SUPREME COURT OF FLORIDA

UNITED STATES OF AMERICA, et al., Appellant(s), v. MAUREEN STEVENS, etc., Appellee(s).	)))))))	Case No. SC07-1074 United States Eleventh Circuit Court of Appeals Case: 05-15088-GG

INITIAL BRIEF OF DEFENDANT-APPELLANT BATTELLE MEMORIAL INSTITUTE

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BRIEF OF APPELLANT/DEFENDANT BATTELLE MEMORIAL INSTITUTE

STATEMENT OF THE CASE

Based on the allegations set forth in the Complaint, the Stevens family's claims fail as a matter of law because Battelle Memorial Institute ("Battelle") owed no legal duty to the decedent, Robert Stevens. Specifically, under Florida law Battelle had no duty to prevent the criminal acts of third parties. The Complaint against Battelle alleges that Mr. Stevens died after inhaling anthrax mailed in a letter to the offices of American Media, Inc. in Florida. Under Florida law, in the case of third party misconduct, a defendant does not owe a duty to the victim of that misconduct unless the defendant has a special relationship with either the victim or the perpetrator or control at the time of the injury of the location of injury or the alleged injury causing instrumentality. The Complaint against Battelle does not allege a special relationship or the requisite control.

A. Statement of Facts: the Stevens Family's Claims

The Stevens family's claims against Battelle arise out of one of a series of terrorist attacks involving mail contaminated with the biological agent *Bacillus anthracis*, also called anthrax. 80253 Dkt. #31:1. In the fall of 2001, an unknown criminal or group of criminals intentionally mailed letters containing some form of anthrax to individuals in Florida, New York, and Washington, D.C. *Id.* One of those letters was mailed to American Media, Inc. in Boca Raton, Florida, where

Mr. Stevens worked. 80253 Dkt. #31:2. Mr. Stevens became ill and died after inhaling anthrax. *Id.* The Stevens family brought suit against the United States, alleging, among other claims, that the anthrax that killed Mr. Stevens was stolen from a government medical research facility in Fort Detrick, Maryland due to the United States's negligence in handling the anthrax. 81110 Dkt. #1. The Stevens family further alleged that there was a history of missing samples of anthrax from the same facility in Fort Detrick. 81110 Dkt. #1 ¶ 9.

Alternatively, the Stevens family brought a separate suit against Battelle, a private research facility, broadly alleging negligence in the handling of anthrax. The Stevens family did not allege that there was a history of missing samples of anthrax against Battelle. The Complaint against Battelle contains only broad and general allegations that Battelle and others negligently hired and supervised employees and failed to protect anthrax in their possession and then states the conclusion that anthrax was "obtained and sent" as a "direct, proximate and foreseeable result of the negligence of the Defendants." Complaint ¶ 13. The Stevens family pled no underlying facts in the complaint against Battelle that plausibly suggest either the broad allegations of negligence or any basis to determine that Battelle owed a duty to Mr. Stevens.

B. District Court Proceedings

1. Battelle's Motion for Judgment on the Pleadings

The conclusory allegations of negligence in the Complaint against Battelle appear to be based on the sole fact that Battelle held in its research facility in Ohio live anthrax bacteria. Battelle filed its Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c) based on well-settled Florida law:[1] a defendant has no duty to protect another person from criminal acts of third parties, absent a special relationship that provides the defendant with control of the victim or the perpetrator or control at the time of the injury of the location of the injury or the alleged injury-causing instrumentality. The Complaint alleges no "special relationship" between Battelle and Mr. Stevens to support the existence of a legal duty, no control over the individual or individuals who mailed the anthrax, and no control at the time of the injury over the American Media offices or the alleged injury-causing anthrax.

The government moved to dismiss the Complaint against it under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The government argued that it could not be liable for any third party criminal activity allegedly occasioned by negligent security practices because it

[1] The District Court determined that Florida law should apply in accordance with the "law of the place where the act or omission occurred." 80253 Dkt. #38:6; 81110 Dkt. # 47:6.

owed no duty of protection to Mr. Stevens and did not have a duty or ability to control the unidentified third party responsible.

2. The District Court's Order

On April 15, 2005, the District Court entered a single order denying both motions. 80253 Dkt. #38; 81110 Dkt. #47. The District Court denied both motions based on its analysis of the threshold duty question – whether either defendant owed a duty to Mr. Stevens or had a duty of control over the third party's interception of the anthrax. Specifically, the District Court reasoned that the Stevens family's allegations establish a legal duty under Restatement (Second) of Torts §§ 302, 302A and 302B (1965), even in the absence of a "special relationship" under § 315, or, alternatively, that under the New York decision *In re September 11 Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003), a duty of care can be found under the "special relationship" test set forth in Restatement (Second) of Torts § 315 (1965). 80253 Dkt. #38:8, 18; 81110 Dkt. #47:8, 18.

3. Certification for Interlocutory Appeal

Upon the District Court's denial, the United States filed a Motion for Reconsideration. 81110 Dkt. #53. On July 5, 2005, the District Court denied the Motion for Reconsideration, but certified its April 15th Order for interlocutory appeal. 80253 Dkt. #41; 81110 Dkt. #58. The Eleventh Circuit Court of Appeals

accepted jurisdiction and the United States and Battelle pursued the discretionary appeal.

4. Certification to the Florida Supreme Court

In the Court of Appeals, the United States and Battelle argued that the District Court had impermissibly expanded theories of tort liability to extend a duty to the "public at large" to prevent criminal misconduct of others, even when that party has no relationship to the perpetrator or the victim and no connection to the site of the injury or control over the injury-causing instrumentality at the time the criminal act occurred. The Appellants argued that this issue was well established by intermediate level courts in the First,[2] Third,[3] Fourth,[4] and Fifth Districts.[5]

The Eleventh Circuit Court of Appeals determined that Florida law has not previously addressed the "factual pattern at hand" and on June 11, 2007, certified the following question to the Florida Supreme Court.

> Under Florida law, does a laboratory that manufactures, grows, tests or handles ultra-hazardous materials owe a

[2] *Aguila v. Hilton, Inc.*, 878 So. 2d 392 (Fla. 1st DCA 2004).

[3] *Boynton v. Burglass, M.D.*, 590 So. 2d 446 (Fla. 3d DCA 1991).

[4] *Daly v. Denny's Inc.*, 694 So. 2d 775 (Fla. 4th DCA 1997).

[5] *Lighthouse Mission of Orlando, Inc. v. Estate of McGowen*, 683 So. 2d 1086 (Fla. 5th DCA 1996).

> duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the materials, and, if not, is a duty created where a reasonable response is not made where there is a history of such dangerous materials going missing or being stolen?

Opinion, No. 05-15088 at 17.

Both the District Court and the Eleventh Circuit appeared to be searching for a special rule of law because this case arose out of the anthrax through the mail attacks in 2001. Battelle throughout has taken the position that a special rule of law does not exist and should not be created by the courts. Florida law requires a plaintiff to allege, as a threshold legal requirement, a duty owed by the defendant. Florida law has long held that there is no duty to prevent third-party misconduct absent allegation of some very specific exceptions, specifically allegations that the defendant has a special relationship with either the victim or the perpetrator or allegations that the defendant had control at the time of the injury over the location of the injury or the alleged injury causing instrumentality. Battelle in each court has argued that the Stevens family has failed to establish the threshold legal requirement of duty because they make no such allegations against Battelle.

SUMMARY OF ARGUMENT

This case does not present unique questions never addressed by this Court. Rather, this case provides this Court an opportunity to further explain longstanding Florida principles and rules to ensure that they are consistently applied to future

tort liability cases. Although this case involves horrific criminal or terrorist conduct, this Court should not let those horrible facts, in the wake of September 11, alter existing Florida law and policy, in order to ensure that someone pays for the Stevens family's loss.

Current Florida case law, set out by this Court and applied consistently by the intermediate appellate courts, requires a threshold determination of whether a defendant owes a plaintiff a legal duty, such that a negligence case may proceed to trial on issues of negligence and proximate causation. This Court has explained that courts must determine whether a defendant's conduct has created a "foreseeable zone of risk" that gives the defendant a duty of care to either lessen the risk or protect the plaintiff.

Florida courts have established boundaries to this foreseeable zone of risk analysis to ensure that a defendant will only be haled to court when the defendant has actual, constructive knowledge of the specific danger and the injury-causing conduct is actually within the defendant's control. One such boundary is the Florida rule that an entity does not owe a duty to protect against third party misconduct. Florida law has established limited exceptions to this rule that appropriately balance the rights of the victim to protection against the right of a defendant to avoid suit when that defendant did not have a real opportunity to prevent the injury causing event. Specifically, a defendant may owe a duty to a

victim of third-party misconduct if that defendant had a special relationship with either the victim or the perpetrator, or that defendant, at the time of the injury, had control of the injury location or the alleged injury-causing instrumentality.

Any rule of law that rejects these boundaries simply because a defendant possesses a substance that can be misused by third parties to cause harm is not appropriate. This Court should ensure that in attempting to allow compensation for an innocent victim injured in a criminal or terrorist attack, it does not create unbounded duties for defendants with little or no connection to the injury causing event. This Court should not establish a rule that will cause companies who conduct socially valuable work with substances that can be criminally misused to become "insurers" to the general public.

The Stevens family's Complaint against Battelle contains only broad, conclusory statements that Battelle negligently hired and supervised its employees working with anthrax. It contains only labels and conclusions as allegations of duty and proximate cause. The Complaint does not allege any underlying facts to support these allegations. It does not allege that Battelle had a history of missing or lost samples. Moreover, the Complaint alleges no facts against Battelle which would have put Battelle on heightened notice that a criminal actor would deliberately intercept such materials and use them to cause harm to an unrelated

victim in a distant location. Absent these allegations, the Complaint against Battelle does not state facts giving rise to a legal duty.

In sum, this Court must ensure consistent rules that can be applied in future tort liability cases. Many substances exist in our society that can be misused to cause harm, but that also provide value to society. In balancing those interests, this Court should not extend the reach of tort liability to an entity that has no control over the injury-causing event or person. To do so would not protect against the criminal activity. Allocating a general and unbounded duty to laboratories solely because they use instrumentalities or substances that can be used as weapons does nothing to promise or secure protection from terrorist conduct such as mailing anthrax and would instead deter laboratories such as Battelle from working with anthrax to create vaccines for the social benefit of the public.

ARGUMENT

The Eleventh Circuit certified this case to this Court on grounds that the existing "limits on negligence liability" previously stated by this Court and the intermediate appellate courts in Florida "fail[ed] to fit neatly into the complex factual pattern at hand." Opinion at 16. Existing precedent, however, can be applied to the "factual pattern at hand" and should be applied.

This Court should not create a special rule just because this case arises out of the unprecedented, anthrax through the mail attacks in 2001. Instead, this Court

should craft questions geared toward further exposition of the effort this Court began with *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), "to restate the general principles of negligence law and clarify the role that foreseeability plays in evaluating the duty and proximate cause elements of a common law negligence claim." *Whitt v. Silverman*, 788 So. 2d 210, 216 (Fla. 2001). Questions that would accomplish this goal are:

1. Does an entity that possesses a substance that can be misused to cause harm, and that is possessed by others as well, owe a legal duty to the victim of third-party misconduct where:

(a) the complaint alleges a third party obtained and sent that substance to the victim;

(b) the complaint does not allege that the defendant had a special relationship with either the plaintiff or the third-party perpetrator; and

(c) the complaint does not allege that defendant had control over either the alleged injury causing instrumentality or the location of the alleged injury at the time of the injury.

2. Does the mere possession of a substance that can be used by others to cause harm create a duty on the defendant that possesses it to protect against that misuse? If not, are there factual scenarios, such as a history of attempted or actual misappropriation for misuse, that, if alleged, could create that duty?

These questions will serve to further explain the rule of law that applies to any plaintiff injured by any substance that can be misused to cause harm and the limits on which defendants may be haled to court to defend a lawsuit when that misuse occurs.

I. FLORIDA LAW DEFINES THE ANALYSIS REQUIRED TO EVALUATE THE THRESHOLD LEGAL REQUIREMENT OF DUTY.

This Court, in *McCain v. Florida Power Corp.*, defined the analysis required to evaluate the threshold legal requirement of duty. 593 So. 2d 500. Under Florida law, this analysis begins with a foreseeability inquiry specific to determining whether a legal duty is owed. *Id.* There is no conflict between the foreseeability analysis required to address the threshold legal requirement of duty and the long standing principle that there is no duty to prevent third-party misconduct. Rather, analyzing whether there was some level of control or special relationship involved assists a court in evaluating whether the third party misconduct was foreseeable. It ensures that a defendant will be forced to defend a lawsuit only when the plaintiff is able to allege that the defendant had the requisite connection to the incident to prevent the alleged injury causing event.

A. <u>Duty is a Threshold Legal Requirement That Must be Properly Alleged Before a Case is Allowed to Proceed.</u>

Whether or not a defendant owes some duty to a plaintiff is a matter of law. *See Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989) (Duty is a matter of law and

there can be no liability without a finding of duty as a matter of law.). Moreover, this legal duty is a *threshold* legal requirement, without which a case may not proceed. *McCain*, 593 So. 2d at 502 (foreseeability duty analysis is the "minimal threshold legal requirement for opening the courthouse doors. . ."). Establishing a legal duty as a threshold requirement is important for preventing entities like Battelle, that provide socially beneficial services, from being haled into court merely for possessing a substance that is used by a criminal or terrorist to harm people.

The foreseeability analysis conducted by a court for purposes of determining whether the defendant owed a duty to the victim should not be confused with the foreseeability analysis that is undertaken to evaluate whether a defendant's negligent conduct proximately caused a plaintiff's injuries. In *McCain,* this Court explained that "the question of foreseeability can be relevant both to the element of duty (the existence of which is a question of law) and the element of proximate causation (the existence of which is a question of fact)." *Id.* at 502. This Court clarified, however, that "the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open." *Id*. If a plaintiff cannot satisfy the minimal threshold legal requirement, the case must be dismissed at the outset.

Application of this threshold legal requirement prevents an entity that is removed from the alleged injury causing event, the victim, and the perpetrator, from being dragged into court to defend its conduct. It allows a lawsuit when the defendant had the requisite connection to stop the event or at least warn the plaintiff against it.

B. The Duty Analysis Must be Based on Alleged Facts, Not Policy.

As this Court explained in *McCain*, there are four general sources that may give rise to a legal duty: "(1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the *general facts of the case*." 593 So. 2d at 503 n.2 (emphasis added). Although determining whether a duty exists is a question of law, if the first three sources are not applicable, some factual examination is necessary to determine whether a duty arises under the fourth source.

The foreseeability analysis should be based on the allegations in the complaint against a defendant, not a desire to hold someone responsible for a terrorist act when the terrorist cannot be found. In analyzing the facts to determine whether a legal duty was owed, this Court should ensure that allowing compensation for innocent victims does not create unbounded duties for defendants with little or no connection to the injury causing event. To do so would

make companies who work with materials that can be criminally misused to cause harm "insurers" to the public and is a step more properly undertaken by the Florida legislature. *See Levy v. Fla. Power & Light Co.*, 798 So. 2d 778, 780 (Fla. 4th DCA 2001), *rev. den.*, 902 So. 2d 790 (Fla. 2005) (A legal "[d]uty is an allocation of risk determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.").

By imposing a duty on Battelle when the acts of the third party were intentional, unauthorized, and criminal, the District Court made inappropriate policy decisions. The District Court's policy choice, for which it relied on Section 302 of the Restatement (Second) of Torts and the Southern District of New York's decision, *In re September 11 Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003), was unsupported and inappropriate.

First, on its face, Section 302[6] does not apply because it is used to analyze whether defendant's conduct was negligent, not whether the defendant owed a legal

[6] Restatement (Second) of Torts § 302 (1965) ("A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.").

duty to the plaintiff in the first place.[7] Section 302, therefore, would only be applicable to this case if this Court determined that Battelle owed a legal duty to Mr. Stevens. Once such a legal duty was established, a trier of fact then could apply Section 302 in analyzing whether Battelle was negligent in fulfilling that legal duty.

Second, the New York case relied upon by the District Court was admittedly a policy decision and Florida courts, unlike the *In re September 11 Litig.* court, refrain from using policy arguments to impose a duty on a defendant to protect the general public because such policy determinations are the responsibility of the Florida legislature, not the courts. *See Grunow v. Valor Corp.*, 904 So. 2d 551, 557 (Fla. 4th DCA 2005).

Courts must apply the rules of law to determine whether the allegations of the complaint sufficiently allege a legal duty. Duty should not be imposed in an unusual case simply as a matter of policy. Policy decisions are the responsibility of the legislature, not the courts.

[7] Restatement (Second) of Torts § 302 cmt. a (1965) ("[t]his section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk.").

C. The Foreseeability Analysis Used to Analyze the Legal Question of Duty Since *McCain* has Boundaries.

The foreseeable zone of risk that creates a legal duty cannot be unbounded. It must have limits to prevent an entire industry from defending litigation when a substance possessed or produced by that industry is misused. Appropriate boundaries already exist under Florida law and should be applied here.

1. Foreseeability is Limited by Location and Time.

The foreseeable zone of risk is limited by geographical space and time. For example, in *McCain,* the Florida Supreme Court held that power generating equipment "creates a zone of risk that encompasses all persons who foreseeably may come in contact with [defendant's] equipment." 593 So. 2d at 504. The plaintiff who was electrocuted when he dug where the signs said it was safe to dig was within the foreseeable zone of risk. *Id.* Similarly, in *Fla. Power & Light Co. v. Periera*, 705 So. 2d 1359, 1361 (Fla. 1998), this Court found that the defendant utility company's maintenance of wires on a bicycle path created a foreseeable zone of risk that included bicyclists and motorcyclists using that path. In both cases, the injury was foreseeable because it occurred in close proximity to the negligent act.

Indeed, courts have emphasized that the "foreseeable zone of risk" extends only to injuries occurring in close proximity to the defendant or the defendant's property. *See Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294, 299 (Fla. 4th DCA

2000) ("[T]he foreseeable zone of risk . . . does not include a motorist injured many miles and many hours away"); *see also Palm Beach-Broward Med. Imaging Ctr., Inc. v. Cont'l Grain Co.*, 715 So. 2d 343, 345 (Fla. 4th DCA 1998) (holding that "the foreseeable zone of risk created by the negligent operation of a motor vehicle does not include an electricity consumer some distance from the scene of an accident"). This limitation recognizes that conduct or locations that are not near a defendant are outside the defendant's control.

Time is also an important boundary on the foreseeable zone of risk. When appellate courts in Florida carved out exceptions to the general rule that there is no duty to protect against third-party misconduct, they emphasized that control must exist at the time of the injury to impose a duty. Under the exception, "the duty to protect strangers against the tortious conduct of another can arise if, *at the time of the injury*, the defendant is in actual or constructive control of: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tort-feasor." *Daly v. Denny's, Inc.*, 694 So. 2d 775, 777 (Fla. 4th DCA 1997) (emphasis added) (citing *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 562 (Fla. 3d DCA 1987)(en banc), *approved*, 533 So. 2d 261 (Fla. 1988). This limitation ensures that only defendants who are best situated to prevent a harm will owe a duty.

Mr. Stevens was outside any "zone of risk" created by Battelle's handling of anthrax because he was not in the vicinity of Battelle and Battelle had no control over the premises at which the injury occurred. Anthrax did not simply escape from one of the named defendant's facilities and travel unaided to Mr. Stevens; rather a third party criminal or terrorist had to deliberately obtain anthrax, modify it, put it in an envelope, and mail it to American Media. Any "foreseeable zone of risk" created by Battelle's research with anthrax would be limited to the laboratories where the materials were handled, and any duty owed would be to persons who came into contact with or were within close proximity to the laboratories.

A foreseeability analysis cannot justify imposing a duty on Battelle to protect the whole country from criminal conduct involving anthrax merely because Battelle possesses the material for lawful purposes. Imposition of such a duty would broaden foreseeability to a level that would require any company working with any product that could conceivably be used to harm another to predict every potential misuse. Such a holding is not appropriate. It is not negligence where a defendant fails to "'anticipate and guard against a happening which would not have arisen but for exceptional or unusual circumstances . . . .'" *Fla. Power & Light Co. v. Lively*, 465 So. 2d 1270, 1274 (Fla. 3d DCA 1985).

That anyone would take or make weaponized anthrax, intentionally place it in an envelope and mail it, and that a victim would die from inhaling the contents of an envelope more than a thousand miles away is inarguably an exceptional and unusual circumstance. Even death by inhaling anthrax is unusual. Between 1900 and 1976, there were eighteen total cases of anthrax inhalation in the United States, and after 1976 no such cases were reported until the attacks in 2001. J. Am. Med. Ass'n, *Anthrax as a Biological Weapon, 2002* (May 1, 2002).[8] These cases occurred in special-risk groups occupationally exposed to anthrax, including goat hair mill, wool and tannery workers; two deaths were laboratory-associated. *Id.*

Battelle has no duty to "safeguard against occurrences that cannot be reasonably expected or contemplated." *Fla. Power & Light Co.*, 465 So. 2d at 1274 (internal citations omitted). It was not foreseeable that Battelle's research activities with anthrax (even if negligently performed) would place Mr. Stevens at risk of dying from mail intentionally contaminated with anthrax. The injury to Mr. Stevens occurred in Florida, thousands of miles from Battelle, and thousands of miles from any "foreseeable zone of risk" created by Battelle's work with anthrax.

[8] This article is attached as Exhibit 4 to 80253 Dkt. #31.

2. The Special Relationship Rule is a Tool to Determine Whether a Defendant's Conduct Created a Foreseeable Zone of Risk When a Case Involves Third Party Misconduct.

It is well-settled under Florida law that there is no general duty to prevent the misconduct or criminal acts of third persons. *See Trainon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (citing Restatement (Second) of Torts § 315 (1964)). Originally applied in the context of cases against the government, where courts analyzed whether a common law duty of care existed thereby justifying the waiver of sovereign immunity, the rule is now well-established. *Id.* at 918; *Kaisner v. Kolb*, 543 So. 2d 732, 736 (Fla. 1989). *See also Michael & Philip*, 776 So. 2d at 298 (noting that Florida has adopted the "special relationship" test set forth in the Restatement).

Florida courts have made exceptions to this general rule in limited circumstances where a special relationship exists that puts the defendant in a unique position to protect the plaintiff from a third party's acts, or enables the defendant to control the conduct of the third party. The "special relationship" rule is set forth in the Restatement (Second) of Torts § 315 (1965). It states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965). The intermediate appellate courts have followed the guidance of this Court and, whether applying Section 315 explicitly or some modification of its principles, have allowed liability for third party misconduct only in limited, exceptional circumstances.

The "special relationship rule" has provided Florida courts with a tool to determine whether harm caused by a third party was in the "foreseeable zone of risk" because the "special relationship" put the defendant in a unique position to protect the victim or control the third party's behavior. This Court applied the special relationship rule in *Nova Southeastern University, Inc. v. Gross* when it examined whether a university owed a duty to warn an adult student that the location of the student's mandatory internship was dangerous. 758 So. 2d 86 (Fla. 2000). This Court held that a "special relationship" existed between the school and the student because the school had control over the student, by requiring the student take the internship, and because the school had knowledge that the location was dangerous; therefore, the school owed a duty to the student. *Id.*

The special relationship exception to the general rule that there is no duty to protect others from third-party misconduct ensures that a duty will not be imposed on a defendant unless the defendant had control of the perpetrator or the ability to protect the victim. Florida courts recognize a "special relationship" between: landlord-tenant, employer-employee, landowner-invitee, and school-minor student.

See Hinckley v. Palm Beach County Bd. Of County Comm'rs., 801 So. 2d 193, 195 (Fla. 4th DCA 2001); s*ee also Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989); *T.W. and K.W. v. Regal Trace, Ltd*., 908 So. 2d 499 (Fla. 4th DCA 2005) (applying special relationship in landlord-tenant context); *K.M. v. Publix Super Mkts., Inc*., 895 So. 2d 1114 (Fla. 4th DCA 2005) (employer-employee); *Butala v. Automated Petroleum and Energy Co*., 656 So. 2d 173, 175 (Fla. 2d DCA 1995) (landowner-invitee). *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982) (school - minor student). These exceptions create an appropriate dividing line that compensates innocent victims when a defendant had the ability to prevent the alleged injury causing conduct.

Even when not called out by name, Florida courts consistently have applied the special relationship rules as a boundary on foreseeability. For example, in *Shurben v. Dollar Rent-a-Car*, 676 So. 2d 467 (Fla. 3d DCA 1996), the court does not cite § 315 nor use the phrase "special relationship," however, the existence of the "special relationship" is apparent: customers of a car rental company alleged the company had a duty to warn them that criminals were targeting tourists based on rental car license plates. *Id.* The car rental company had control over the location because it knew that criminals were targeting tourist car renters in its location based on rental car license plates, but failed to warn its customers of this fact. *Id.* at 468. Like the facts alleged in *Gross, supra*, where this Court held a

university owed a duty to warn a student when it had knowledge that the student's mandatory internship was in a dangerous neighborhood, the court held that the car rental company had an obligation to share its actual knowledge of on-going criminal conduct against renters in its vicinity. It was this "special relationship" between a company and its customer and the company's knowledge of the precise criminal behavior at issue that created the duty to the customers. *Id*.; *see also K.M. v. Publix Super Mkts., Inc.*, 895 So. 2d 1114, 1118 (Fla. 4th DCA 2005) (recognizing that *Shurben* was a "special relationship" case, and affirming that the existence of such a relationship is "*required*" before recognizing "a duty to take precautions against the criminal acts of third parties") (emphasis added).

At times, Florida courts have imposed a modified exception to the general rule that a defendant does not have a duty to protect the victims of third party misconduct. This modified boundary on foreseeability is a rule that similarly evaluates control. Courts using it impose a duty where a defendant's control over either the perpetrator or the location and knowledge of the specific danger has given that defendant the unique ability to control the situation and protect the victim. *Daly v. Denny's, Inc.*, 694 So. 2d 775, 777 (Fla. 4th DCA 1997) (emphasis added) (citing *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 562 (Fla. 3d DCA 1987)(en banc), *approved*, 533 So. 2d 261 (Fla. 1988); *see also* discussion *supra*. at 20:21.

In *T.W. and K.W. v. Regal Trace, Ltd.*, the District Court explained that when examining the existence of duty in cases involving third-party misconduct, courts should first address whether a special relationship exists. 908 So. 2d 499, 504 (Fla. 4th DCA 2005). If such a relationship exists, then a court will determine "whether the incident at hand occurred within the course of that relationship so as to give rise to a duty." 908 So. 2d at 504. If the court determines the incident did not occur within the course of the special relationship, then "it must be determined whether another exception to the general rule of no liability for third-party criminal acts applies, namely control of the premises, and whether such exception gives rise to a duty." *Id.*

In sum, a legal duty should not be imposed on a remote defendant that has no ability to prevent the injury. In the case of third-party misconduct, a rule that imposes a duty only where the defendant either has a recognized special relationship with the victim or third party perpetrator, or has control over the alleged injury-causing instrumentality, the victim, the perpetrator, or the location at the time of injury, is an appropriate dividing line and is consistent with current Florida law.

3. <u>These Boundary Setting Rules Apply in Cases Alleging Both Acts of Omission and Commission.</u>

Florida courts consistently apply the special relationship and time and location limitations in conducting the foreseeable zone of risk analysis. No

distinction between acts of omission and commission enter into the analysis.[9] Neither the Restatement nor Florida law makes a distinction between acts of "omission" and "commission" when examining the negligence and duty elements. On its face, § 315 applies to those "whose conduct consists of failure to act as well as one who does act,"[10] Restatement (Second) of Torts § 314 cmt. b (1965), and § 302 expressly refers to "[a] negligent *act or omission*." Restatement (Second) of

[9] In any event, the complaint against Battelle alleges acts of omission. The Stevens's allegations against Battelle are, in every instance, of a failure to act: (a) the Defendants failed to properly or solely maintain or store the Anthrax in its possession; (b) the Defendants failed to properly inventory, warehouse, or catalog the Anthrax in its possession; (c) the Defendants failed to properly monitor employees who have access to the Anthrax; (d) the Defendants failed to maintain their premises in a manner precluding unauthorized individuals from having access to the Anthrax; (e) the Defendants failed to employ proper security measures to prevent the improper use, possession, access and/or disbursement of the Anthrax; (f) the Defendants failed to establish appropriate procedures or protocol concerning the access of employees of the Defendants to the Anthrax; (g) the Defendants failed to implement inventory or catalog or monitoring systems in order to account for the Anthrax in their possession; (h) the Defendants failed to take appropriate security measures to insure that possession and access to the Anthrax would be limited to those individuals with proper clearance; (i) the Defendants failed to implement adequate security measures to prevent access to the Anthrax by unauthorized individuals. 80253 Dkt. #1 ¶ 12.

[10] Section 314 - the general rule that one has no duty to act for the protection of others - provides that it should be read together with § 315. Restatement (Second) of Torts § 314 cmt. a (1965). Section 315, in turn, refers to the duty of an "actor," which under comment b of § 314 includes "one whose conduct consists of failure to act as well as one who does act."

Torts § 302 (1965) (emphasis added). Neither § 302 nor § 315, therefore, apply solely to one type of act over the other.

Any attempt to create a distinction between acts of commission and acts of omission as grounds for applying § 302 rather than § 315 is ill-advised. It would broaden the duty to protect against the criminal acts of third parties far beyond what Florida law has allowed and would result in word play to convert any set of given facts into allegations of an act of commission so as to avoid the limitations of liability under § 315. Such a result should be avoided. *See, e.g., White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979) ("[I]t seems incongruous to suggest that liability should turn on the tenuous metaphysical construct which differentiates sins of omission and commission.").

Moreover, Florida courts have repeatedly applied § 315 to acts of commission. *See, e.g., Aguila v. Hilton, Inc.*, 878 So. 2d 392 (Fla. 1st DCA 2004) (applying § 315 and holding no duty owed by hotel based on claim it promoted and facilitated underage drinking and driving, resulting in fatal car accident; *Austin v. Mylander*, 717 So. 2d 1073 (Fla. 5th DCA 1998) (applying § 315 and holding policeman owed no duty to cab driver where policeman placed an intoxicated felon in cab and felon later killed cab driver). Thus, allegations of acts of commission are not sufficient to avoid the requirement of either a special relationship or control at the time of the injury to establish duty in cases involving criminal conduct.

II. ANY RULE OF LAW THAT REJECTS THE WELL-ESTABLISHED BOUNDARIES ON FORESEEABILITY SIMPLY BECAUSE A DEFENDANT POSSESSES A SUBSTANCE THAT CAN BE USED INTENTIONALLY BY UNRELATED PARTIES TO CAUSE HARM IS NOT APPROPRIATE.

This Court should not expand the reach of tort liability and disregard established rules of law simply because a defendant possesses a substance that can be used intentionally by unrelated parties to cause harm. Moreover, limits on foreseeability should not change simply because the attacks on Mr. Stevens were caused by anthrax and were possibly terrorist attacks in the wake of September 11. Such a result would be reactionary and would disregard well-established Florida law.

To so expand the reach of tort liability would have unfortunate consequences in a wide range of industries. It would penalize companies that provide socially useful services and would discourage them from performing those functions. For example, manufacturers, transporters, and distributors of fertilizer products could be dragged into court after terrorist attacks using bombs made of fertilizer, even if there is no demonstrated connection between an individual company and the particular fertilizer used. In this way, these companies would become an insurer for the whole fertilizer industry and liable to the public at large. Likewise, construction companies that use dynamite in their operations could be forced to defend a lawsuit if third party criminal actors misuse dynamite to cause harm.

Drugstores that stock products that can be synthesized to create methamphetamines could potentially owe a duty to the general public to prevent a criminal from stealing those products to formulate methamphetamine in a hazardous homemade laboratory. This Court should reject such a broad expansion of existing Florida law and ensure that the Florida limits on duty can be consistently applied in any future tort litigation.

A. Plaintiffs Cannot Avoid the Boundaries on the Legal Question of Duty By Ignoring the Third-Party Misconduct.

Plaintiffs have said that the duty they are alleging is the duty not to allow the interception of anthrax and, therefore, the third-party misconduct limitation on the legal question of duty does not apply. There are two problems with that approach. First, the complaint specifically alleges third party criminal misconduct. Second, the complaint does not allege that Battelle had reason to foresee that third party criminal misconduct.

Plaintiffs' complaint alleged that anthrax was "obtained and sent" to Mr. Stevens at American Media where he inhaled it and subsequently died. This allegation (obtaining and sending anthrax through the mail) is unquestionably a criminal act.[11] Throughout this case, the Stevens family has asserted that

[11] The Complaint against Battelle alleges that "Anthrax was *obtained and sent* to American Media, Inc., employer of Robert Stevens. Mr. Stevens was then exposed to the Anthrax and died . . . ." 80253 Dkt. #1 ¶ 13 (emphasis added).

intentional criminal conduct occurred, and that this criminal conduct caused Mr. Stevens's death. Brief of Appellee, 11th Cir., 05-15088-GG, at 9, (Jan. 18, 2006) ("Appellees' Br.") (acknowledging there was "criminal conduct"); Appellees' Br. at 10 (stating that anthrax "was sent to Robert Stevens and killed him"); Appellees' Br. at 28 (discussing "the criminal acts of the people who mailed the Anthrax" and "the criminal act of mailing Anthrax bacteria"); Appellees' Br. at 29 (arguing that negligence exists "even if the actual injury is the result of criminal conduct"); Appellees' Br. at 32 (discussing "the conduct of the third person who mailed [anthrax] to American Media, Inc. and killed Robert Stevens"); Appellees' Br. at 35 (discussing "the criminal act committed by the distribution of the bacteria through the mail").

In any event, the Stevens family cannot credibly argue (and has never attempted to argue) that Mr. Stevens's death was *not* the result of a criminal attack. There is no dispute that a third party intentionally sent the anthrax to American Media, Inc. Battelle, therefore, answered the complaint and moved for judgment on the pleadings because the complaint alleged third party criminal conduct, but did not allege either a special relationship or that Battelle, at the time of the injury, controlled the location of injury, or the alleged injury causing instrumentality. Based on the complaint, the Stevens family could not meet the threshold legal requirement to allege existence of a duty.

Furthermore, the complaint does not adequately allege facts that would support a duty on behalf of Battelle to prevent the misappropriation and misuse of anthrax. The negligence allegations in the Complaint are not supported by any underlying facts from which a court could reasonably infer the broad categories of negligence in the Complaint. In May 2007, the United States Supreme Court overruled the pleading standard enunciated in *Conley v. Gibson*, 355 U.S. 41 (1955), that a complaint could not be dismissed unless it appeared beyond doubt that the plaintiff could prove "no set of facts"[12] in support of his claim which would entitle him to relief. See *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 2007 WL 1461066 at *10 (May 21, 2007) . In so holding, the Court enunciated a pleading standard: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 2007 WL 1461066, at *8 (May 21, 2007) (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). Thus, the Stevens's family's conclusory allegations of negligence, that are simply a recitation of the elements of a cause of action, do not contain "enough factual matter" to "raise a right to relief above the

[12] 355 U.S. at 45-46.

speculative level" and are insufficient to survive Battelle's Motion for Judgment on the pleadings.[13] *Id.*

The case against Battelle is a slender reed of "they had it, Mr. Stevens died from it; therefore, Battelle must have done something wrong." Such allegations should not be sufficient to force Battelle to expend significant legal fees simply to prove that the anthrax that killed Mr. Stevens did not originate from Battelle, that samples were not stolen, lost, or misplaced at Battelle, and that Battelle was not negligent in handling the anthrax it possessed. Legal duty is a minimum legal threshold for Plaintiffs to enter the courthouse doors. Without it, this case should not proceed.

Imposing a duty to all simply because a company possesses a hazardous substance that could be misappropriated and misused expands the concept of legal duty well beyond this Court's precedent and subjects innocent, responsible companies to litigation simply because they handle the same type of material that

[13] In *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court dismissed a complaint for failure to state a claim under Rule 12(b)(6) where the plaintiffs did not allege any facts that would support their conspiracy claims. The rule set out in *Twombly*, requiring allegations to be plead with more than just "labels and conclusions," applies equally to Defendant's Rule 12(c) Motion for Judgment on the Pleadings. *See First Merchants Collection Corp. v. Republic of Argentina*, 190 F.Supp.2d 1336 (S.D. Fla. 2002) (The Eleventh Circuit treats Rule 12(b)(6) motions to dismiss and Rule 12(c) motions for judgment on the pleadings identically.) (citing *Agricredit Acceptance, LLC v. Hendrix*, 32 F.Supp.2d 1361, 1364 (S.D. Ga.1998)).

is used by a criminal. Such a ruling would discourage a company like Battelle from conducting socially valuable services, such as research to assist in the development of vaccines or antidotes that may be useful if anyone attempts such attacks again.

Instrumentalities that can be used as weapons exist in society and must be controlled, but imposing a general duty on a company that possesses anthrax to protect the public at large from criminal acts of third parties does not accomplish that control. *See, e.g.*, *District of Columbia v. Beretta, USA, Corp.*, 872 A.2d 633 (D.C. 2005). In *Beretta*, the court refrained from imposing on the gun manufacturer a general duty of care to the public because to do so would create an "indeterminate class of plaintiffs" as well as an "indeterminate class of defendants whose liability might have little relationship to the [social] benefits of controlling illegal guns." *Id.* at 644. Courts have not imposed a duty to protect the general public from illegal use of guns but have decided a duty may be imposed only if it would redress the harm. To impose a duty on Battelle to protect "the public at large" from something that is not intended to be used as a weapon would necessarily create an "indeterminate class of plaintiffs," in addition to an "indeterminate class of defendants."

B. This Court Should Not Assume Facts That Are Not Alleged Against Battelle in Deciding the Certified Question.

In its opinion, the Eleventh Circuit raised the specter of stolen guns or stolen dynamite when the facility's door had been left unlocked. Perhaps those facts would present a different case for establishing duty and resulting negligence. The problem with both of these formulations, however, is that they are inconsistent with the facts that have been alleged against Battelle.

The District Court improperly included, as part of the question it certified to the Eleventh Circuit, the assumption that there had been "a history of missing or unaccounted for samples" of anthrax prior to the alleged injury-causing event. Opinion, No. 05-15088 at 13. This allegation was not made against Battelle and should not enter into this Court's equation as the question relates to Battelle. Contrary to the Plaintiffs' allegations against the government, that the government "failed to adequately secure samples of [anthrax] and, as early as 1992, samples . . . were known to be missing," Complaint ¶ 9, no such allegations were made against Battelle.

Even if there had been a history of lost or missing samples at the Battelle facility alleged against Battelle, that allegation alone would not create a duty. A defendant is only required to protect against criminal acts if it had actual or constructive knowledge of the specific danger. *See Malicki v. Doe,* 814 So. 2d 347, 363 (Fla. 2002); *Wal-Mart Stores, Inc. v. Caruso,* 884 So. 2d 102, 105 (Fla.

4th DCA 2004). Plaintiffs' argument requires an assumption that any company handling anthrax should have expected that someone would misappropriate and misuse it by sending it in letters. However, it was not foreseeable that Battelle's research activities with anthrax (even if negligently performed) would place Mr. Stevens at risk of dying from mail intentionally contaminated with anthrax. Battelle has no duty to "'safeguard against occurrences that cannot be reasonably expected or contemplated.'" *Fla. Power and Light Co. v. Lively*, 465 So. 2d 1270, 1274 (Fla. 3d DCA 1985) (citation omitted).

Moreover, without allegations demonstrating Battelle should have been on notice that the specific type of criminal behavior, *i.e.*, the inclusion of anthrax powder in mailed letters, would occur, Plaintiffs have not alleged a foreseeable zone of risk. Battelle did not owe a duty to protect against such unforeseen criminal conduct. *See Wal-Mart Stores, Inc. v. Caruso*, 884 So. 2d 102, 105 (Fla. 4th DCA 2004).

A company should not be required to anticipate all potential criminal behavior that might occur far outside its range of control. *Relyea v. State*, 385 So. 2d 1378, 1383 (Fla. 4th DCA 1980). To impose liability in cases involving unforeseen criminal conduct such as the instant case, where the defendant has no notice of the specific danger and no opportunity to protect against it, would make Battelle and any similarly situated entity that works with a substance that could be

used by criminals, insurers to the general public simply because they work with materials that can be misused to cause harm.

CONCLUSION

This Court should ensure that the rules for establishing tort liability, specifically in cases involving third party misconduct, are consistent. Allocating the duty to a laboratory to protect the public from all uses or misuses of a substance that laboratory, as well as others, possesses, does nothing to promise or secure protection from terrorist conduct such as mailing anthrax. Instead, forcing Battelle to defend this tort case arising out of the criminal acts of third parties they could not control would inhibit Battelle and companies like it from developing technological advancements for the good of society for fear of unreasonable legal exposure from intentional criminal acts.

Respectfully submitted,

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