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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D18-2658

ASAEL ABAD, et al.,

Appellants,

v.

G4S PLC, a foreign corporation; G4S SECURE SOLUTIONS (USA) INC., a Florida corporation; and G4S US, INC., a Florida corporation,

Appellees.
_____/

INITIAL BRIEF OF APPELLANTS

On appeal from the Fifteenth Judicial Circuit in and for Palm Beach County

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PREFACE

This is an appeal from an Agreed Final Order of Dismissal with Prejudice as to Certain Plaintiffs, which rendered final the underlying Order Granting Defendant's Motion to Dismiss Amended Complaint for Failure to State a Claim. The parties will be referred to as Plaintiffs and Defendant, or by their names, as they appeared below, as they appear in this Court, or as otherwise designated. The following designations will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

The trial court granted Appellee/Defendant's [G4S Secure Solutions (USA), Inc.] Motion to Dismiss.[1] Thus, the facts are taken from the Operative Complaint, which this Court must accept as true in this procedural posture.

On June 12, 2016, Omar Mateen shot 102 people in the Pulse nightclub, a club in Orlando frequented by members of the LGBT (lesbian, gay, bisexual, and transgender) community, killing 49 and wounding 53 (R40, ¶ 1; R53, ¶ 102). This horrific act of violence was [at the time] the deadliest mass shooting committed in the United States (R40).[2]

At the time, and since September 10, 2007, Mateen was employed by the Defendant as a type of armed security guard called a Custom Protection Officer—a position granted a higher level of security clearance than other security guards employed by Defendant (R52, ¶ 97; R54, ¶ 112; R57, ¶¶ 118-19).

A. The Operative Complaint

i. Defendant submits a fraudulent psychologist evaluation to hire Mateen as an armed security guard.

Prior to employing and training Mateen to be an armed security guard, Defendant was required to administer a psychological examination, as it was

[1] Plaintiffs sued three G4S entities, but voluntarily dismissed without prejudice two of these three entities (R129-32). Thus, Plaintiff refers only to this one G4S Defendant.

[2] Sadly, this was surpassed in 2017 by the horrific Las Vegas mass shooting.

required for all new hires (R55, ¶ 114). The purpose of the evaluation was to determine if Mateen was fit to carry a firearm, with a psychologist determining and having to attest to his mental and emotional stability (R55-56, ¶¶ 114-15). Notably, Defendant knew that Mateen had been dismissed from a corrections officer training class just months before, on April 27, 2007, for suggesting that he was planning to bring a gun to class in order to commit a mass shooting like the one that had recently occurred at Virginia Tech (R57, ¶¶ 122-23).

Aware of Mateen's pre-existing desire to commit a mass shooting, Defendants submitted a psychological evaluation of Mateen, with a psychologist's attestation, to the Florida Department of Agriculture and Consumer Services in order to secure approval for Mateen's security guard firearms license, which included a Class G firearms license that permitted Mateen to carry concealed weapons (R57-58, ¶¶ 124-25).

The psychological evaluation and psychologist's attestation submitted to the Florida Department of Agriculture and Consumer Services by Defendants in order to obtain Mateen's security license and firearms license was *fraudulent* (R58, ¶ 126). Defendants falsely represented to the Department that Mateen's psychological assessment was given, reviewed, approved, and signed by a named physician (R58, ¶ 126). But that doctor never evaluated, or even saw, Mateen's psychological exam, and she did not sign his psychological evaluation (R58, ¶

127). In fact, she had closed her Florida practice two years before and was not even living in Florida at the time Mateen's psychological assessment was supposedly performed (R58, ¶ 127). (The Florida Department of Agriculture and Consumer Services later determined that Defendant falsely listed the doctor's name on 1,514 forms submitted to the Department between 2006-2016 (R58, ¶ 128)). Aware of Mateen's preexisting desire to emulate a mass shooting, and relying on the fraudulent "evaluation" of Mateen, Defendant applied for and obtained Mateen's security and Class G firearms license without ever having him complete the required psychological evaluation or having a licensed psychologist review and approve the results of such an evaluation (R58, ¶ 129).

ii. Having hired Mateen based upon the fraudulent psychological evaluation, Defendant trains Mateen to be an expert marksman – all the while being put on notice of his continuing desire to commit mass murder.

Once Defendant falsely obtained Mateen's security and firearms licenses, it provided him with an initial 28 hours of firearms training, including instruction and practice on a shooting range (R58, ¶ 130). Defendant provided Mateen with yearly firearms training, as required to maintain his Class G firearms license, including instruction and practice on a shooting range. (R58-59, ¶ 131, 139). This training not only contributed to Mateen becoming proficient with a firearm, but also to him becoming an expert marksman (R59, ¶ 132).

During Mateen's employment, Defendant was put on specific notice that Mateen was an unstable, dangerous individual with a desire to commit acts of mass violence against members of the general public, and particularly against members of the LGBT community. In 2013, Mateen was assigned by Defendant to work as an armed guard at the St. Lucie Courthouse (R58, ¶ 133). The St. Lucie County Sheriff's Department soon requested Mateen be permanently removed from this assignment after reporting to Defendant that Mateen repeatedly threatened his colleagues; claimed to be in league with al-Qaeda and Hezbollah; claimed to be associated with the Boston marathon bombers; expressed a desire to martyr himself; and praised the actions of the Army major who shot 45 people at Fort Hood (R59, ¶¶ 133-38).

After learning of Mateen's threats and his desire to commit mass murder, consistent with the comments he made prior to his employment as an armed security guard re Virginia Tech, Defendant merely transferred Mateen to another location (R59, ¶¶ 139-41). Thus, Defendant did not have Mateen finally undergo a psychological evaluation or assessment, or report his behavior to the Florida Department of Agriculture and Consumer Services, and Defendant also did not move him to an unarmed security guard position. (R59, ¶¶ 139-41). Instead, Defendant continued to provide Mateen with the training necessary for him to

maintain his Class G firearms license, thereby making him a more accomplished and proficient shooter (R60, ¶ 139).

Defendant then placed Mateen in a position where he worked with a former policer officer for several months during 2014-2015 (R60, ¶ 142). During that time, the former officer reported to Defendant that Mateen was "unhinged and unstable," was in a constant state of anger, engaged in frequent homophobic and racist rants, and [unsurprisingly] "talked about killing people." (R60, ¶ 142). Defendant failed to take any action after being notified of Mateen's conduct and refused to transfer him to another position (R60-61, ¶ 143).

Despite all of the above information and knowledge, Defendant never once subjected Mateen to an actual psychological evaluation to determine whether he was really fit to be armed, never had a psychologist actually assess and attest to Mateen's fitness to be armed, and never notified the Florida Department of Agriculture and Consumer Services of Mateen's conduct so that it could be considered prior to issuing or renewing Mateen's security and firearms licenses (R598, ¶ 139).

iii. Mateen uses his gun licenses [obtained under false pretenses] to purchase the weapons used in the mass shooting.

Mateen was able to use his Class G license [which, as noted above, was fraudulently obtained through Defendant's actions] to purchase the guns he used in the Pulse massacre. Approximately 2 weeks prior to the shootings, Mateen

attempted to purchase body armor and ammunition from a licensed gun dealer without showing his firearms license, and was *turned away by the dealer* (R61, ¶ 146). Then about a week before the shooting, he brought his firearms license to a different gun dealer and was able to purchase the guns he used in the shootings (R61, ¶ 147). The owner of the gun dealership who made the sale specifically cited Mateen's security licensures, including his Class G firearms license, *as a reason for deciding to sell the weapons*. (R61, ¶ 147).

iv. The mass shooting.

As noted above, on June 12, 2016, Omar Mateen shot 102 people in the Pulse nightclub, a club in Orlando frequented by members of the LGBT (lesbian, gay, bisexual, and transgender) community, killing 49 and wounding 53 (R40, ¶ 1; R53 ¶ 102). During the course of this massacre, Mateen terrorized the patrons and staff of Pulse while telling victims that he "wouldn't stop his assault until America stopped bombing his country." (R53, ¶ 103). At one point, he phoned 911 to praise the Boston Marathon bombers and an American suicide bomber who died in Syria 2 years earlier (R53, ¶ 104).

v. The causes of action.

The Plaintiffs sued the Defendant for negligence for the living survivors, and wrongful death for the decedents (Count 1, Negligence, R62-65 R65-68, Wrongful Death). The Defendant had a duty to make an appropriate investigation of its

prospective employees prior to hiring, and use due care in, hiring them, providing them with firearm training, retaining them as employees, or obtaining/maintaining their Class G firearms licenses, but failed to do so with regard to Mateen (R62-63, ¶ 151; R65, ¶ 159).

Plaintiffs further alleged Defendant breached these duties in the following ways (R63, ¶¶ 152-55; R66, ¶¶ 160-63):

> 152. In breach of these duties, prior to hiring and training MATEEN, while retaining him as an employee, or prior to obtaining/maintaining MATEEN's Class G firearms license, the [Defendant] failed to conduct an appropriate psychological evaluation of MATEEN that was reviewed and approved by a licensed psychologist.
>
> 153. In breach of these duties, the [Defendant] hired or trained MATEEN, retained MATEEN as an employee, or obtained/maintained MATEEN's Class G firearms license, despite the fact that [Defendant] knew or should have known that MATEEN had been dismissed by the Florida Department of Corrections for making threats against his training class and had demonstrated a propensity to threateningly carry weapons into unauthorized locations.
>
> 154. In breach of these duties, the [Defendant] retained MATEEN as an employee, maintained MATEEN's Class G firearms license, or provided firearms training to MATEEN despite the fact that they knew or should have known that MATEEN made violent threats against his coworkers and their families, professed an allegiance with, and sympathy for, terrorists, and expressed an appreciation for gruesome terrorist attacks on Americans.
>
> 155. In breach of these duties, the [Defendant] retained MATEEN as an employee, maintained MATEEN's Class G firearms license, or provided firearms training to MATEEN despite the fact that they knew or should have known that MATEEN was behaving "unhinged and unstable", engaging in homophobic and racist rants, and talking about his desire to kill people while at work.

B. Motion to Dismiss Arguments

Defendant moved to dismiss the lawsuit, asserting it owed no duty as a matter of law to the Plaintiffs (R89-100). Defendant asserted the third-party victims were strangers to the Defendant and there could be no legal duty for Mateen's criminal acts (R89). Defendant asserted its conduct did not foreseeably create a broader zone of risk that poses a general harm to others (R92). There was no connection between Mateen's employment and his decision to commit the mass shooting (R94). He did not use a company weapon or equipment (R94). Mateen made a private purchase of the weapons (R94). Mateen's Class G firearms license was not a prerequisite to purchasing the weapons, as Mateen had a right to purchase these weapons (R94). Whether Defendant knew or should have known of Mateen's mental state was not relevant, since Mateen's employment did not place the victims into a class of persons within a reasonably foreseeable zone of risk (R95-96). The firearms training was also irrelevant as the victims were still not placed into a reasonably foreseeable zone of risk (R96 n.3). The Defendant had no awareness of or control a foreseeable risk when it came to Mateen privately purchasing weapons and committing the mass shooting (R98 n.5).

While the Plaintiffs did not plead a negligent hiring or negligent training claim, Defendant also argued that Plaintiffs claims failed under the case law relevant to these types of claims (R91-93; R96-98).

Plaintiff filed a Response in Opposition (R103-119). A duty of care arose from the complex and unique facts of this case (R109, R112). Plaintiffs contended that Defendant's conduct created a foreseeable zone of risk posing a general threat of harm to third parties, giving rise to having a duty to act with reasonable care (R108-10) (relying on *U.S. v. Stevens*, 994 So. 2d 1062, 1068 (Fla. 2008), and *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992)). Florida law does not require a special relationship between the Defendant and Plaintiffs to require Defendant to have acted with reasonable care (R112-13).

Specifically, despite knowing of Mateen's prior disturbing threat to bring a gun to his correctional officer training class to copy-cat the mass shooting at Virginia Tech, Defendant fraudulently obtained a security license and Class G firearms license for Mateen (R110-11). Defendant then trained Mateen to become an expert to use a firearm, and continued training him and renewing his license (R111). All the while, Defendant was notified of Mateen's disturbing and threatening actions during his employment (R111).

Yet, Defendant continued to renew Mateen's license every year, and never disclosed these matters to the Florida Department of Agriculture and Consumer Services (R111). Defendant knew or should have known of the risk associated with obtaining a security license and Class G firearms license, without the required psychological evaluation and assessment, for someone like Mateen who openly

expressed a desire to commit a mass shooting at the outset of his employment (R113-14). The risk was made further clear with Mateen's disturbing conduct actions after that point, all the while the Defendant trained Mateen to use a firearm to the point of being an expert marksman (R114). A reasonable person would understand the public would be exposed to an unreasonable risk of harm, such that Mateen's actions were a foreseeable consequence of Defendant's failure to use reasonable care (R114).

Contrary to Defendant's argument, the Defendant did create the risk (R114). In addition to training Mateen to become an expert marksman, the Defendant legitimatized Mateen through fraudulently helping him obtain the security license and Class G firearms license (R114). The facts as alleged showed that Mateen specifically purchased the weapons used in the mass shooting because he had this license (R114). The fact Plaintiff could have purchased the weapons without showing or having any licenses at all was an issue that was only relevant to *proximate cause*, not duty (R114).

Plaintiffs also explained they are not pursuing any claims arising out of Defendant's status as Mateen's employer (R108 n.2). Thus, arguments regarding the ability to state a negligent hiring, employment, or retention claim were academic and not before the Court. *Id.*

Defendant filed a Reply in support of its Motion to Dismiss (R120-28). Defendant argued it could not be held strictly liable for the misconduct of its employee in his personal life (R121). Defendant contended unlike the anthrax in *Stevens* that is an ultrahazardous substance, guns are "ubiquitous in our society" and could be purchased by someone like Mateen who has no "history of diagnosed mental illness" (R123). Defendant asserted Mateen's mass shooting was "disconnected from his work in every meaningful way" (R123). Thus, Defendant reiterated it did not create a foreseeable risk of harm to the Plaintiffs (R123). Defendant asserted it could not control or minimize the risk posed by Mateen (R124). Defendant stated that had it terminated Mateen, he would have still been able to purchase the firearms he used to carry out his attack (R124).

C. Hearing and Trial Court's Order

The trial court held a hearing on Defendant's Motion to Dismiss. The trial court did not rule at the hearing. However, the trial court then entered an Order granting Defendant's Motion to Dismiss (R135-41). The trial court held that Defendant did not owe a legal duty to the Plaintiffs (R139).

The trial court held that *Stevens* was distinguishable, since the government defendant there created an ultrahazardous toxin in a laboratory and owed a duty to the public to implement adequate safeguards to prevent its removal from the laboratory (R138). Addressing the Defendant's training of Mateen, and the threats

he made in his years of employment, the trial court reasoned that Defendant owed no legal duty since it did not control Mateen's movement (R138). Defendant was not required to protect the general public from Mateen in perpetuity (R138). While Defendant's training may have enhanced Mateen's ability to handle a firearm proficiently, firearms training was different than the anthrax in *Stevens* (R139).

The trial court did not consider it material that the Defendant fraudulently assisted Mateen to obtain a Class G firearms license (R138). The trial court noted that this license is not required to purchase a firearm, and thus the trial court ruled this did not legally impact Mateen's ability to purchase the firearms used in the shooting (R138-39). The trial court did not address the fact that Mateen was only able to purchase these handguns used in the mass shooting because he had the Class G license, however (R135-39).

Plaintiffs then filed a Second Amended Complaint (R150-205). However, the Plaintiffs later withdrew these claims (R316-17). The trial court subsequently entered a Final Judgment dismissing the Plaintiffs' case as raised in the Operative Complaint, the First Amended Complaint discussed above (R316-17).

SUMMARY OF ARGUMENT

This case addresses whether Defendant owed a duty of care to the Plaintiffs, the survivors and personal representatives of many victims of the Pulse nightclub shooting. This Court should reverse the trial court's Order and Final Judgment that held the Defendant did not owe a duty of care.

The Defendant employed Mateen, who committed what was, at the time, the largest mass shooting in this country. It is true that Mateen committed his massacre on his private time, while using his private weapons. However, under the unique facts of this case, Defendant owed a duty of care to the Plaintiffs.

This is not a negligent hiring or negligent retention case, but a general negligence case. Defendant's conduct foreseeably created a broader zone of risk that posed a general threat of harm to others. Defendant hired Mateen as an armed security guard despite being informed he wanted to copy-cat the Virginia Tech mass shooting. Defendant then assisted Mateen in fraudulently obtaining special firearms licenses to perform his job, all the while without completing a mandatory psychological evaluation that undoubtedly would have revealed Mateen's psychological imbalance and propensity to want to commit a mass shooting.

Then, Defendant trained Mateen to become an expert marksman, annually renewing his special gun licenses, never informing state authorities there was no evaluation, and never performing the evaluation. In the years of employment,

Mateen engaged in repeated disturbing and threatening behavior, including expressing a desire to commit a mass shooting. Additionally and critically, Mateen then purchased the murder weapons specifically because of the legitimacy associated with him having the special firearms licenses. While these licenses were not required to legally purchase a weapon, under these facts, Mateen specifically purchased the weapons because he had these licenses. Finally, these licenses enabled Mateen to carry a concealed weapon. Under the totality of the facts, Defendant owed a duty of care to the Plaintiffs. This Court should reverse.

ARGUMENT

POINT-ON-APPEAL

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS, AS DEFENDANT OWED A LEGAL DUTY TO THE PLAINTIFFS.

Standard of Review

On a motion to dismiss, a court must accept the facts alleged in the complaint as true and must draw all reasonable inferences in favor of the pleader. *Cocco v. Pritcher*, 1 So. 3d 1246, 1248 (Fla. 4th DCA 2009) (citation omitted). A trial court's ruling on a motion to dismiss is reviewed *de novo* by this Court. *Id.* Whether a duty of care is owed is a question of law for this Court. *See Wallace v. Ed Dean*, 3 So. 3d 1035, 1046 (Fla. 2009) (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992); Restatement (Second) of Torts § 328B.)

Argument

The trial court erred in concluding that Defendant did not owe a legal duty to the Plaintiffs. Contrary to the trial court's conclusion, the Defendant created a foreseeable zone of risk to the general public, which gave rise to a duty to act with reasonable care. The Defendant was not an absolute guarantor of safety to the public, and the Defendant's duty did not extend to the end of time. However, under the unique factual circumstances here, the Defendant owed a legal duty to the Plaintiffs.

A. The general law on the duty of care.

A negligence cause of action is comprised of four elements, only the first is at issue here, duty. This asks whether a defendant has a "duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct for the protection of others against unreasonable risks." *Clay Elec. Co. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (citation omitted). As noted above, whether a duty exists is a question of law for this Court.

A duty of care can arise from four different sources; one of these sources is from the general facts of the case. *See McCain*, 593 So. 2d at 503 n.2, followed in many later Supreme Court cases, including, *inter alia*, *Dorsey v. Reider*, 139 So. 3d 860, 863 (Fla. 2014), and *Wallace*, *supra*. As the Supreme Court observed in *Dorsey*, "[T]he determination of the existence of a common law duty flowing from the general facts of the case depends upon an evaluation and application of the concept of foreseeability of harm to the circumstances alleged." *Id.* (citing *McCain*, 593 So. 2d at 502-04).

In *Stevens*, the Supreme Court explained that Florida law recognizes "that negligence liability may be imposed on the basis of affirmative acts which create an unreasonable risk of harm by creating a foreseeable opportunity for third party criminal conduct, even though there is no 'special relationship' between the parties that independently imposes a duty to warn or guard against that misconduct." 994

So. 2d at 1068. In determining whether a duty of care exists in such situations, the *McCain* foreseeable zone of risk test controls because the Florida Supreme Court "intended *McCain* to function as a restatement of the law of negligence." *Id.* at 1067 (citation and quotation omitted). As the Supreme Court noted in *Stevens*, under the *McCain* test:

> [W]here a person's conduct is such that it creates a foreseeable zone of risk posing a general threat of harm to others, a legal duty will ordinarily be recognized to ensure that the underlying threatening conduct is carried out reasonably. [A]lso . . . as a general proposition the greater the risk of harm to others that is created by a person's chosen activity, the greater the burden or duty to avoid injury to others becomes. Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken.

Stevens, 994 So. 2d at 1067 (quotations and citations omitted). Thus, "where the risk of injury is great[,] the corresponding duty of [care] is heightened." *Stevens*, 994 So. 2d at 1070.

B. Defendant owed a duty to the Plaintiffs under the facts of this case.

This case presents an example of where a duty of care is owed under the facts of a case. While there is no case directly on point, that is because there is no case that has addressed the scope of the facts in this case. The Supreme Court in *McCain* expressly recognized that unique facts can trigger a duty of care, when the test laid out by the Court is supported under the facts of the case. This is such a case.

Defendant contended it could not owe a duty of care and be an absolute guarantor of the public safety. Plaintiffs have never contended there was absolute or strict liability here. Defendant also contended that they could not owe a duty of care because this would mean they would have been forever liable for Mateen's actions, no matter where and when Mateen committed an atrocity such as this mass shooting. Plaintiffs did not make this argument, either. Instead, under *these* facts, Defendant's conduct created a foreseeable zone of risk posing a general threat to others, giving rise to a duty to act with reasonable care.

To begin with, let's step back to the beginning of Mateen's employment with Defendant. The Defendant was specifically put on notice that Mateen had threatened to bring a gun to his correctional officer training class in order to reenact the Virginia Tech massacre, where nearly three dozen college students and teachers were executed. Yet, the Defendant set this recent history aside and, incredulously, hired Mateen. Furthermore, it was a condition of employment that Mateen have a security license and Class G firearms license. Notwithstanding the fact Mateen had *already* threatened to commit a mass shooting, Defendant fraudulently obtained these licenses on Mateen's behalf. Defendant did so by submitting a psychological evaluation and psychologist's attestation under the forged signature of a psychologist who never saw or evaluated Mateen or otherwise determined him to be fit to carry a firearm.

In of itself, Plaintiff did not below, and does not here, assert that the Defendant owed a duty of care to the general public if Mateen had, say early in his employment, committed a mass shooting akin to this mass shooting in this case. But there is much more. (That is a hypothetical under some other facts, and not this case). Defendant then, for years, trained Mateen to expertly use a firearm, and continued training him and renewing his firearms license. All the while, the Defendant was specifically notified that Mateen had, as mentioned above:

- repeatedly threatened his colleagues;
- claimed to be in league with al-Qaeda and Hezbollah;
- claimed to be associated with the Boston marathon bombers;
- expressed a desire to martyr himself;
- praised the actions of the Army major who shot 45 people at Fort Hood;
- was acting "unhinged and unstable;"
- was in a constant state of anger;
- engaged in frequent homophobic and racist rants; and
- talked about killing people.

Defendant will surely argue it had no statutory duty to disclose these matters to law enforcement. Defendant may also contend it did not have a statutory duty to disclose these matters to the Florida Department of Agriculture and Consumer Services, when annually re-renewing Mateen's license. But Defendant had fraudulently obtained Mateen's security license in the first place. It should have notified the Department of this fact, and it should have notified the Department that it never performed a psychological evaluation of Mateen, who so obviously

was not fit to be trained as an expert marksman all the while. The issue here, as well, is not whether Defendant owed a statutory duty, but a duty under the facts of the case.

And, there is another critical fact here. About 2 weeks before the shooting, Mateen attempted to purchase body armor and ammunition, clearly items for the mass shooting he was contemplating. He was turned away. Yet about a week before the shooting, Mateen purchased the weapons used in the mass shooting from a licensed gun dealer. The Operative Complaint alleges, and it must be accepted as true, that the licensed gun dealer only sold these [murder] weapons to Mateen because he presented his security license and Class G firearms license. In other words, Mateen utilized his fraudulently-obtained licenses as the impetus to purchase his weapons of mass execution. The facts of a case *do matter*, and the facts here directly tied the Defendant's actions to the mass shooting.

The Defendant argued and the trial court agreed, that what mattered was that Mateen *could have* purchased weapons legally from another gun dealer, without having to show these licenses. But those would be facts in a *different* case. In this case, Mateen utilized the status position and legitimacy of his employment and these licenses, to purchase *the* weapons. This nexus directly connects the Defendant to the mass shooting. The Defendant notes that Mateen was legally able to purchase weapons since he was not *formally* designated as mentally disturbed.

The Defendant ignores that it was on long-standing notice Mateen expressed a desire to commit a mass shooting, i.e., he was obviously mentally unfit to purchase a gun. Defendant may not have had a duty to report this, but this does not immunize Defendant from owing a duty of care under the facts of this case.

The Defendant's arguments here also do not go to duty, but to proximate cause. That is, the Defendant's arguments would go to the issue of whether Mateen may have still engaged in the mass shooting under other facts and circumstances in purchasing weapons elsewhere. But while the existence of a legal duty is a question of law, "[t]he issue of proximate cause is generally a question of fact." *Florida Power & Light Co. v. Periera*, 705 So. 2d 1359, 1361 (Fla. 1998); and *Wallace*, 3 So. 3d at 1046 n.18. While not an issue before this Court, there is more than enough factual evidence that the Defendant's conduct foreseeably and substantially caused the mass shooting, the test for proximate cause.

In granting the Motion to Dismiss, the trial court stated that finding a duty of care here would mean the military could be held liable for training a sharpshooter who at some time in the future shoots another person based on expertise acquired in the military. Respectfully, the trial court looked at the facts far too narrowly. The facts of this case are not *simply* that an employer trained an employee who becomes proficient and then shoots someone in a private setting, while not

fulfilling an employer-employee relationship. The Defendant's training of Mateen is not a fact that can or should be viewed in isolation.

Rather, the Defendant began this training while aware of Mateen's pre-existing desire to reenact a mass shooting. Defendant then hired Mateen under false pretenses, falsifying documents regarding the very psychological evaluation that almost certainly would have proven Mateen was not fit to be trained with weaponry. Then while aware of these facts, the Defendant then observed a series of not just disturbing and threatening actions, but specific statements regarding killing other people, praising another mass shooter, and the other facts discussed above. All the while, the Defendant trained *this employee*, under these facts, to be an expert marksman.

The trial court was similarly concerned that to impose a duty here would mean the Defendant would have owed a duty of care with no time or place limits. The trial court, respectfully, should have focused on the facts of this case, not hypothetical facts in another case. Thus, the issue is not whether, 10 years from now, Mateen or some other employee hypothetically commits a crime akin to this mass shooting. The fact is Mateen was still employed by Defendant, with a fraudulently obtained security and special firearms license, that enabled him to purchase the murder weapons. He then committed the mass shooting about 1 week

after purchasing the weapons, using the legitimacy of his Defendant-acquired licenses.

Defendant also noted below that it had employed Mateen for a lengthy period of time without incident. The fact Mateen refrained from committing a mass shooting for years did not lessen the Defendant's duty of care to the general public. It is not as if Mateen's disturbing behavior ceased at any time. The facts of this case do matter, not hypothetical facts of another case.

Under these unique and remarkable facts, Defendant created a foreseeable zone of risk that posed a general threat of harm to others. Defendant's conduct foreseeably created a *broader* zone of risk. This fact pattern supports the imposition of Defendant's duty, i.e., the "'minimal threshold legal requirement for opening the courthouse doors.'" *Stevens*, 994 So. 2d at 1069 (quoting *McCain*, 593 So. 2d at 502-03).

C. The Plaintiffs were not required to establish a special relationship between Defendant and Plaintiffs before imposing a duty to act with reasonable care.

The Defendant contended below that it could only owe a duty of care if there had been a special relationship between it and the Plaintiffs. The trial court did not address this in its Order granting the Motion to Dismiss, and Defendant's position is incorrect under Florida law.

In *Stevens*, the Florida Supreme Court expressly recognized a special relationship is *not* required. As the Supreme Court explained, Florida law recognizes "that negligence liability may be imposed on the basis of affirmative acts which create an unreasonable risk of harm by creating a foreseeable opportunity for third party criminal conduct, even though there is no special relationship between the parties that independently imposes a duty to warn or guard against that misconduct." *Stevens*, 994 So. 2d at 1068 (citation and quotation omitted).

In that case, the plaintiff alleged that the government failed to employ adequate security procedures while generating, testing, and handling deadly laboratory organisms, exposing "the public to an unreasonable risk of contamination as a result of unauthorized interception and disbursement of lethal materials" by third parties. 994 So. 2d at 1068. The Supreme Court determined the government's conduct gave rise to a "duty to protect all others exposed to any 'unreasonable risk of harm' arising out of that activity" pursuant to Section 302B of the Restatement of Torts (Second), which provides:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Stevens, 994 So. 2d at 1067. The Court in *Stevens* reasoned:

> taking the facts alleged in the complaint as true and reading them in the light most favorable to plaintiff here, the plaintiff's complaint may fairly be read to allege: (1) defendant knew or should have known of the risk of bioterrorism associated with lethal laboratory organisms under its ownership and control, particularly in light of its history of missing laboratory specimens dating back to 1992; (2) a reasonable medical research and testing laboratory operator in possession of those facts would understand that the public would be exposed to an unreasonable risk of harm unless it implemented adequate security procedures to guard against the risk of unauthorized interception of toxic materials from its laboratory; (3) the death of Mr. Stevens was a foreseeable consequence of the defendant's failure to use reasonable care in adopting and implementing security measures reasonably necessary to protect against the possibility of unauthorized interception and release of the biohazards under its control.

Id. at 1069 (quoting the district court's order in the case).

In this case, the Defendant contended that *Stevens* was an outlier case that was limited to its facts that anthrax is an ultrahazardous substance. The Court's opinion, however, does not indicate that the nature of the substance was the reason why a duty of care was owed. There, as in all cases, it is the facts that matter. Additionally, the fact that guns in our society are ubiquitous, and anthrax is not, is not a sound reason to set aside the Defendant's conduct regarding Mateen's murder weapon of choice. This is not a scenario where Defendant was simply aware of a psychologically disturbed employee in a general sense. This is also not a scenario where Defendant was simply aware of a psychologically disturbed employee who had a fondness for using guns. While employed, Mateen specifically discussed his desire to engage in *a mass shooting*. He was employed having already expressed

his desire to emulate *another mass shooting*. And, he of course committed a mass shooting here. Mateen's nexus to committing a mass shooting was every bit as dangerous as the third-party criminal actor's use of anthrax in *Stevens*.

The Defendant also asserts that in *Stevens*, it was the government's own materials [the anthrax] which it controlled, and which it failed to secure, such that a third party was able to intercept the materials and commit a crime. Here, again, however, the Defendant reads into *Stevens* a test that was not expressed by the Court itself. The Court did not require a defendant has to control the person or control the materials in order to impose a duty of care to third parties for who there is no special relationship.

Instead, the same analysis from *Stevens* is fully applicable here. Defendant was obviously directly aware of the known risk [Mateen] from his first day of employment. Defendant knew or should have known of the risk in obtaining a security license and Class G firearms license – without a psychological evaluation and assessment – for someone such as Mateen who had indicated he wanted to commit a mass shooting. Does this mean that employers are unable to hire people who have mental history issues for fear of exposure to tort liability? No. A duty of care was not necessarily owed at *that* moment in time. But this employer, with these facts, worked to obtain these licenses without the very check and balance that

would have undoubtedly revealed Mateen was unfit to be trained as an expert marksman, all the while with the legitimacy of these special gun licenses.

Then, as covered extensively above, Defendant knew or should have known the risk was increased dramatically in the years to come, as Defendant annually renewed these licenses, and trained Mateen extensively in weapons so he became an expert marksman, despite Mateen's threatening, disturbing behavior that included his expressing a desire to kill people, expressing sympathy for another mass shooter and terrorists. And, finally, the direct link between the Defendant's misconduct regarding the licenses and Mateen being able to purchase the deadly product that was akin to the hazard present by anthrax (the murder weapons).

Of course, Defendant will argue it did not create the risk that Mateen would kill the Plaintiffs. *Stevens* does not require a defendant to have created a deadly product, or to have the ability to control the deadly product (or person's conduct). Moreover, Plaintiffs have presented sufficient allegations, as described in depth here, that the Defendant *did* create the foreseeable zone of risk, or that Defendant "creat[ed] a foreseeable *opportunity* for third party criminal conduct. . . ." *Stevens*, 994 So. 2d at 1068 (emphasis added). There is a direct link between Defendant's conduct and the mass shooting.

Finally, Plaintiff acknowledges that in *Knight v. Merhighe*, 133 So. 3d 1140, 1144 (Fla. 4th DCA 2014), this Court held that absent a special relationship, a defendant may owe a duty to protect a plaintiff from the conduct of a third party "if the defendant is in actual or constructive control of: (1) the instrumentality of the harm; (2) the premises upon which the tort is committed; or (3) the person who committed the tort." *Knight*, 133 So. 3d at 1146. *Knight* had much different facts, as that addressed whether parents of a mentally troubled adult child owed a duty of care to attendees at a family event. To the extent this Court held these are the *only* situations where a duty of care exists, Plaintiffs respectfully contend this would overlook *Stevens*, *supra*. The Supreme Court did not impose a requirement a plaintiff establish a defendant owes a duty of care only in these three scenarios.

CONCLUSION

For the reasons stated above, this Court should reverse the Final Order of Dismissal in the Defendant's favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on February 15, 2019.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellants hereby certify that the type size and style of the Initial Brief of Appellants is Times New Roman 14pt.

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