IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,916

Florida Bar No. 184170

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

Petitioner,

vs.

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

Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER ON THE MERITS

WAL-MART STORES, INC.,
a foreign corporation

(With Appendix)

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TABLE OF CITATIONS

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SUPPLEMENTAL ARGUMENT

In December 1997, this Court decided Merrill Crossings Associates v. McDonald, 22 Fla. L. Weekly S739 (Fla. December 4, 1997); holding, in a negligent security case against a commercial establishment, that the intentional tortfeasors could not be put on the verdict form, pursuant to § 768.81(4)(B), Fla. Stat. (1993); and this Court's decision in Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). The decision in Wal-Mart Stores, Inc. v. Coker, 22 Fla. L. Weekly D1561 (Fla. 1st DCA June 23, 1997) a case involving a statutory violation, but not a negligent security case; reversed the jury's apportionment of liability as to the intentional tortfeasors; and held the negligent defendant, Wal-Mart, 100% vicariously liable for all acts and damages caused by itself and the intentional tortfeasors. The question now remains if the decision in Merrill has the same force and effect, in a case which does not involve claims of negligent security and the answer must be no.

In Merrill, the following questions were certified as one of great public importance:

> IS AN ACTION ALLEGING THE NEGLIGENCE OF THE DEFENDANTS IN FAILING TO EMPLOY REASONABLE SECURITY MEASURES, WITH SAID OMISSION RESULTING IN AN INTENTIONAL, CRIMINAL ACT BEING PERPETRATED UPON THE PLAINTIFF BY A NON-PARTY ON PROPERTY CONTROLLED BY THE DEFENDANTS, AN "ACTION BASED UPON AN INTENTIONAL TORT" PURSUANT TO SECTION 768.18(4)(B), FLORIDA STATUTES (1993), SO THAT THE DOCTRINE OF JOINT AND SEVERAL LIABILITY APPLIES?
>
> IN SUCH AN ACTION, IS IT REVERSIBLE ERROR FOR

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THE TRIAL COURT TO EXCLUDE AN INTENTIONAL CRIMINAL NON-PARTY TORTFEASOR FROM THE VERDICT FORM?

Merrill, S739.

This Court answered the first question in the affirmative, that in a case alleging negligent security, this did constitute an action based on an "intentional tort," so the doctrine of joint and several liability applied and not § 768.81. Merrill, S739-740. Since the negligent security case was viewed as one based upon an intentional tort, this Court answered the second certified question in the negative; i.e., that it was not reversible error to exclude the intentional tortfeasor from the verdict form. Merrill, S740.

Two questions now remain after this Court's decision in Merrill; regarding the issue of intentional tortfeasors in cases that do not allege negligent security as the cause of action. In Merrill, this Court found that the action involved, when McDonald was shot and injured by an assailant in the parking lot of the Wal-Mart store, was one which arose from being intentionally shot, and therefore was based on an intentional tort. Merrill, s744. Therefore, in that negligent security case, it was foreseeable intentional conduct for which the appellant, a commercial enterprise, had a duty to protect McDonald, a potential business customer. Merrill, S40.

This Court pointed out that the First District had distinguished Fabre, on the basis that Fabre involved an automobile collision case and the comparison of negligent acts

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between parties and non-parties; as opposed to Merrill, which involved negligent parties, and those with criminal intentional acts. This comparison was never contemplated when the Legislature enacted § 768.81 to abolish joint and several liability; and to limit each party's liability to only their percentage of fault. Merrill, S40.

Unlike Fabre, where the plaintiff was a innocent passenger suing for damages resulting from an auto accident caused by the combined negligence of the driver of her car and the other driver; in Merrill, the harm suffered by McDonald was a direct foreseeable result of the defendants' negligence in failing to take security measures to protect the plaintiff, a potential customer. Merrill, S40. In other words, the cause of action in Merrill was for negligent security, to protect a customer of Wal-Mart and Merrill Crossings, where it was foreseeable that a customer might suffer criminal or intentional harm. This Court framed the difference between Fabre and Merrill, by noting that Merrill dealt with a negligent tortfeasor, whose acts or omissions gave rise to or permitted intentional tortfeasors actions against the plaintiff, where the defendants had a duty to protect the plaintiff by providing reasonable security measures. Merrill, S42.

This Court summed up its analysis of the Restatement of Torts and Florida law, by finding it would be irrational to allow a party, who negligently failed to provide reasonable security measures, to reduce that party's liability, because there was the

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very intervening intentional tort that the security measures were suppose to protect against. Merrill, 840. This Court held that by its very term, § 768.81 did not apply because the negligent security cause of action arose from an intentional tort, i.e. a customer of Wal-Mart, being shot in the Wal-Mart parking lot, where Wal-Mart knew or should have known of this type of criminal behavior and should have protected against it.

As described by Plaintiff's counsel at the Coker trial, the actions of Wal-Mart, in the Coker case, were simply that of one Defendant, out of 3 parties, who ultimately made it possible for the intentional tortfeasors to murder the Plaintiff at a totally different place. The cause of action against Wal-Mart was for negligence and violation of a Federal statute and it was not a negligent security case. In other words, Wal-Mart's duty to Coker was not one of reasonable security measures to prevent Coker from being injured, on Wal-Mart's premises, as a foreseeable customer. On this basis alone, there is a sufficient d stinction between Merrill and Coker, that the application of § 768.81 would still be mandatory.

In Coker, the Plaintiff's attorney told the jury that Wal-Mart was negligent by violating Federal law and that the Plaintiff would have been alive but for Wal-Mart's negligent acts. The Plaintiff went on to tell the jury however that Bonifay had executed the Plaintiff, therefore he should be held the most responsible. The Plaintiff, Coker, had absolutely nothing to do with Wal-Mart and as the Plaintiff pointed out to

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the jury, the real issue for the jury was compensation (T 641).

There are two substantive issues in Coker that distinguish it from Merrill; that require this Court's attention. As previously mentioned, Coker is not a case where the Defendant had a duty to employ reasonable security measures to protect the Plaintiff, who was injured on premises that were meant to be kept secured by the Defendant. Rather, Coker is a negligent sale case and the violation was a Federal statute. Any exception to § 768.81 as outlined, in Merrill, should be at most, limited to premises liability cases for negligent security, like Merrill.

In addition, Defendants should not be unilaterally held vicariously liable for everything that any intentional tortfeasor does. The District Court decision in Coker makes every defendant an insurer for the acts of intentional tortfeasors. There should be no exception to the comparative fault statute for intentional tortfeasors, unless they are involved in negligent security cases like Merrill. It is clear that the Merrill case is limited to negligent security, as established in the certified questions in this Court's opinion. Merrill, supra. It is important that the negligent security limitation to the exception to § 768.81 be maintained. To allow a blanket application of Merrill to preclude intentional tortfeasors from ever appearing on a verdict form, would lead to clearly absurd results.

For example, in a car accident case like Fabre, if it turned out that the driver of Mrs. Fabre was negligently driving, and that the driver of the other car had intentionally smashed into

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the plaintiff, the negligent driver would be liable for everything. In other words, there is absolutely no public policy reason that the negligent driver should have to pay for the damages of the intentional tortfeasor, who decided to run down the plaintiff.

Along the same lines, a social host would be held vicariously liable for a guest who gets mad and punches another guest in the face, as an insurer of the intentional tortfeasor in an ordinary premises liability situation. There is no reason for these negligent defendants who have assumed a duty of care to the plaintiff beyond that ordinarily owed; when that duty of care does not include reasonable security measures to prevent a crime, then there is no reason for the abrogation for the application of § 768.81.

In the present case Bonifay, at the suggestion of his cousin, killed Coker, a clerk in an auto parts store in a botched plan to rob the store and kill the manager Wells, who had fired his cousin. Bonifay knew he was shooting the wrong man when he shot the Plaintiff, but he did it anyway because he always wanted to kill someone. The underlying court held Wal-Mart 100% liable for violation of Federal law, in selling the bullets to Bonifay. There are many legitimate to sell and buy ammunition in this country and this is not a negligent security case where the Defendant was being sued for not providing adequate police-type protection. In fact, in Merrill the defendants were sued for not having one more security guard patrolling the parking lot to

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protect foreseeable plaintiffs like McDonald from foreseeable crime; the classic negligent security case. In Coker, it was sued for selling ammunition to 18-year-old Bonifay, a negligent act under the Federal gun law. Negligent sales are a far cry from intentional torts and this is an important distinction that prevents the application of Merrill to preclude the finding of fault on the part of the intentional tortfeasors in the present case. This simply is not the situation where the very act being sued for is negligent failure to provide security measures the actual act that leads to the harm to the plaintiff. Rather, in the present case the negligent act, failure to adhere to the Federal statute, led only to the sale of bullets to Bonifay, who later went off Wal-Mart's premises to kill Coker at the auto parts store. There was no compelling or public policy reason for holding the negligent Defendant, Wal-Mart, to pay for its share of the loss because of an intentional tort committed away from its premises and not encompassed by its duty of care.

While the Legislature has established that joint and several liability should be limited, this Court has now made a single exception to that limitation contained in § 768.81. There is no public policy reason, or legislative intent, in making the negligent security exception, to the comparative fault statute, a blanket exception; such that no intentional tortfeasor will ever be listed on a verdict form, regardless of what negligent acts the defendant has been sued for. Surely, such a rule would result in the exception swallowing up the rule and the complete

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abrogation of § 768.81.

Another important issue in the application of Merrill to this Court's decision in Coker is the question of damages. As argued extensively by Wal-Mart, the effect of the First District's decision is to hold Wal-Mart 100% liable, even though the jury was repeatedly told that only a portion of the damages should be paid by Wal-Mart. The following excerpts from the Plaintiff's closing argument and the Court's instructions make it very clear that regardless of what the total amount of damages awarded to the Coker family was going to be, only a portion of that was going to be damages that had to be paid by Wal-Mart:

> Was Bonifay at fault and was Eddie Fordham at fault and was Barth at fault and was Bland at fault and was Archer at fault in causing the death? (the intentional tortfeasors)
>
> PLAINTIFF COUNSEL, MR. LEVIN: That's where we get to what's called apportionment of damages or apportionment of fault of who all participated. See, because under the law, there's not just one legal cause, I mean, there can be a lot of people or companies that caused this person's death...
>
> (T 636).
>
> * * *
>
> Wal-Mart was the adult here. (The negligent tortfeasor.) They were the ones selling ammunition at 1,500 stores. They've got to take the responsibility to better train their people....
>
> (T 639).
>
> * * *
>
> Wal-Mart and Bonifay should be the most liable when YOU determine on that verdict

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form how to split up damages....

(T 641).

* * *

When you get through this entire board, do not make any reductions. You figure out what the total loss is and YOU figure out what Wal-Mart and all them are responsible for and the Judge will make the appropriate reductions to determine who pays what. You don't make any reductions to determine how much Wal-Mart -- you figure out what the total loss is and the Judge will make that....

(T 650).

* * *

THE COURT: Members of the Jury, I shall now instruct you on the law that you must follow in reaching your verdict. And as I told you earlier, you will each receive a copy of these instructions. So if some of the content doesn't stay with you as I go through it, because much of this is unfamiliar territory to you, don't worry and just follow with me because you will each get a written copy of the instructions.

(T 696).

* * *

In determining the total amount of damages sustained by Sandra, Christopher and Michelle Coker, you should not make any reduction because of the responsibility, if any, of Robin Archer, Clifford Barth, Kelly Bland, Patrick Bonifay and/or Larry Fordham, Jr. I will enter a judgment based on your verdict. And if you find that Robin Archer, Clifford Barth, Kelly Bland, Patrick Bonifay and/or Larry Fordham, Jr. were legally responsible in any degree, in entering the judgment I will reduce the total damages by the percentage of responsibility which I find it chargeable to each.

(T 704).

* * *

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> THE COURT: But in this particular case, I make these findinss: This jury was extremely attentive...
>
> (T 717).

It was very clear where the jury knew that it wanted to hold Wal-Mart liable for only a portion of Coker's damages, it found that Wal-Mart was only 35% liable for the $2.17 million dollars it awarded to the Coker family (T 723; 725-727). Therefore, even if this Court disagrees and holds that Merrill applies to all cases involving intentional tortfeasors, regardless of the negligence alleged against the Co-Defendant, then at the very least, the Opinion below has to be reversed for a new trial on damages.

It was clear from the directions given to the jury, by both Plaintiff's counsel and the Court, that the Verdict was going to be reduced, so that the Defendant was only going to be paying for those damages it caused in selling the bullets. Clearly, the jury wanted the bulk of the damages to be paid by the intentional tortfeasors, i.e. 65%. To now hold that Wal-Mart must pay not only its 35% but the intentional tortfeasor's 65% - flies in the face of the Record below, let alone principles of fault that still exist under Fabre. To hold Wal-Mart 100% liable, clearly reinstates the doctrine of joint and several liability, in direct and express conflict with the intention of the Florida Legislature. Even if the Legislature did not mean for intentional tortfeasors to go on the verdict form, if the case was one for negligent security; that does not change the fact

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that in the ordinary negligence context joint and several liability simply does not apply and each tortfeasor should be liable only for its share of the damages. § 761.81; Fabre, supra.

In a new trial for example a jury would be given the opportunity to assess the real damages caused by Wal-Mart alone, and will not be imposing liability against Wal-Mart vicariously for the acts of the intentional tortfeasors. The jury in the present case determined that Wal-Mart should only be liable for approximately $760,000 in damages. If this Verdict is reversed, then clearly there must be a new trial on liability for the jury against to assess the damages caused by Wal-Mart, for its negligent acts in violating the Federal statute; and there certainly is no basis to hold Wal-Mart 100% liable for all the damages. In other words, in Merrill, Wal-Mart was charged with a duty to provide reasonable security measures to prevent the harm to the Plaintiff when he was shot in the Wal-Mart parking lot as he went into Wal-Mart to shop. That is not the same situation that exists in Coker; and there is no basis to hold Wal-Mart liable vicariously, for acts of the intentional tortfeasors, where it was not charged with negligent security.

It does not appear that there is any justification, based on the Merrill decision for making every defendant in Florida an insurer for the acts of intentional tortfeasors; especially when the Defendant is not being sued in a negligent security context.

It is respectfully submitted that this Court limits its decision in Coker to, 1) either allow the intentional tortfeasors

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to remain on the Verdict Form, as this is not a negligent security case; or at the very least, 2) if the Verdict is reversed, and the intentional tortfeasors are removed from the Verdict Form, there must be a new trial on damages, so a jury can properly assess those damages caused by Wal-Mart.

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CONCLUSION

It is respectfully submitted that this Court limit its decision in Merrill to negligent security cases; and that the Verdict below be reinstated; or at the very least, if the Verdict is reversed, a new trial be ordered so that the jury **may assess** the damages caused by Wal-Mart to the Plaintiff.

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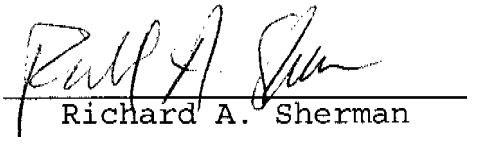
By: 
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