017

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,916

Florida Bar No. 184170

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

Petitioner,

vs.

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

Respondent.

FILED
SID J. WHITE
OCT 31 1997
CLERK, SUPREME CO
By
Chief Deputy Clerk

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

REPLY 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
Rosemary B. Wilder, 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

TABLE OF CONTENTS

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

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

REPLY ARGUMENT

The incredible arguments made on appeal, to justify the jury's assessment of more liability on Wal-Mart then the premeditated murderer, are patently frivolous and contrary to even the Record cites the Plaintiff relies on. This is simply a weak attempt by the Plaintiff to uphold the Jury's Verdict, which unquestionably was contrary to the manifest weight of the evidence, finding Wal-Mart more liable than Bonifay, who knowingly shot a different man, Coker, four times as he begged for his life; once in the back, once in the chest; and then twice in the head. The judge recognized this when she viewed the liability assessment as contrary to both the facts at trial and the law:

> THE COURT: Counsel, I will tell you that after the verdict was rendered, I wondered and I still don't know whether or not as a matter of law the shooter could be less responsible than the person who provided the ammunition when there were no egregious facts about that purchase. It was a straightforward purchase. And I mean egregious by Wal-Mart being put on notice that something awful was going to happen. And the argument was based upon the evidence that they just didn't have proper procedures.
>
> And that's the way everyone argued that there wasn't anything else.
>
> (H 4/25/96, 20).

The Plaintiff is also wrong when she claims that there is no Record evidence regarding her lawyer crying during closing argument. The attorney just said he did not remember crying, or wiping tears away; and said he always brings a handkerchief to closing arguments to cry into, so the jury would not see his

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

emotion (H 4/25/96, 17-18). The judge verified in the transcript the emotion of the Plaintiff's attorney and she specifically heard his voice break when this occurred (T 718). Furthermore, the judge acknowledged that there was an emotional display on the part of Mr. Levin in closing, but expressly ruled that it was canceled out by defense counsel's remarks in his closing, but she did not rule that the emotion was not shown (H 4-5).

More importantly, the Plaintiff continues to try and convince this Court that Wal-Mart deserved to be held more liable, because it told the jury that the Coker family was better off with Mr. Coker being dead, citing T 79-80. This is a clear mischaracterization of Wal-Mart's statement in opening; and this was used again to inflame the jury, when it was repeated by the Plaintiff in her closing. Rather, what Wal-Mart pointed out to the jury in opening, was simply, that all the extreme alleged evidence of extensive damages, the Plaintiff and her children were seeking, was not as the Plaintiffs portrayed; but rather their financial situation had improved dramatically, as did their physical conditions; and at no time did Wal-Mart ever suggest or infer in any manner that the Coker family was better off with Mr. Coker being murdered (T 79-80).

A final blatant mischaracterization of the Record is the Plaintiff's suggestion that she never asked for millions of dollars in closing and that the only number she even mentioned to the jury was a $1,000. Rather the Record is absolutely crystal clear that in closing argument, from pages T 685 to 690, the

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 - 7557

Plaintiff detailed a variety of numerical damage figures, up to and including one requested award for $725,000; and a total request for millions of dollars in damages. Suffice to say that all of these mischaracterizations of the Record are simply attempts to counter the prejudicial, inflammatory arguments made to the jury; including the fact that the Plaintiff did tell the jury that Wal-Mart should be held responsible for juvenile crime, etc., which was detailed in her rebuttal closing argument (T 688-696). In fact the Plaintiff even put on an expert who went into great detail regarding how ammunition sellers like Wal-Mart had to be regulated, because they were responsible for the increase in juvenile crime in the United States. She argued also in closing how Wal-Mart, in order to save a dime, was willing to inadequately train its employees, who were too young to evaluate the age of its customers; and ended up by asking for millions of dollars in damages, with tears in Plaintiffs' counsel's eyes, and at the very least, with so much emotion that his voice broke; as he admitted below and on appeal (T 273-290; 637-641; 686-689; 718).

The intentional tortfeasors were properly placed on the verdict form and finally Coker admits that the issue will be decided shortly by the Supreme Court, The Plaintiff continues her punitive argument against Wal-Mart, by claiming that even if the Florida Supreme Court agrees that intentional tortfeasors should be placed on the verdict form, then an exception must be made in this particular case, because the cold-blooded murderers

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

were scared kids. In support of this the Plaintiff cites the Federal Gun Control Act, which was not even violated in the present case. Fordham, an 18 year-old, told 17 year-old Bonifay that he was old enough to purchase bullets; and the interchangeable ammunition that could be used in both rifles and guns was purchased by Fordham at Wal-Mart. In fact, Fordham was correct. In a recent appellate court decision from Texas, the court addressed the sale of interchangeable ammunition to a party that is not less than 18, finding no violation of the Federal Gun Control Act and holding there was no duty of care owed by Wal-Mart to the third party, as a result of the interchangeable ammunition sale in that case. Wal-Mart Stores, Inc. v. Tamez, 1997 W.L. 622764 (Tex. App. October 9th, 1997-Corpus Christi).

In Tamez, a 19 year-old purchased interchangeable ammunition which could be used either in a handgun or rifle, an ultimately accidently shot Raul Tamez. Tamez's father brought suit: the jury awarded $3.5 million dollars in actual damages and $2 million dollars in punitive damages against Wal-Mart and the appellate court reversed. After outlining the essential elements of negligence law in Texas, which is virtually identical to that in Florida, the court quoted the provision of the Federal Gun Control Act which was the same provision that Coker argued imposed a duty of care on Wal-Mart:

> ... The sale of ammunition is regulated by the Federal Gun Control Act 18 U.S.C. §§ 921 et. seq. (West 1976 & Supp.1997). Section 922(b), the relevant provision, provides in pertinent part:

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

> (b) It shall be unlawful for any licensed ...dealer...to sell or deliver:
>
> (1) Any firearm or ammunition to any individual who the license knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun, **or** rifle, or ammunition for a shotgun or a rifle, to any individual who the license knows or has reasonable cause to believe is less than twenty-one years of age.

18 U.S.C. § 922(b)(1)(West 1976 & Supp.1997).

Wal-Mart argued because Tamez was not under 18 and the ammunition could be used in a rifle, it had complied with the Federal Statute and if the interchangeable ammunition was to be sold to only people over 21, then Congress should have said that. Since the ammunition was interchangeable, as it was in the present case, as long as it was sold to individuals over 18 there was no violation of the Federal Gun Control Act, and Wal-Mart could not be found negligent per se. See Phillips v. K-Mart Corp., 588 So.2d 142 (La.Ct.App.1991). The Texas court looked to the fact that the Federal Gun Control Act required a dealer that was selling a gun or armor piercing ammunition to make a record of the name, age, and place of residence of each purchaser. Tamez, 2-3. Therefore, Congress had expressly recognized and imposed as extra duty of care for guns and armor piercing ammunition, but there was no such corresponding duty upon the seller of regular ammunition. Tamez, 3. In fact, the current provision of the Federal Gun Control Act represented a change from the prior

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 • (305) 940 7557

statute enacted in 1968, when all purchasers of any weapon or any ammunition were required to give their name, age, and place of residence. Tamez, 3. Therefore, Congress was clearly aware of the fact that most recently the only duty to inquire as to the age of the purchaser and to record that information was for the purchase of guns and armor piercing ammunition only. Tamez, 3. The court then looked to an appellate decision from Arizona which also had affirmed a summary judgment on behalf of the seller of ammunition because the purchaser was not under 18, but was under the age of 21, and had bought interchangeable bullets and therefore there was no violation of any due statutory duty of care. Tamez, 3, citing Bell v. Smitty's Super Valu, Inc., 183 Ariz. 66, 900 P. 2d 15 (Ct.App.Ariz.1995).

The court also looked to Fly v. Cannon, 836 S.W.2d 570 (Ct.App.Tenn.1992) which held that, as a matter of law, the proximate cause of the plaintiff's injury was not the sale of .44 Magnum ammunition to the purchaser in violation of the Federal Gun Control Act, as the sale merely created a key condition by which the unfortunate incident was made possible, and the proximate cause of the incident was the action of the purchaser firing the gun at the injured party, thus relieving the seller of liability. Tamez, 3. The Texas appellate court adopted the Tennessee and Arizona legal theories, finding that since the purchaser was not under 18 who bought the interchangeable ammunition, there was no violation of the Federal Gun Control Act and no negligence per se. Tamez, 3.

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

The court then went on, however, to discuss common law negligence addressing the exact public policy arguments made by Coker in her Brief, that teenagers must be prevented from having guns and bullets, with the court holding that there was no breach of any duty of care by Wal-Mart in the sale of the interchangeable ammunition. Tamez, 5-6. The court stated that the issue was whether Wal-Mart acted unreasonably in selling the interchangeable ammunition to a 19 year-old, and the court found that under the facts of that case there was no reason for Wal-Mart to anticipate the negligence or careless use of the handgun, shotgun, or any rifle on the part of the purchaser; he was not a minor at the time of the purchase since he was over 18; there were no observable signs of immaturity or incompetence; or any form of aberrant behavior. Tamez, 6. In fact, there was nothing in evidence to indicate to Wal-Mart that the ammunition in question would be used unlawfully in an improper or negligent manner, and therefore, there was no evidence to show any breach of any duty to any third party. Tamez, 6.

In the present case, because Bonifay was an underage minor at 17, he arranged for Fordham to buy the bullets because they thought it was legal for an 18 year-old to buy bullets, and in fact, under the Federal Gun Control Act the purchase of interchangeable ammunition by anyone not less than 18 is legal. As the judge herself observed in the Motion for New Trial, the worst that could be said about the sale of the ammunition was that Wal-Mart might have been negligent, there certainly was

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

nothing putting Wal-Mart on notice that something awful was going to happen. Under the court's view of the evidence and the law as stated in Tamez, it would be reversible error to let a Verdict stand, finding Wal-Mart more liable than the intentional murderer. But since the First District had already ruled that this question had to go to the jury and could not be decided as a matter of law, at the very least the Verdict is contrary to the manifest weight of the evidence and must be reversed for a new trial.

Coker argues that Wal-Mart is benefiting if not held more liable than what the jury determined, if the intentional murderers are placed on the verdict form, since they are minors (Brief of Respondent, 23). For this proposition she cites Kitchen v. K-Mart Corporation, 697 So. 2d 1200 (Fla. 1997) where this Court held that a seller of a rifle to a drunk buyer, who is known to be intoxicated, can be held liable to a third party injured when the buyer uses the gun to injure the third party, under the theory of negligent entrustment. In other words, joint and several liability should be imposed on Wal-Mart for it to be even more liable than the percentage assessed by the jury for its negligence and it should be punished by having its percentage of liability increased to 100%; in direct conflict with the public policy reasons behind the enactment of the Tort Reform Act in 1986.

As pointed out by the court in Tamez, if Congress wanted to eliminate the availability of firearms and all ammunition 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

those under 21, or even to eliminate it completely, is within its power to do so, but it had constantly refused. In fact, as noted in Tamez, the statute has been liberalized since its enactment in 1968. Now the Plaintiff wants this Court to step in where Congress has not and punish Wal-Mart for selling interchangeable ammunition to someone who was not under the age of 18 and thus not even in violation of the Federal Gun Cantrol Act. The bottom line is the Plaintiff is trying every way possible to avoid the fact that this Court affirmed limited joint and several liability, when it found § 768.81 constitutional; so the Plaintiff says the joint and several liability should be imposed as a punitive measure against Wal-Mart because the killers were kids. The punishment of course is paying two-thirds of the Verdict the jury did not find Wal-Mart liable for, to punish it for selling interchangeable ammunition to an 18 year old. Clearly if this Court finds that all intentional tortfeasors might go on the verdict form, there is absolutely no question that at the very least the Verdict found by the jury below must be reinstated and Wal-Mart's liability limited to that percentage of negligence determined by the jury. To make an exception for cold-blooded murderers is quite remarkable, simply on the basis that the one that pulled the trigger was only 17. These are matters left to the Florida Legislature and the United States Congress, and under currently existing Florida law if a new trial is not ordered, the Jury Verdict must be reinstated.

The absolutely incredulous argument made by the Plaintiff,

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 put on no meaningful evidence to substantiate that Bonifay was a cold-blooded killer is contrary to the facts at trial. Not only was there a wealth of evidence that this was a premeditated murder, but in fact Bonifay did not even care who he killed, because he **was** supposed to kill Wells on Friday night and when he botched that, he had absolutely no compunction whatsoever in shooting Coker, a complete stranger, the following night. Even the Record evidence the Plaintiff cites; in support her fantastic theory that Archer threatened to kill Bonifay's family, forcing Bonifay to fear for their lives and to kill Coker; completely flies in the face of her unsubstantiated argument. Rather, Archer testified that he hired Bonifay because Bonifay told him he wanted to kill somebody, anybody and that Bonifay was resourceful in the past in using weapons (T 539-540). Archer undisputedly testified that he never made any threats against Bonifay's family, if he refused to commit the crime, and also testified that he never requested or ordered Bonifay to commit the crime (T 541). This was further substantiated by testimony of Barth, who stated that Bonifay asked him to lie and tell the criminal jury that Archer threatened Bonifay's life if he did not commit the crime, but in fact that was a lie (T 211).

The jury was not left with any impression that Archer did something shockingly heinous, besides inducing Bonifay to commit this horrible crime, and all the evidence undisputedly pointed to only one conclusion - that this was a cold-blooded, premeditated murder committed by Bonifay and that Bonifay and Barth did it as

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

a lark, laughing and giggling after Bonifay shot Coker four times. To say that the jury made a logical determination that Archer and Bonifay were only a total of 50% at fault for the death of Coker, not only defies common sense, but is clearly contrary to the manifest weight of the evidence in this case.

The Plaintiff even admits that her attorney told the jury that Wal-Mart and Bonifay should be the most liable, but that is not what the jury found. Suffice it to say, that no reasonable jury could draw any conclusion from the evidence presented in this trial other than Bonifay was far more responsible for the death of Coker, in having intentionally pumped four bullets into him; than Wal-Mart, which just sold the interchangeable ammunition.

It is interesting that the Plaintiff cites to Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995), approved, 666 So. 2d 140 (Fla. 1996) where the intentional tortfeasors were placed on the verdict form. McGhee contains a lengthy, well reasoned analysis of why the intentional tortfeasors should be placed on the verdict form. Similarly, the Plaintiff's resort to two California cases, that are totally off point, in no way supports the fact that the Jury's Verdict in this case, apportioning more liability to the premeditated murder, than to the negligent Defendants, was not contrary to the manifest weight of the evidence.

Both in the April and May hearing transcripts, on the post trial Motions, the judge determined that the Verdict was contrary to the manifest weight of the evidence; but did not believe there

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

was case law allowing her to order a new trial and it was this legal error that forms the basis for the Defendants' appeal. In this particular case, no reasonable jury could have found Wal-Mart more liable than the premeditated murderer, especially where Bonifay was hired because he wanted to kill somebody and he knowingly shot the wrong person four times, as Mr. Coker was begging for his life. Under established Florida law, the Verdict in this case is undisputedly contrary to the manifest weight of the evidence. This is also substantiated in the Brief of Respondent, which now argues that the Verdict is okay, because Bonifay, was just a scared "kid" something never argued to the jury; as opposed to the cold-blooded, premeditated murderer that the overwhelming, undisputed evidence established at trial. As the judge determined the Verdict 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 5885
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 and then asked for damage amounts in excess of one million dollars. 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.

While a whole new trial is required in this case, at the very least there must be a new trial on liability and apportionment of fault; even if this Court finds that an intentional tortfeasor should not be on the verdict form. The Plaintiff argued below that Barth and Fordham did not act intentionally, which allowed for the small percentage of liability assessed against them, and therefore, a reassessment of liability is still required; if McDonald and Slawson are affirmed (H 4/25/96, 19-20). Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12 (Fla. 1st DCA 1996)(pending Supreme Court Case Nos. 88,524 and 88,776); Slawson v. Fast Foods Enterprises, 671 So. 2d 255 (Fla. 4th DCA 1996); Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996)(verdict form must apportion liability among all those who contributed to injury, whether parties or not; reversal for a new trial on liability and apportionment of fault).

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

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 - 7557

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

Wal-Mart was entitled to a J.N.O.V. in its favor on the issue of intervening superseding cause. Under any analysis of the facts as presented, this murder was not the natural and probable consequence of the sale of interchangeable 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 was 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 100% liable for the premeditated murder committed by Patrick Bonifay, without any factual basis to sustain a finding that this murder was

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

reasonably foreseeable by Wal-Mart, at the time it sold the bullets, is to go far beyond what was ever intended by the Congress in enacting the relevant portions of the Gun Control Act. Tamez, **supra.** 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.

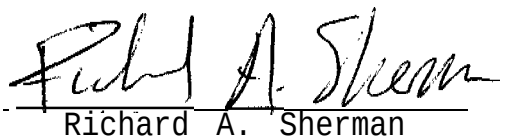
CONCLUSION

The trial court erred in failing to grant a new trial or remittitur as the Verdict was contrary to the manifest weight of the evidence and excessive. Wal-Mart is entitled to a directed verdict as a matter of law where the superseding, intervening negligence of the murderer, severed any chain of causation and any negligence on the part of Wal-Mart was not the proximate cause of the injury. Therefore, the Verdict must be reversed and the judgment entered for Wal-Mart or the very least, a new trial granted on both liability and damages.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, 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 af the foregoing was mailed this 29th day of October , 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
Rosemary B. Wilder, 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

/bp