so "'highly unusual, extraordinary, [or] bizarre' as to be 'beyond the scope of any fair assessment of a danger created by the defendant's negligence.'" Id. at 134, citing Kowkabanv v. Home Depot. Inc., 606 So. 2d 716 (Fla. 1st DCA 1992). Also, in Hardv v. Pier 99 Motor Inn, 664 So. 2d 1095 (Fla. 1st DCA 1995), the district court held that a patron at a hotel had the right to state a claim against the hotel for the intentional criminal act of a third person in stabbing the patron in a parking lot. Specifically, the court stated: "Unquestionably, appellant's injuries were caused by the intervening acts of Stallings. But Pier 99 is not relieved of liability by this intervening act as a

matter of law unless Stallings' criminal act was unforeseeable." Id. at 1098.

In addition to the foregoing, there have been numerous cases decided by the district courts holding that a negligent tortfeasor can be held liable for the intentional criminal acts of another person. See Foster v. PO Folks, Inc., 674 So. 2d 843 (Fla. 5th DCA 1996); Tallahassee Furniture Co. v. Harrison, 583 so. 2d 744 (Fla. 1st DCA 1991), rev. denied, 595 So. 2d 558 (Fla. 1992); Williams v. Bumpass, 568 So. 2d 979 (Fla. 5th DCA 1990); Coral Gables Federal Savinss & Loan v. City of Opa-Locka, 516 So. 2d 989 (Fla. 3d DCA 1987), rev. denied, 528 So. 2d 1181 (Fla. 1988) ; Carlisle v. Ulysses Line, 475 So, 2d 248, 251 (Fla. 3d DCA 1985) ; Patterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985), rev. denied, 484 So. 2d 8 (Fla. 1986); Angell v. F. Avanzini Lumber Co., 363 So. 2d 571 (Fla. 2d DCA 1978).

The issue of foreseeability in the instant case is more compelling than any of the previously cited cases because the very reason 18 U.S.C. § 922(b) (1) was enacted was to prevent the type of harm which occurred in this case. As stated by the United States Supreme Court in Huddleston v. United States, 415 U.S. 814 (1974):

> Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. S.Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). The principal purpose of the federal gun control legislation, therefore, was to curb crime by keening 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or

> incompetentcy.' S.Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968).

Huddleston, 415 U.S. at 824 (emphasis added).

Proximate causation was even more clear in this case because the evidence was unrefuted that Bonifay and Fordham had no ammunition on Saturday night and that neither Bonifay nor Fordham was able to acquire .32 pistol ammunition from any other source in time to get to Trout Auto Parts before midnight. (T-II 131, 215-16, 226; T-IV 535, 543). Bonifay and Fordham obviously knew no other place where ammunition could be obtained, or else they would not have gone to two separate stores at nine o'clock at night to purchase it, especially when Bonifay and Fordham had to borrow the money from Barth in order to make the purchase. (T-II 126). Further, Fordham and Bonifay needed .32 ammunition, which is one of the rarest pistol ammunitions sold. Gulf Breeze Pistol Parlor, the largest seller of firearms in the Pensacola area, only sells one pack of .32 ammunition a week, and K-Mart did not even have any in stock. (T-II 253-54). The evidence thus clearly demonstrated that had Wal-Mart not sold the ammunition, it was highly improbable that Bonifay and Fordham would have acquired .32 ammunition in time to have arrived at Trout Auto Parts before midnight when the store closed. Therefore, Coker would still be alive because he would not have been working at that store any other night. (T-II 190-92).

Based on the foregoing, the trial court correctly denied Wal-Mart's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

CONCLUSION

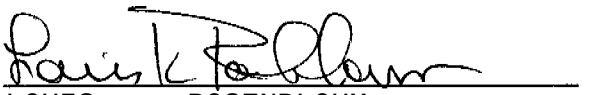
The circumstances surrounding the death of Mr. Cokes are extremely tragic. A disgruntled employee wanted to kill a former co-employee and persuaded his seventeen-year old cousin to commit the murder, possibly by threatening the life of the minor's family. The minor borrowed a gun and convinced an eighteen-year old friend to purchase the ammunition.

Wal-Mart's training procedures regarding the sale of ammunition were so haphazard that it was a virtual certainty that Wal-Mart would sell pistol ammunition to minors in violation of federal law. As a result, two minors walked into Wal-Mart without adult supervision on a Saturday night near closing time and were unlawfully sold pistol ammunition without anyone asking their ages or checking for identification. Within three hours, they shot and killed Billy Wayne Coker, leaving a psychologically disturbed wife, a mentally deficient eleven-year old son, and a nine-year old daughter.

Based on the foregoing, the jury's apportionment of fault was not contrary to the manifest weight of the evidence, nor was the award of damages the product of passion, sympathy, prejudice or any extraneous force. Additionally, Coker's death was the readily foreseeable consequence of Wal-Mart's unlawful sale of ammunition and the trial court justifiably denied Wal-Mart's motion for judgment notwithstanding the verdict. Finally, the names of the non-party tortfeasors should not have been placed on the verdict form, and judgment should be entered for plaintiff

for the full amount of the damage award.

Respectfully submitted:



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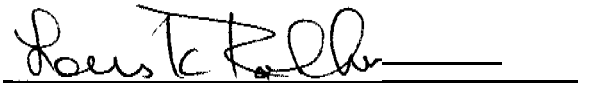
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to RICHARD A. SHERMAN, ESQUIRE, Richard A. Sherman, P.A., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316, attorney for petitioner; and JEFFREY P. GILL, ESQUIRE, Bridgers & Gill, 121 South Palafox St., Suite A, Pensacola, Florida 32501, attorney for petitioner, by mail, this 9th day of October, 1997.



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