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

REPLY BRIEF OF DEFENDANT-APPELLANT BATTELLE MEMORIAL INSTITUTE

Tami Lyn Azorsky
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500

Martin B. Woods
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
New River Center
200 East Las Olas Boulevard
Suite 2100
Fort Lauderdale, FL 33301
Telephone: (954) 462-9500

Dated: October 22, 2007

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SUMMARY OF THE ARGUMENT

The foreseeable zone of risk from which a legal duty arises cannot be unbounded. It must have limits to prevent an entire industry from defending litigation when a substance possessed or used by that industry is misused by an unrelated person. Appellant Battelle Memorial Institute ("Battelle") summarized in its opening brief the established Florida precedent that sets those limits in a way that imposes responsibility in situations where it should exist but prevents unfounded lawsuits against individuals and businesses. That precedent establishes a straightforward rule: in the case of third-party misconduct, a defendant owes a legal duty to the victim 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. Battelle demonstrated how that rule from existing precedent easily could be applied to this case involving attacks with *bacillus anthracis* ("anthrax") by mail.

Appellees, in contrast, chose to avoid both the applicable law and the facts alleged in their complaint against Battelle. They advance an argument that is based on facts that were not alleged in their Complaint and that cannot be alleged. Appellees have never alleged that Battelle had a history of lost or missing samples or any other reason to believe that its security procedures were inadequate. The

Complaint against Battelle contains no specific facts that would justify any of the generalized claims of negligence in the Complaint. Nonetheless, Appellees seek a rule of law that would allow Battelle to be haled to court merely because it possesses for lawful and socially useful purposes a material that some unknown assailant obtained from an unknown source and mailed to Florida. This Court should issue an opinion that prevents that result.

ARGUMENT

I. APPELLEES' ARGUMENTS RELY ON A SET OF FACTS PLAINTIFFS DID NOT PLEAD.

Appellees criticize the arguments Battelle has made to this Court as flawed on the basis that it "begins with the assumption that third parties had anthrax." *See* Appellees' Brief at 3. The criticism is not valid. Plaintiffs' own Complaint alleges that anthrax "was obtained and sent to American Media, Inc., employer of Robert Stevens." *See* Appendix to the Initial Brief of Appellant Battelle Memorial Institute ("Appendix") at Tab 1, Page 5. In contrast, the facts on which the Stevens family relies to argue that a duty should be imposed on Battelle are not alleged in the Complaint against Battelle and could not be alleged.

A. Appellees Have Not and Cannot Plead the Facts that are the Lynchpin of Their Argument.

The centerpiece of the Stevens family's argument is a series of factual statements that are not alleged anywhere in the Complaint against Battelle. In an

effort to support their arguments that Battelle created a foreseeable zone of risk, Appellees in their brief tell a fascinating story. They say:

> The Complaint alleges that the government created the particular strain of anthrax bacteria that killed Stevens, and it has been genetically traced to its biological warfare research facility at Fort Detrick, Maryland. Battelle was later provided access to the same strain of anthrax after it had been developed by the government. This anthrax has only one function and that is to incapacitate or kill individuals exposed to it.

See Appellees' Brief at 7. The problem with the story is that these allegations are **not** in the Complaint against Battelle.[1] The complaint does **not** allege that Battelle ever "[was] made aware pathogens were missing." *See* Appellees' Brief at 3. Indeed, there is **no** allegation that Battelle ever had lost or missing samples.

Appellees not only make factual statements in their brief that are not alleged in their Complaint, they make factual statements that they have contradicted in public statements. For example, in attempting to argue that duty is not limited to situations in which the defendant had a special relationship with either the victim or the perpetrator, or control, at the time of the injury, over the location or instrumentality of injury, Appellees state in their brief "the dangerous instrumentality utilized to harm Stevens was created by, and within the exclusive

[1] While the Complaint against the government does allege that the government had a history of missing samples at one of its facilities back in 1992, none of the quoted allegations regarding the anthrax strain are alleged in the Complaint against the government either.

control, of the Petitioners." *Id.* at 17. Again, there is **no** such allegation in the Complaint against either Battelle or the United States and there could be no such allegation. The Stevens family's counsel has publicly acknowledged that Battelle is "one of a group of perhaps 12 or so companies that potentially could be the source [of the anthrax that was used to kill Robert Stevens]." *See* Appendix at Tab 4, Page 2. Moreover, the reality is that anthrax is a naturally occurring microbe that, for centuries, has caused disease in animals and illness in humans.[2] *See* Appendix at Tab 5, Page 2237. The "factual" statements in Appellees' brief simply do not reflect either the allegations in the Complaint or the factual reality.

B. A Review of the Complaint Filed by Appellees Reveals that it Alleges No Basis for Finding that Battelle Owed a Duty to Mr. Stevens.

A brief review of the Complaint against Battelle reveals that it contains few factual allegations at all and none that support Appellees' legal arguments. Appellees do not and cannot allege that Battelle had lost or missing samples of anthrax, exclusive control of the anthrax that was sent to American Media, or a special relationship with either Mr. Stevens or the individual who "obtained and sent" (Appendix, Tab 1, ¶ 13) anthrax to American Media, Inc. Instead, they list

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[2] Nonetheless, anthrax inhalation is rare. Eighteen cases were reported in the United States between 1900 and 1976. Most occurred in special risk groups, including goat hair mill or wool or tannery workers. Two were laboratory associated. *Id.* at Tab 5, Page 2238.

generalized allegations that Battelle negligently handled anthrax, negligently hired the employees who handled anthrax, and negligently supervised and trained these employees. These generalized allegations, however, are not supported by any alleged facts.[3] Even if they were, they would not support the finding of a legal duty owed to a victim of an anthrax through the mail attack. *See infra.* at 7-15.

Battelle seems to be a named defendant in a lawsuit based on only one fact: it possessed anthrax for lawful and socially useful purposes. That simple fact should not be enough to drag a defendant to court. To prevent that result, this Court must reaffirm that the threshold legal requirement of duty has limits. Failing to set such limits would create unbounded duties for entities around the country whenever someone misuses a legal substance or thing to commit a crime.

The Eleventh Circuit in its opinion addressing the issues it felt this Court had not addressed in the past, made certain factual assumptions, specifically past knowledge of theft of materials the third-party used to cause injury and knowledge of the source of the materials. The Eleventh Circuit expressed the opinion that the following issues were unaddressed in Florida law:

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[3] While notice pleading is appropriate, a complaint must contain "enough factual matter" to "raise a right to relief above the speculative level." *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 2007 WL 1461066 at *8 (May 21, 2007); *see also* Battelle's Initial Brief at 30-31. The Complaint against Battelle does not.

> Would a gun store owner who consistently left the door unlocked at night, *knowing that guns had been stolen in the past*, be found free from liability if an unknown third party was killed by a criminal *using one of the stolen guns*? Would a construction company that failed to increase security *after dynamite was stolen on several occasions* be found not liable if an unknown third party *used the materials* to blow up a building simply because there was no special relationship between the construction company and the thief or the construction company and the occupants of the demolished structure?

(*See* Appendix, Tab 10, at 16) (emphasis added.). Having set that stage, the Eleventh Circuit asked:

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

(*Id.* at 17.)

The first part of the certified question[4] must be answered, "No." Otherwise, without alleging anything more than "you possessed dynamite," the occupants of the demolished building could file a lawsuit against every possessor of dynamite in the country to investigate their security practices. The family of the victim shot by an unknown criminal could file a lawsuit against every gun store owner in the

[4] In its opening brief, Battelle suggested alternative questions that did not assume any facts not alleged in the Complaint. *See* Battelle's Initial Brief at 10-11.

country to investigate whether they faithfully locked their doors at night. This Court should not issue a rule that allows these results. Instead, consistent with prior precedent, this Court should hold: In a case involving third-party misconduct, the defendant does not owe the victim a legal duty unless the defendant had a special relationship with either the plaintiff or the defendant or control at the time of the injury over the instrumentality of injury or the place of injury. In any other circumstances, the injury is not foreseeable.

II. EXISTING FLORIDA LAW SHOULD BE APPLIED IN THIS CASE INVOLVING ANTHRAX.

Battelle presented in its initial brief the law applicable to the threshold legal requirement of duty. Battelle summarized the manner in which Florida law places boundaries on foreseeability (Battelle's Initial Brief at 16-24) and demonstrated that the boundaries apply in cases alleging both acts of omission and acts of commission (*Id.* at 24-26). Appellees' response does not dispute any of the applicable law.

A. The Precedent Cited by Appellees Reveals the Boundaries on Foreseeability Summarized in Battelle's Initial Brief.

Foreseeability, as analyzed for purposes of determining the threshold legal requirement of duty, has boundaries. First, it is limited by geographical space and time. *Id.* at 16-20. Second, in the case of third-party misconduct, a duty exists only if the defendant had control over the injury-causing instrumentality or the

location at the time of the injury or a special relationship with either the plaintiff or the perpetrator. *Id.* at 20-24. These boundaries apply to both acts of commission and acts of omission. *Id.* at 24-26. None of the cases cited by Appellees suggests any different rule.

Only three of the cases cited by Appellees involve third-party misconduct at all and, in each of them, defendant had control over either the location or the injury-causing instrumentality at the time of the injury or a special relationship with the victim or the perpetrator.

- In *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999), this Court held that a duty was owed when a sheriff's deputy, during a vehicle stop, directed an intoxicated driver to drive to a designated location. Duty existed because the deputy assumed control over both the driver and the location by directing the intoxicated individual to drive other passengers to a designated spot.

- In *Whitt v. Silverman*, 788 So. 2d 210, 217 (Fla. 2001), a third-party struck two pedestrians while leaving defendant's property as a result of reduced visibility due to the gas station owner's failure to maintain bushes on the property. The defendant controlled the location of injury because the bushes allegedly obstructing the motorists view grew on the defendant's property.[5]

- In *Hewitt v. Avis Rent-A-Car System, Inc.*, 912 So. 2d 682 (Fla. Dist. Ct. App. 2005), victims of an auto accident sued Avis Rent-a-Car because the car causing the accident had been rented illegally in a scam being run by Avis employees. Defendant had control over the injury-causing instrumentality, the cars illegally rented by its

[5] The Court limited the foreseeable zone of risk to "the patrons of the business as well as those pedestrians using the abutting streets and sidewalks . . . ." *Id.* at 222 (emphasis added).

employees, because defendant knew of the illegal rentals and failed to stop them.

Similar control is not alleged in this case against Battelle.

The other cases cited by Appellees do not involve third-party misconduct. Foreseeability, nonetheless, was limited by geographic space and time.

- In *Rylands v. Fletcher,* a reservoir on the defendant landowner's property broke and flooded the nearby plaintiff's coal mines. L.R. 3 H.L. 330 (1868).
- In *Louisville National Railroad v. Hickman*, 445 So. 2d 1023 (Fla. 1st DCA 1983), the defendant railroad company owed a legal duty to a plaintiff standing near the train tracks who was injured by exposure to poisonous gas released during the derailment of defendant's train.
- In *Hines v. Reichold Chemicals, Inc.*, 383 So. 2d 948 (Fla. 1st DCA 1980), the defendant owed a duty to plaintiffs who worked immediately adjacent to defendant's manufacturing site that discharged chemicals into the atmosphere.
- In *Cities Service Co. v. State*, 312 So. 2d 799 (Fla. 2nd DCA 1975), the defendant owed a duty to prevent phosphate waste on its property from leaking into plaintiff's nearby waters.

The Stevens family, by contrast, did not and cannot allege that anthrax escaped from a facility and moved unaided to injure Mr. Stevens.

Appellees' statement that the wild animal cases and cases finding strict liability for abnormally dangerous activities are "particularly applicable" to this case (*see* Appellees' Brief at 10, 19 and 20) is simply wrong. First, strict liability was not alleged by Appellees and therefore reliance on such cases is inappropriate. In strict liability cases, there is no duty analysis; rather, duty is presumed. *See,*

e.g., Dorse v. Armstrong World Indus., Inc., 513 So. 2d 1265, 1267 (Fla. 1987) (noting that duty of care is not an issue in strict liability cases). Moreover, even abnormally dangerous activities law has a proximity of location requirement. In contrast, the anthrax that allegedly injured Mr. Stevens was thousands of miles from Appellant's laboratory and clearly did not arrive in Florida unaided.

Second, Appellees' argument comparing Anthrax to the escape of a dangerous animal is improper. [6] There is a significant distinction between animals on one hand, and anthrax on the other. While an inherent risk in keeping wild animals is that they will injure you, your invitees, or even escape and injure others, anthrax cannot "escape" from a laboratory without assistance. Appellees' deliberate avoidance of the fact that a criminal or terrorist took anthrax from *some* source, put it into a letter, and then mailed that letter to Florida, is the crucial step in the instant equation and completely removes this case from the wild animal analogy. Even if Appellees' Complaint could allege with some specificity that the anthrax involved actually originated from Battelle's facility, anthrax is not a wild animal that fled Battelle's facilities and traveled, unassisted, from Ohio to Florida to attack Mr. Stevens.

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[6] *See e.g. Scorza v. Martinez*, 683 So. 2d 1115, 1117 (Fla. 4th DCA 1996) (escaped monkey injured plaintiff); *Loftin v. McCrainie*, 47 So. 2d 298 (Fla. 1950) (wild steer).

Appellees' reliance on a so-called distinction between acts of nonfeasance/omission and those of misfeasance/commission is also mistaken. Using this distinction, they attempt to argue that Battelle engaged in misfeasance by setting in motion a "force," thereby implicating § 302 rather than § 315[7] of the Restatement (Second) of Torts. However, when Battelle conducted scientific research on anthrax, it was not setting in motion a "force" that traveled unaided to Mr. Stevens in Florida; someone mailed a letter containing anthrax. Moreover, §§ 302, 314, and 315 all expressly apply to both acts and omissions. *See* Battelle's Initial Brief at 22-26. Florida courts have recognized this application and repeatedly applied § 315 to acts of commission. *Id.* at 26. Finally, § 302 cannot apply to the duty analysis because, by its terms, it is used to analyze whether the conduct is negligent not to whom the defendant owed a legal duty.

B. Imposing a Duty on a Distant Laboratory Simply Because it Possesses a Substance Misused by Others Would Create Inappropriate, Unbounded, and Unpredictable Susceptibility to Suit.

There are objects and substances in society that have legitimate uses, but that can be misused to harm others. Rules of law should address all of them

[7] Section 315 of the Restatement (Second) of Torts (1965) establishes an exception to the general rule that there is no duty to prevent the misconduct or criminal acts of third parties when the defendant has a "special relationship" either with the plaintiff or the perpetrator. Florida courts have expanded that exception to find a duty when the defendant, at the time of the injury, had control over the injury-causing instrumentality or the location.

consistently and should ensure that legitimate actors are not called to court to account for a criminal's misconduct.

Appellees urge this Court to look to a New Jersey case involving illegal use of stolen guns for guidance. *See* Appellees' Brief at 32 (citing *Gallara v. Koskovich*, 836 A. 2d 840, 364 N.J.Super. 418 (2003). *Gallara* is neither like the instant case nor controlling precedent. Nonetheless, a comparison of *Gallara,* the case it distinguished, *Valentine v. On Target, Inc.,* 727 A.2d 947 (Md. 1999), and other cases involving illegal gun use is illustrative of the lines that can be drawn when deciding who owes a duty in cases involving third party misconduct.

These decisions demonstrate that there may be factual situations in which the relationship of the parties or the ability to control or prevent the situation justify imposition of a duty. Courts have refused, however, to impose a general duty to protect the public at large from illegal use of guns. *See District of Columbia v. Beretta, USA, Corp.,* 872 A. 2d 633 (D.C. 2005), *cert: denied*, 546 U.S. 928 (2005). Courts recognize that to hold the gun manufacturers liable as an industry would create "limitless notions of duty and foreseeability" and result in an "indeterminate class of plaintiffs" and "indeterminate class of defendants whose liability might have little relationship to the [social] benefits of controlling illegal guns." *Id.* at 643-44. (Internal citation omitted).

The *Gallara* court, applying New Jersey law, found a duty existed based on very specific facts. The plaintiffs presented facts to establish that (1) the defendant gun store owner had violated a statute imposing specific standards on gun dealers to secure guns from theft, including the maintenance of an adequate and functioning security system; (2) the gun used in the crime had been directly linked to the defendant's store; and (3) the crime occurred in the near vicinity and close in time to the theft. *See Gallara,* 836 A. 2d 840 at 848-851. The *Gallara* court found on those facts that it was both foreseeable that guns will be stolen as well as "readily foreseeable that stolen guns will be used for criminal purposes." *Id.* at 850-851 (internal citations omitted).

In reaching its decision, the *Gallara* court distinguished *Valentine v. On Target, Inc.*, another case against a gun store alleging liability for murder using a stolen gun. 727 A. 2d 947 (Md. 1999). In *Valentine*, the Maryland Court of Appeals affirmed the trial court's grant of a motion to dismiss because the complaint did not describe how the handguns had been displayed or what could have been done to prevent theft. *Id.* at 948. Instead, the complaint contained only "conclusory allegations suggesting that the elements are in fact present in the controversy." *Id.* at 949. Notably, the allegations in the *Valentine* complaint were strikingly similar to the allegations in the complaint against Battelle. *Id.* at 948.

The distinctions between *Gallara* and *Valentine* are real. In *Gallara*, there were specific facts showing that the defendant had violated the law in securing guns, thieves stole the guns, and then promptly used them to commit murder. In *Valentine*, there were no such allegations and there was no duty owed by the gun store owner. In this case against Battelle, there is no allegation of violation of applicable regulations, no known assailant, no known source of the anthrax, and the crime occurred thousands of miles away from the defendant's allegedly negligent conduct. Moreover, Appellees alleged no facts that would tend to establish that the anthrax used to murder Mr. Stevens originated from Battelle's laboratory.

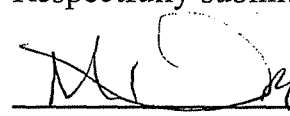
Instead, based on Battelle's possession of anthrax and generalized allegations of negligence, Appellees seek to interrogate Battelle on the procedures it used to hire, train, and supervise employees and to protect anthrax in its facility in Ohio. Just as the *Beretta* court found that allocating the duty to gun manufacturers does nothing to promise or secure protection from illegal guns, allocating a duty to laboratories does nothing to promise or secure protection from terrorist acts such as mailing anthrax. To impose a duty on Battelle to protect "the public at large" from unforeseen criminal conduct such as occurred at American Media, would make Battelle and any similarly situated entity that works with a substance that could be misused by criminals, insurers to the general public and would necessarily create

an "indeterminate class of plaintiffs," in addition to an "indeterminate class of defendants." Any farmer could be haled to court if a criminal uses a fertilizer bomb; any drug store owner if a methamphetamine laboratory explodes; or any gun store owner when a murder occurs with a stolen weapon. The imposition of such unbounded duties is a policy choice more appropriately undertaken by the legislature. *See Grunow v. Valor Corp of Fla.*, 904 So. 2d 551, 557 (Fla. 4th DCA 2005)

CONCLUSION

This Court should not create a special rule of law simply because this case involves the 2001 anthrax through the mail attacks. It should confirm the boundaries on foreseeability that exist in Florida precedent and hold that, in the case of third-party misconduct, a defendant does not owe a legal duty to the victim unless the defendant has a special relationship with either the victim or the perpetrator or, at the time of the injury, control over either the injury causing instrumentality or the location of the injury.

Respectfully submitted,



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New River Center
200 East Las Olas Boulevard
Suite 2100
Fort Lauderdale, FL 33301
Telephone: (954) 462-9500

Dated: October 22, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Defendant Appellant Battelle Memorial Institute was served by U.S. Mail on the following this 22nd day of October, 2007:

Richard D. Schuler, Esq.
Schuler & Halvorson, P.A.
Barristers Building, Suite 4-D
1615 Forum Place
West Palm Beach, FL 33401

Tami Lyn Azorsky, Esq.
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, DC 20006

Philip M. Burlington, Esq.
Burlington & Rockenbach
2001 Palm Beach Lakes Boulevard
Suite 410
West Palm Beach, FL 33409

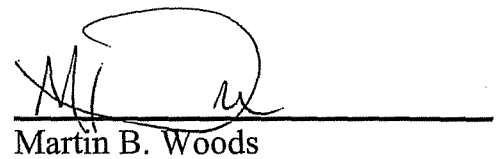
Christina M. Falk, Esq.
Jason S. Patil, Esq.
U.S. Department of Justice
Civil Division, Torts Branch
Environmental Torts Section
PO Box 340 Benjamin Franklin Stn
Washington, DC 20044

Thomas D.Byron, III, Esq.
Douglas N. Letter, Esq.
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7260
Washington, DC 20530

MARTIN B. WOODS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and is in compliance with the font requirements of Rule 9.210, Florida Rules of Appellate Procedures.



Martin B. Woods