No. 105789 and 105851 (consolidated)

IN THE
SUPREME COURT OF ILLINOIS

HECTOR ADAMES, JR., and ROSALIA DIAZ, as Co-Special Administrators of the Estate of JOSHUA ADAMES, Deceased, Plaintiffs-Appellees, vs. MICHAEL F. SHEAHAN, in his official capacity as Cook County Sheriff and BERETTA U.S.A. CORP., Defendants-Appellants, and DAVID SWAN, CHICAGO RIDGE GUNSHOP AND RANGE, INC., and FABBRICA D'ARMI PIETRO BERETTA S.P.A., Defendants.	On Appeal from the Illinois Appellate Court, First Judicial District Case No. 1-05-3911 There Heard on Appeal from the Circuit Court of Cook County, Illinois No. 01 L 05894 Honorable Carol Pearce McCarthy, Judge Presiding.

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT MICHAEL F. SHEAHAN, IN HIS OFFICIAL CAPACITY AS COOK COUNTY SHERIFF

NATURE OF THE CASE

Plaintiffs-Appellees, Hector Adames, Jr. and Rosalia Diaz ("Plaintiffs"), as co-special administrators of the estate of Joshua Adames, deceased ("Adames"), filed this action against Defendant-Appellant Michael Sheahan in his official capacity as Cook County Sheriff ("Sheahan"), among other Defendants, seeking

damages under a *respondeat superior* theory of liability for the fatal, accidental shooting of Adames by 13-year-old William "Billy" Swan ("Billy") with Billy's father's service revolver, a handgun manufactured by Beretta U.S.A. Corporation ("Beretta"). At all times relevant, Billy's father, David Swan ("David"), was employed by the Cook County Sheriff's Department and stored the handgun at home together with his own handguns.

The trial court granted summary judgment to Sheahan on Plaintiffs' *respondeat superior* claims, determining that in his capacity as Cook County Sheriff, Sheahan owed no duty to Adames because he could not reasonably foresee that David's storage of the handgun would result in the shooting. Additionally, the trial court found that Sheahan owed no duty to prevent Billy's criminal conduct. Plaintiffs later appealed the trial court's summary judgment ruling. On appeal, the Appellate Court reversed the trial court's summary judgment ruling in Sheahan's favor and remanded the cause for further proceedings, determining, among other things, that gun storage was incidental to David's employment with the Cook County Sheriff's Department and that David's storage of the handgun was the proximate cause (as opposed to a mere condition) of Adames' shooting. After the Appellate Court denied Sheahan's petition for rehearing, this Court accepted Sheahan's timely filed petition for leave to appeal.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether summary judgment in Sheahan's favor is warranted where there was no special relationship between Sheahan and Adames and when, even assuming, *arguendo*, such a special relationship existed, Adames' shooting by Billy Swan was not reasonably foreseeable so as to give rise to a legal duty for Sheahan to protect Adames?

II. Whether summary judgment in Sheahan's favor is warranted where the manner in which the handgun was stored was not the proximate cause of Adames' shooting, but only furnished a condition that made shooting possible?

JURISDICTIONAL STATEMENT

On August 23, 2005, the trial court entered separate summary judgment orders for Sheahan and Beretta. (Appendix A, A4-A11). Those orders were rendered final and appealable with Plaintiff's decision to voluntarily dismiss David Swan from this matter on November 1, 2005 and Defendant Chicago Ridge Gunshop and Range, Inc. having previously been voluntarily dismissed from the instant suit some two months earlier, on or about September 20, 2005. (R. Vol. XXVII, C 6721, 6732). Plaintiffs timely filed their notice of appeal on November 30, 2005. (Appendix B, A12-A14).

The Appellate Court initially reversed the trial court's entry of summary judgment for both Sheahan and Beretta via an opinion released on October 11, 2007. (Appendix C, A16-A59). Both Sheahan and Beretta thereafter timely filed

separate petitions for rehearing. On November 21, 2007, the Appellate Court denied both those petitions. (Appendix D, A61). Approximately one week later, on or about November 29, 2007, the Appellate Court released a modified opinion. (Appendix F, A65-A108). On December 21, 2007, Sheahan filed his petition for leave to appeal to this Court. Defendant Beretta's petition for leave to appeal was timely filed on January 3, 2008. On March 26, 2008, this Court allowed and consolidated Sheahan's and Beretta's respective petitions for leave to appeal. (Appendix G, A110-A113). This Court has jurisdiction over this appeal pursuant to Supreme Court Rule 315, governing appeals from the Appellate Court to this Court.

STATEMENT OF FACTS

The relevant facts, undisputed only for purposes of this appeal, were stated in the Appellate Court's modified opinion, dated November 29, 2007 (Appendix F, A65-A108), as follows:

A. Billy Swan

> On the morning of Sunday, May 5, 2001, Billy was home alone while his mother was at work and David and his brother went out. Billy called Adames and invited him over to play. Billy went into his parents' bedroom to watch through their window for Adames' arrival. Billy knew that inviting Adames over and going into his parents' bedroom were both against the rules.

Billy noticed that his parents' closet door was open and he saw a gun box on a shelf. Billy retrieved the box, which he claims was unlocked and contained three handguns belonging to David, including a Beretta 92 Series handgun (handgun) with a full magazine clip of bullets. Billy never saw his father carry or clean a gun in the house, but thought that his father might have a gun.

Billy had never handled a gun before, but he picked up the handgun and pushed a button that released the magazine holding the bullets. Billy replaced the clip and removed it several times. He also moved the slide mechanism at the top of the handgun and a bullet popped out. Billy repeatedly removed and replaced the bullets and magazine from the handgun. Billy stated that he understood the handgun to be loaded when the magazine was in place. However, he thought that bullets came out of the top of the magazine when the handgun was fired, not from within the chamber of the handgun. Billy also thought that removing the magazine fully unloaded the handgun.

After a few minutes, Billy saw his friend, Michael, riding his bicycle outside. Billy took the three guns, put them in his pockets and went downstairs to see Michael. Billy showed Michael the guns and how they worked. Adames arrived and Michael went to another room in Billy's house.

Billy and Adames began wrestling and playing around. Billy showed Adames the handgun, ejecting the magazine and bullets as described above. Billy removed the magazine and the bullet using the slide on the handgun, placing the bullets and magazine in his pocket. Billy first pretended to fire the handgun six or seven times at Adames before he actually pulled the trigger. Billy knew the handgun was dangerous and it could hurt or kill somebody, but he thought that the magazine had to be loaded in the handgun to fire a bullet. The handgun discharged a chambered bullet that hit Adames in the abdomen.

Billy ran upstairs and put the guns back in his parents' closet. Billy then ran back downstairs and realized that he had shot Adames. He called 911 and told the dispatcher that he found a gun and accidentally shot his friend while playing. Billy also stated that he did not know there were any bullets in the handgun.

Billy was subsequently found delinquent in juvenile court proceedings relating to the shooting. The delinquency holding was based on a finding that Billy committed involuntary manslaughter and reckless discharge of a firearm. Billy was placed on probation. This court affirmed the delinquency finding of the juvenile court.

B. David Swan

David testified that he graduated from the police academy in 1988, was deputized with the Cook County sheriff around January 1988, and promoted to lieutenant in 1997 or 1998. David carried a gun with him to work as an officer. When David started with Sheahan, his service revolver was a Smith & Wesson .38 Special. Eventually, he became certified in automatic weaponry and the handgun became his service handgun. David was promoted to a supervisory position and no longer needed his handgun on the job and, therefore, rarely brought it to work. David continued as a supervisor after the incident, even though all of his firearms were confiscated by the police investigators.

David testified that he owned three guns: the Beretta handgun, the .38 Special, and a .25 automatic. All three guns were stored in the same locking gun case, along with ammunition. David stored the case, and additional ammunition, on the top shelf in his closet. He maintained one key to the case on his key ring and an additional key in the junk drawer of his dresser. Approximately a year before the shooting, David completed his annual firearm qualification. David disagreed with Billy's testimony and stated that he locked up all three guns in the lockbox, returned them to the top shelf in his closet and did not touch the guns after that date.

For the purposes of defendants' summary judgment motions and these proceedings, the presumption is that the lockbox was unlocked.

David understood from his training that the Cook County Sheriff's Office ("Sheahan") required deputies to secure and store their weapons in either a locking box, like he used, or with a trigger lock. David testified that, pursuant to department requirements, he stored the ammunition separately from the handgun and that the handgun was stored without a bullet in its chamber. David knew how to check if a bullet was in the chamber and how to clear the weapon. David also knew about trigger locks, but did not have one and did not look into purchasing one for his handgun. However, David was not aware that the handgun would fire a bullet with the magazine removed. David also was unaware of a settlement by Beretta in a different case that included an agreement to include either magazine disconnect safeties in all guns sold after January 1, 2001, or a warning label that the firearm is capable of firing when the magazine is not engaged.

David testified that his house rules included a prohibition on any child in the parents' bedroom at any time and no one outside the family was allowed in the house when David or his wife was not home. David testified that he reminded Billy of these rule on

May 5, 2001, and Billy told him that he was going to go to the park. David speculated that Billy found the lockbox and the key and gained access to the gun. However, from the moment he returned to the house after the shooting to the day of his deposition, Billy had never openly discussed the shooting. David admitted that he never informed his children that he maintained guns in the household and that he never taught them gun safety.

In response to the shooting, Sheahan filed a complaint against David before the Merit Board claiming that David failed to properly secure and store his handgun. David's guns were taken from him by the police in their investigation and never returned to him. Following a bench trial, David was found not guilty of criminal charges based on the proscription under Section 24-9 of the Criminal Code of 1961, 720 ILCS 5/24-9 (2004) against improper storage of a firearm in a premise in which a minor under 14 is likely to gain access to the firearm.

C. Sheriff's Office Rules and Policies

Sheahan's general counsel, executive director, and weapons training officers testified about the department's rules, procedures and training programs. At the time of the incident, Sheahan had a general order in place that mirrored or exceeded the requirements of Section 24-9 of the Criminal Code of 1961. 720 ILCS 5/24-9

(2004). The purpose of the general order is to promote safe gun usage, citing 1,134 Americans were killed in 1997 from accidental shootings and that, annually, about 300 children are killed in accidental shootings. The general order requires officers to secure duty weapons in a secured lock box container or other location that would prohibit access by unauthorized persons to avoid accidents. In addition, officers are required to store any keys to such locking devices in a secure location separate from the weapon. Officers were taught to expect children to look everywhere in their homes. Therefore, weapons must always be inaccessible to children and properly stored to avoid accidents with children.

Sheahan's training program also included materials on educating family members on gun safety, particularly children. Education of children was detailed as an additional responsibility beyond proper storage. Specifically included in the materials is the recommendation to openly discuss firearm safety with children and avoid ignoring the issue.

Officers are informed that their responsibility for their firearm includes unintentional discharge because of improper storage, education, or disarming of the firearm. Officers were re-certified in their firearms annually, which included a program on home firearm safety. Although David did not need a weapon to

perform his duties as a supervisor, he completed this program annually.

D. The Handgun

Extensive testimony and documentation was presented regarding the handgun itself and various safety measures available in the industry. The handgun is a semiautomatic pistol designed for law enforcement and military use. The handgun is loaded by filling the magazine with bullets and inserting the filled magazine into the magazine well. The handgun is prepared for discharge by chambering the first round, pulling the slide to the rear of the handgun, and releasing it. When the safety is off, the handgun may be fired by its double-action trigger pull. After the chambered round is fired, the slide recoils to the rear, the spent cartridge is ejected, and the next live round is chambered upon the return of the slide.

This process will continue each time the trigger is pulled until the magazine is empty, at which time the slide remains locked open until the slide catch lever is released. Therefore, the user knows when firing the handgun that the magazine and chamber have been emptied. A user may also check if a round has been chambered by manually pulling the slide back and visually determining if a round has been loaded. Additionally, the

handgun has a chamber loaded indicator -- a small extractor head painted red -- that protrudes from the side of the slide when the chamber is loaded. Other safety devices on the weapon include: an ambidextrous safety-decocking lever; a hammer drop catch; a flared and serrated trigger guard; an automatic firing pin catch; a two-piece inertial firing pin unit; a reversible magazine release button; and a slide overtravel stop. Beretta did not include a magazine disconnect safety on this model.

Each handgun sold by Beretta was packaged with an instruction manual that included specific warnings and safety instructions. Like the training provided by Sheahan, the instruction manual contains repeated warnings of the dangers of firearms and the importance of proper handling and storage to avoid accidental injury or death. In particular, it contains advice to owners to store guns in locked storage units out of reach of children with ammunition stored separately.

Further, the manual contains advice to owners to make sure the cartridge chamber is empty when storing the handgun. Explicit step-by-step instructions on how to safely and completely unload the handgun are provided. The manual also includes instructions on how to fully engage the safety, release the magazine, fully retract the slide to extract and eject the chambered cartridge, and,

finally, visually inspect the open slide and magazine well to ensure all cartridges have been completely ejected. This information is repeated several times in the manual.

E. Expert Testimony

Plaintiffs presented witnesses who opined that the gun as designed was unreasonably dangerous. Plaintiffs' expert, Stanton Berg, a firearms consultant, admitted that an accident-proof handgun is impossible, but claimed that repetitive accidents may be designed out by gun manufacturers. Berg opined that if the handgun had a magazine disconnect safety, a device that stops the firearm from firing when the magazine is not fully inserted, the shooting in this case would not have occurred. Berg noted that this safety device was invented in 1910 and had even been used by Beretta on 92 Series handguns utilized by some police departments. Berg listed over 300 models of handguns that utilize a magazine disconnect safety and concluded that a handgun without such a safety is defective.

Berg continued to opine that the chamber loaded indicator located on the side of the slide was insufficient. He claimed the indicator was too small to provide an effective warning that a bullet was chambered. Berg also testified that the handgun should contain a warning on the firearm itself that it could be fired with

the magazine removed. Berg admitted on cross-examination that the nature and function of a firearm is to discharge a projectile at a high rate of speed. Berg stated that the majority of law enforcement agencies in the country utilized firearms without a magazine disconnect safety. Berg also admitted that it was a valid concern of these agencies to assure that they utilize firearms without anything that threatened to be an impingement on the firing of the gun.

Wallace Collins, a firearms and ammunition design and safety expert, testified to his study of safety assists suitable for handguns. Collins determined that the following safety characteristics were available at the time the handgun was manufactured, but were not included: a magazine disconnect safety; a warning that the gun will fire when the magazine is released; a better-located chamber-loaded indicator with clear directions; and a key lock. Therefore, Collins concluded that the handgun was unnecessarily dangerous.

Collins testified that these safety features were readily available, inexpensive, and commercially feasible. Collins opined that the key safety component that was missing was the magazine disconnect safety. Collins concluded that countless accidents like

the shooting in this case could be avoided by the implementation of the devices.

Stephen Teret, a professor of epidemiology for the School of Public Health at Johns Hopkins University, also was deposed as a witness for Plaintiffs. Teret prepared a report on the shooting and testified that he concluded that the absence of a magazine disconnect safety caused the shooting in this case. Teret included data in his report from a survey designed by the Johns Hopkins Center for Gun Policy and Research, performed by the National Opinion Research Center and reported in the Journal of Public Health Policy. The survey asked respondents whether they thought that a pistol can still be shot when its magazine is removed. Of the 1,200 respondents: 65% answered the pistol could still be fired; 20.3% answered the pistol could not be fired; 14.5% did not know; and .2% refused to answer. Of the 34.8% who responded that the pistol could not fire when the magazine is removed or that they did not know, 28% lived in a gun-owning household. Teret also testified that he felt the chamber loaded warning was not effective and could not possibly warn people who have no knowledge about guns.

Witnesses for Beretta testified that they understood that children gain access to guns and accidental shootings have

occurred both with and without the magazine inserted in the gun. It was agreed that this incident would not have occurred with a magazine disconnect safety installed on the handgun. It was further admitted that Beretta was capable of manufacturing guns with such a feature at a cost of up to $10 per gun. However, Beretta did not include a magazine disconnect because there was no market demand for that feature. Beretta also admitted to other manufacturers' use of the aforementioned safety devices on their handguns.

Beretta introduced evidence that the Beretta FS is utilized by police departments throughout the country. Testimony was presented that the handgun, as manufactured, met or exceeded industry standards. Further testimony on behalf of Beretta claimed that for the past 20 years, the vast majority of law enforcement agencies have consistently expressed a preference for no magazine disconnect safety or internal locking devices. Law enforcement officers and agencies do not want weaponry that may become inoperable by an inadvertent release of the magazine that could possibly jeopardize the safety of officers and the public.

ARGUMENT

I. SUMMARY JUDGMENT IN SHEAHAN'S FAVOR IS WARRANTED BECAUSE THERE WAS NO SPECIAL RELATIONSHIP BETWEEN SHEAHAN AND ADAMES AND, EVEN ASSUMING, *ARGUENDO*, SUCH A SPECIAL RELATIONSHIP EXISTED, ADAMES' SHOOTING BY BILLY SWAN WAS NOT REASONABLY FORESEEABLE TO GIVE RISE TO A LEGAL DUTY FOR SHEAHAN TO PROTECT ADAMES.

A. Standard of Review.

Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (2008); *Dowd & Dowd v. Gleason*, (1998), 181 Ill. 2d 460, 483. The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Bagent v. Blessing Care Corp.*, (2007), 224 Ill. 2d 154, 162. Whether summary judgment is appropriate is a matter that this Court reviews *de novo*. *Roth v. Opiela*, (2004), 211 Ill. 2d 536, 542. In passing upon the propriety of the trial court's entry of summary judgment (or an Appellate Court's reversal thereof), this Court considers whether the existence of a genuine issue of material fact should have precluded the judgment or, absent such an issue of fact, whether judgment is proper as a matter of law. *Kedzie & 103rd Currency Exch. v. Hodge*, (1993), 156 Ill. 2d 112, 116-17.

Summary judgment should be entered without hesitation where the right of the moving party is clear and free from doubt. *Mydlach v. DaimlerChrysler Corp.*, (2007), 226 Ill. 2d 307, 311. Indeed, summary judgment "is a salutary means of disposing of litigation in which there is no genuine factual dispute." *Joiner v. Benton Community Bank*, (1980), 82 Ill. 2d 40, 44. Where a plaintiff fails to establish any element of an asserted cause of action, summary judgment for the defendant is warranted. *Bagent*, 224 Ill. 2d at 163. The determination of the existence of a duty (or lack thereof) is a question of law appropriately resolved via summary judgment. *Wojdyla v. Park Ridge*, (1992), 148 Ill. 2d 417, 421.

B. The Circumstances In The Case At Bar Did Not Create A Legal Duty On Shehan's Part To Warn Or Protect Adames From Billy Swan's Criminal, Unforeseeable Conduct.

The trial court properly granted summary judgment in Sheahan's favor because he had no duty to protect Adames from a criminal attack. First, no "special relationship" existed between Sheahan and Adames that gave rise to a common law duty on Sheahan's part to warn or protect Adames from harm in the first instance. The Appellate Court's determination that a special relationship need not exist in order to impose a duty of care upon Sheahan under the facts of this case was wrong. Further, even assuming, *arguendo*, that such a "special relationship" did exist (which it did not), the subject shooting was not reasonably foreseeable to Sheahan. Additionally, Sheahan did not voluntarily undertake to protect Adames from third party criminal attacks so as to fit within the established exception to the "special relationship" rule. Those issues too

unquestionably relieve Sheahan of any legal duty toward Adames for the incident in question. Again, the Appellate Court's contrary determination was erroneous and should be reversed.

Additionally, the other factors relevant to the duty analysis support the trial court's summary judgment ruling in Sheahan's favor. Most significantly, the burdens and consequences of placing an obligation on Sheahan to protect a shooting victim from third party criminal acts under these circumstances are truly onerous. The Appellate Court's opinion gives scant, if any, consideration to that factor in its duty analysis. The Appellate Court's view that Sheahan should be liable any time unauthorized access to an officer's duty weapon results in an accidental shooting is nothing short of draconian. That is particularly true in a case such as this where the failure to secure the weapon against unauthorized access directly violates an officer's training, there is no claim that the mode of storage allowing the gun to be accessed in any way furthered the mission of Sheahan and there are no allegations that the weapons training provided to the officer was in any way inadequate or non-exhaustive.

The Appellate Court's decision as to Sheahan is contrary to Illinois law, namely that as articulated by this Court in *City of Chicago v. Beretta U.S.A. Corporation*, (2004), 213 Ill. 2d 351, a case involving public nuisance claims against gun manufacturers. Tellingly, in *Beretta U.S.A. Corp.*, this Court noted, in pertinent part: "Judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the

unfairness of imposing liability for the acts of another." *Beretta U.S.A. Corp.*, 213 Ill. 2d at 381. Such pronouncements by this Court countenance against the imposition of a duty against Sheahan in this case. Indeed, the extension of liability to an officer's employer based upon a *respondeat superior* theory where the employer has absolutely no control over either the shooter or the officer's household defies all notion of fairness to which this Court alluded in *Beretta U.S.A. Corp.*

Here, there is no claim that the Sheriff's training on gun safety was anything other than proper and detailed. Indeed, there have never been any direct claims of negligence pled against Sheahan in this matter and the record documents the extensive efforts made to properly train Sheriff's officers on proper and safe gun usage and storage. To use the fact of this training as a basis to impose liability – as opposed to the theoretical case where there was an allegation the training was deficient or itself led to a gun being made accessible – places an extreme and unfair burden on Sheahan that should be rejected by this Court. Indeed, the Appellate Court's opinion, if allowed to stand, places near strict liability on Sheahan, as well as other Illinois municipal police agencies, for any injuries caused by unauthorized use of duty firearms.

The Appellate Court, seemingly ignoring a trend documented by this Court in *Beretta U.S.A. Corp.* and similar cases toward a growing resistance of the imposition of a duty to warn or protect another against the criminal acts of a third party, has literally opened a legal "Pandora's Box," allowing gunfire

victims to seek recompense from police agencies any time an officer's weapon is accessed by an unauthorized individual and used in a shooting. Certainly, if there is a claim that the particular police agency's actions or inactions led to the shooting, a claim should lie. But to place liability following the facts of this case acts to impose liability without any showing of failure by Sheahan.

At the same time, the Appellate Court's ruling clearly places Sheahan and similarly situated municipal police agencies and departments in a "Catch 22" situation. Indeed, Sheahan's training programs and other rigorous efforts to promote gun safety and proper gun storage have now been turned against him and used to impose liability. The Appellate Court's opinion, if allowed to stand (which it should not), will serve only to discourage Sheahan and other police agencies from creating, implementing and providing training about procedures related to the safe and secure storage of handguns, as to do so will invite potential *respondeat superior* claims. To impose a duty of care based strictly upon the existence of training provided on handgun storage by Sheahan, without more (as the Appellate Court has done here), amounts to punishing Sheahan for being safety-conscientious and is bad public policy.

That Sheahan responded to general concerns about accidental shootings and adopted a proactive approach toward training his officers about that risk ought to be commended and not used as a basis to expand liability in a potentially limitless fashion for both Sheahan and other similarly situated municipal police agencies who properly train their officers in gun safety.

Accordingly, this Court should reverse the Appellate Court's decision and reinstate the trial court's summary judgment ruling in Sheahan's favor.

1. That There Was Neither A Special Relationship Between Sheahan And Adames Nor A Negligently Performed Voluntary Undertaking To Create A Duty For Sheahan To Protect Adames From Billy Swan's Clearly Criminal Conduct Is Fatal To Plaintiffs' Negligence Claims.

In a negligence action, the plaintiff must set out sufficient facts establishing the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from the breach. *Curtis v. County of Cook*, (1983), 98 Ill. 2d 158, 162. Without a showing from which a court could infer the existence of a duty, no recovery by a plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper. *Rowe v. State Bank of Lombard*, (1988), 125 Ill. 2d 203, 215. Whether there is a relationship between the parties requiring that a legal obligation be imposed upon one for the benefit of another is a question of law to be determined by the court. *Pelham v. Griesheimer*, (1980), 92 Ill. 2d 13, 18-19. In determining whether a duty exists, reasonable foreseeability of harm is the primary, but not the sole concern. Indeed, a court must also consider the likelihood of injury, the magnitude of the burden to guard against the injury, and the consequences of placing the burden on the defendant. *Petrauskas v. Wexentahler Realty Management Co.* 186 Ill. App. 3d 820, 825 (1st Dist. 1989).

The "foreseeability" element is something that "is objectively reasonable to expect, not merely what might conceivably occur." *Benner v. Bell*, 236 Ill. App.

3d 761, 766 (4th Dist. 1992). Foreseeability must be judged by what was apparent to the defendant at the time of the attack on the plaintiff. *Hill v. Charlie Club, Inc.*, 279 Ill. App. 3d 754, 760 (1st Dist. 1996). "Since anyone can foresee the commission of a crime virtually anywhere at any time . . . [T]he question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it." *Id.* at 759. Furthermore, foreseeability is determined based on the facts and circumstances of each case. *Getson v. Edifice Lounge, Inc.*, 117 Ill. App. 3d 707, 711 (3rd Dist. 1983).

Generally, there is no duty to protect others from criminal activity by third persons absent a "special relationship" between the parties. *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141, 147 (1st Dist. 2000). A special relationship has been recognized where the parties are in a position of: (1) carrier and passenger; (2) innkeeper and guest; (3), business inviter and invitee; and (4), one who voluntarily takes custody of another in such a manner that it deprives the person of his normal opportunities for protection. *Lutz v. Goodlife Entertainment, Inc.*, 208 Ill. App. 3d 565, 569 (1st Dist. 1990). Absent one of these four special relationships, the only other way that one may be held liable for the criminal attack of a third party is based upon negligence in the performance of a voluntary undertaking to protect a tort victim. *Rowe*, 125 Ill.2d at 215-16.

a. <u>Billy Swan's Shooting Of Adames Was A Criminal Act That Coupled With The Circumstances Presented Forecloses The Imposition Of A Tort Duty Of Care Upon Sheahan.</u>

Notably, the Appellate Court, citing *People v. Taylor*, (2006), 221 Ill. 2d 157, appears to gloss over the "special relationship" requirement in the third party criminal attack context (obviously because no such relationship existed here) and hastily asserts that notwithstanding his delinquency adjudication, Billy's actions were not "criminal" in nature so as to foreclose the imposition of a duty upon Sheahan and that the subject attack was reasonably foreseeable. That analysis is flawed.

Indeed, in focusing strictly and, Sheahan asserts, myopically, on whether Billy's shooting of Adames was a "criminal" act, the Appellate Court put the proverbial cart before the horse. This Court's discussion of the Juvenile Court Act in *Taylor* does not at all support that Billy's conduct was non-criminal in nature. If anything, this Court's analysis of the Juvenile Court Act of 1987 ("the Act"), 705 ILCS 405/1-1 *et seq.*, in *Taylor* clarifies that a "criminal" act occurred here.

At issue in *Taylor*, was whether a juvenile adjudication pursuant to the Act is considered a "conviction," as that term is used in the Illinois escape statute, 720 ILCS 5/31-6 (1998), and the Illinois Criminal Code of 1961 ("the Code"), 720 ILCS 5/2-5 (1998). This Court ultimately determined in *Taylor* that a finding of delinquency does not amount to a "conviction," citing that juvenile delinquency

proceedings conducted under the Act prior to sweeping, radical amendments that took effect in 1999 involved neither the entry of a plea nor the imposition of a sentence. Instead, the Act then provided for a "dispositional hearing" where the juvenile court determined whether "it is in the best interests of the minor and the public that he be made a ward of the court," and if so, the minor was thereafter subjected to a dispositional order. 705 ILCS 405/5-20 and 705 ILCS 405/5-22 (1996).

The Appellate Court in the instant case improperly stopped short in its duty analysis when it concluded, based upon its strained reading of *Taylor,* that Billy's delinquency finding was not akin to a "conviction." The question, however, is not whether Billy was convicted, but rather whether his acts were criminal in nature. Plaintiffs cannot credibly claim that they were not. The Appellate Court's focus on whether there was a "conviction" is completely misguided. The lack of any formal "conviction" does not render Billy's actions during the incident in question any less unlawful or proscribed. Indeed, Billy's delinquency adjudication pursuant to the Act was based upon the juvenile division of the Circuit Court of Cook County's finding that Billy committed involuntary manslaughter and reckless discharge of a firearm – both of which, notably, constitute criminal offenses in Illinois.

Moreover, the Appellate Court ignored the temporal aspects to this Court's holding in *Taylor*. That the juvenile adjudication in *Taylor* occurred in 1998 – that is, before landmark amendments to the Act took effect - was key to

this Court's holding that the juvenile adjudication in that case did not amount to a "conviction" under the escape statute and the Code.

Indeed, this Court discussed the import of the 1999 amendments to the Act at length in *Taylor*. The Appellate Court here, conversely, completely ignored that analysis and the impact of the 1999 amendments. The amended policy statement in the Act, standing alone, supports that the juvenile delinquency adjudication process is now (and at the time of Billy's delinquency finding) akin to a criminal proceeding. That policy statement provides that the Illinois legislature's intent in passing the subject amendments was to "promote a juvenile justice system . . . that will protect the community, *impose accountability for violations of law* and equip juvenile offenders with competencies to live responsibly and productively." *Taylor*, 221 Ill. 2d at 166. Significantly, the 1999 amendments to the Act also provide a number of features common to a criminal trial such as the entry of a plea, formal findings of guilt or innocence and the imposition of sentences.

The Appellate Court's hypertechnical approach to the issue of whether Billy engaged in "criminal" conduct ought to be rejected. Billy was adjudged in a delinquency proceeding and/or trial conducted under the Act to have acted recklessly enough to be guilty of the offense of involuntary manslaughter – a crime. Neither Plaintiffs nor the Appellate Court can, as much as they may try to, alter those facts so as to circumvent the special relationship requirement. Absent the existence of a "special relationship" and any voluntary undertaking

on Sheahan's part to protect Adames (which there was none – see subsection b below), Sheahan had no duty to protect Adames from Billy's obvious criminal conduct.

b. Sheahan Did Not By Virtue Of His Implementing General Rules And Orders Related To Gun Safety And Proper Firearm Storage Voluntarily Undertake To Protect Shooting Victims Such As Adames From Third Party Criminal Attacks.

All that Plaintiffs could ever cling to in this case in hopes of creating a duty running from Sheahan to Adames are Sheahan's general orders and policies. Specifically, General Order 3.14.1 sought to prevent accidental shootings by requiring weapons to be secured in a locked box, container or other location that a reasonable person would believe to prohibit access by unauthorized individuals. (R. Vol. XX, C 4874-4878, 4880). Plaintiffs asserted, and the Appellate Court accepted, that the implementation of such orders and guidelines by Sheahan amounted to a voluntary undertaking to safeguard Adames from Billy's criminal conduct. Plaintiffs and the Appellate Court are wrong.

Whether a legal duty exists is a question of law and is determined by reference to whether the parties stood in such a relationship to each other that the law imposes an obligation on one to act for the protection of the other. Where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, the law must say what is legally required. *Rhodes v. Illinois Central Gulf Railroad*, (1996), 172 Ill. 2d 213, 238.

Moreover, whether a voluntary undertaking exists "is not specifically determined by the act undertaken but upon a reasonable assessment of its underlying purpose to be determined on a case by case basis." *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1002-03 (1st Dist. 2005). Accepting the scheme promulgated by the Appellate Court obviates the requirement to examine the facts and circumstances of each case individually. That scheme should be stricken upon further review by this Court.

In addition, it bears mention that to operate as an exception to the special relationship rule, a voluntary undertaking must involve an act or promise to an identifiable group of individuals. *See Rowe*, 125 Ill. 2d at 217 (landlord that voluntarily undertakes to provide additional security measures has duty to his property's inhabitants to properly do so); *Bourgonje v. Machev*, 362 Ill. App. 3d at 996 (landlord's oral promise to one tenant to provide security lights could create duty to protect that tenant from criminal attack). Significantly, Plaintiffs introduced no evidence to support a reasonable inference that Adames was an identifiable beneficiary of Sheahan's general orders and policies. Likewise, there is no evidence that Sheahan was aware of any potential situation at the Swan home that guided the orders enacted or the training provided on safe gun storage. At best, the general orders and training were directed to the protection of children generally, such that imposition of a direct duty in this case is improper.

Finally, Sheahan's general orders only establish the standard of care to which he and/or his employees can be held assuming that a duty is owed in the first instance (which it is not here). In other words, Sheahan's general orders cannot independently create a legal duty where none otherwise exists under Illinois law. *See, e.g., Rogers v. Clark Equipment Company*, 318 Ill. App. 3d 1128, 1136 (2nd Dist. 2001) (noting that this Court has determined that evidence of a defendant's custom and practice is relevant to the applicable standard of care, but that the issue of standard of care is not reached until a legal duty has been established in the first place).

Simply stated, there is no "voluntary undertaking" in this case that renders Sheahan liable for Adames' shooting and resultant death. The lack of any special relationship coupled with the absence of any voluntary undertaking by Sheahan defeats Plaintiffs' instant claims. Again, the Appellate Court erred in determining otherwise.

2. <u>That Billy Swan's Shooting Of Adames Was Not Reasonably Foreseeable To Sheahan Also Dooms Plaintiffs' Instant Claims.</u>

Billy's actions were also not reasonably foreseeable to give rise to a duty on Sheahan's part to protect Adames from Billy's criminal conduct. That too warranted that summary judgment be granted in Sheahan's favor as to Plaintiffs' claims. The Appellate Court's contrary determination was wrong. Again, reasonable foreseeability is also (separate from the issues of whether a special relationship existed and a voluntary undertaking occurred) relevant to a court's

duty analysis. *American National Bank & Trust Co. v. National Advertising Co.*, (1992), 149 Ill.2d 14, 26.

While all accidents may in retrospect be foreseeable, that alone is insufficient to impose a duty. *See, Hill*, 279 Ill. App. 3d at 760 (noting that since anyone can foresee the commission of a crime in hindsight, that is not a pertinent concern). Instead, the relevant inquiry focuses on the likelihood that an injury will result from the conditions that give rise to the injury – and not the likelihood that an injury will result from a particular set of circumstances. *DiBenedetto v. Flora Township*, (1992), 153 Ill.2d 66, 72, 605 N.E.2d 571, 574. The Appellate Court appears to have lost sight of that focus in conducting its foreseeability analysis.

It cannot be said that unauthorized access to the subject handgun and an accidental shooting was likely to have occurred given the Swan household rules. This is not the theoretical case where an officer left his gun in a location where it would be reasonably anticipated that it would be found by a child, or ignored signs that the gun was being accessed despite the particular precautions taken. David and his wife prohibited their sons from entering their bedroom where the guns were kept. (R. Vol. XVIII, C 4389; R. Vol. XIX, C 4511, 4564). They also prohibited their sons from having guests in their home when they were not there. (R. Vol. XIX, C 4564). Plaintiffs presented no evidence that those rules had been broken in the past, or that David had reason to believe that Billy would break the rules on the day in question.

There was also no evidence that Billy had ever accessed any of David's guns before the day of the shooting. David also testified that he believed that the gun box was locked. (R. Vol. XIX, C 4589-4590; R. Vol. XX, C 4803-4808). While Billy's testimony that he found the box unlocked is accepted as true for summary judgment purposes, David's *belief* that the box was locked is not disputed. That *belief* from David's standpoint makes it less foreseeable to him that Billy would gain access to the gun. There was also no evidence introduced by Plaintiffs to create any inference of foreseeability that Billy would actually then load the gun, repeatedly manipulate the gun, impermissibly invite a guest in to the house, and then shoot the guest, *albeit* accidentally, despite being directly aware of the risks posed by the handgun.

Further, that Sheahan promulgated general orders related to gun safety and proper gun storage does not automatically warrant a finding that the instant shooting was eminently foreseeable, as the Appellate Court determined. First, to hold as such effectively abrogates the case-by-case analysis that is required to be undertaken whenever the question of foreseeability arises. *Country Mut. Ins. Co. v. Hagan*, 298 Ill. App. 3d 495, 504 (2nd Dist. 1998). Further, contrary to the Appellate Court's view, Sheahan's rigorous firearms and the related safe handgun storage training actually militates against any finding of foreseeability from Sheahan's perspective. Indeed, Sheahan obviously seeks to eliminate accidental shooting incidents via that training. Sheahan would have no reason to know that despite receiving training, David would (presumably) store his service

revolver in an unlocked gun box and with ammunition nearby. The conditions giving rise to this specific incident, including the Swans' house rules, David's belief that the gun box was locked, and the lack of any evidence that Billy had ever accessed the handgun in the past, weighs against imposing any duty of care upon Sheahan for Adames' benefit.

In this regard, that it was known by Sheahan that officers would store their guns at their residences also does not support imposition of a duty. The training mandated and the reasonable expectations were that guns be stored so that they would be inaccessible to third parties. There was nothing about the training or the expectations of Sheahan of his officers that in any way lead to the gun being kept in an accessible manner. As such, there can be no claim that the method and manner of the storage of the handgun in any way served the purposes of Sheahan.

Indeed, to the extent the handgun was accessible, this was strictly contrary to the training by Sheahan and only serves, if the Appellate Court's opinion is allowed to stand, to impose liability on Sheahan with no direct or tangible connection to the Sheriff's mission. The Appellate Court erred in determining otherwise. For this reason also, the trial court's summary judgment order in Sheahan's favor should be reinstated.

3. Public Policy Considerations That Factor Into A Court's Duty Analysis Also Countenance Against The Imposition Of A Legal Duty Against Sheahan In The Instant Case.

The question of whether a duty exists to protect against third party attacks is not defined by notions of reasonable foreseeability alone. *See, e.g.*, *Hill*, 279 Ill. App. 3d at 758. Tellingly, the Appellate Court's opinion is devoid of any meaningful analysis of the public policy considerations that also are supposed to factor into a court's duty determination. Those considerations include the burdens and consequences that would result from imposition of a duty under the circumstances presented. *Petrauskas*, 186 Ill. App. 3d at 825; *see also, Beretta* U.S.A. Corp., 213 Ill. 2d at 391 (discussing burden as factor in deciding whether to impose duty.) Tellingly, the Appellate Court here merely paid lip service to this important facet of a court's duty analysis.

To impose a duty against Sheahan under the circumstances presented here would be arduous. Under the Appellate Court's adopted scheme, Sheahan now has to not only control the conduct of persons with whom he has virtually no contact and protect persons not even known to him, but also gain knowledge about and regulate each and every one his thousands of officers' households where weapons storage is concerned, all in order to avoid liability for accidental shootings. Obviously, this is a task that cannot be performed – short of requiring "bed checks" by Sheahan. That burden would also flow to any other Illinois municipal police agency whose officers maintain their service weapons when off

duty. Respectfully, this burden is too heavy a burden to place on Illinois' municipal police agencies and its taxpayers.

The burden the Appellate Court has placed on Sheahan and other municipal state agencies is obviously onerous, novel, impossible to satisfy and unsound. The expansion of Sheahan's liability to that degree cannot be countenanced in light of this Court's holding in *Beretta U.S.A. Corp.* and the Appellate Court's prior holdings. *See e.g., Ventura v. Picicci*, 227 Ill. App. 3d 865 (1st Dist. 1992) (holding that defendant parent owed no duty to protect plaintiff shooting victim from adult resident son's criminal acts); *see also McGrane v. Cline*, 973 P.2d 1092 (Wash. Ct. App. 1999) (holding defendant homeowner owed no duty to safeguard against third party criminal attack where firearm was misappropriated by a child's guest and thereafter involved in a fatal shooting and robbery).

This Court should, keeping in mind the public policy considerations at play here, decline to extend the duty of protection against third party criminal attacks to the limitless bounds as the Appellate Court did. A finding that Sheahan owed no duty in this case will promote the beneficial policy of police agencies providing guidelines requiring safe gun storage, providing ample training on safe gun storage and acting to remedy known incidences of improper storage without adding an attendant concern that such actions will result in liability under *respondeat superior* theories of liability. Indeed, the trial court here exercised proper restraint and considered both notions of fairness and the

potential public policy implications of its ruling. This Court should now do the same and reinstate the trial court's summary judgment order in Sheahan's favor.

C. The Appellate Court's Decision Extends *Respondeat Superior* Liability To Unreasonable And Impermissible Bounds.

The Appellate Court, citing *Gaffney v. City of Chicago*, 302 Ill. App. 3d 41 (1st Dist. 1998), determined that Adames' shooting occurred within the course and scope of David's employment with Sheahan. It erred in doing so. Generally, whether an employee was acting within the scope of employment depends on "the employment contract and the nature of the [employment] relationship, which must exist at the time of and in respect to the particular facts out of which the injury arose." *Bagent v. Blessing Care Corp.*, (2007), 224 Ill. 2d 154, 165. Other fact-based inquiries including, but not limited to, those listed in Sections 228 and 229 of the Restatement of Agency, also bear upon whether conduct is incidental to employment. *See id.* Those inquiries concern, among other things, that the actions in dispute have a temporal connection to the agent's service to the master and whether the agent's subject actions violate the master's promulgations. *Id.* at 167.

David was not acting within the scope of his employment at the time he stored the subject handgun. In holding otherwise, the Appellate Court improperly analyzed the Restatement factors involved in determining whether liability arises under *respondeat superior*. It is undisputed that David did not carry the handgun to work daily and had not done so for an extended period.

Indeed, nearly a year had passed since he had touched the gun for any reason. Further, David's retention of the handgun at home was not at all for Sheahan's gain or benefit. Indeed, the record is devoid of any testimony from David to the effect that he stored the handgun in an unlocked gun box so as to have the capacity to immediately respond to any emergencies arising in his presence.

The record is clear that David was to store the handgun to be inaccessible. Conversely, in *Gaffney*, the record reflected that the negligent manner of gun storage was motivated, in part, by the officer's desire to have the gun accessible in the event of an emergency due to the fact that he was "on call" 24 hours a day. The instant record does not contain such evidence. Further, *Gaffney* does not support the Appellate Court's finding in this case that David's storage of the firearm was within Sheahan's enterprise. There was nothing about David's employment for the Sheriff that supported a need to have the gun accessible. To find liability against Sheahan in such a setting under the guise of *respondeat superior* principles goes too far. Unlike in *Gaffney,* here the gun was to be inaccessible and there were no requirements to the contrary. For these reasons alone, *Gaffney* is distinguishable.

Finally, there was no temporal connection between Adames' shooting and David's service to Sheahan. David was off duty when he stored the handgun and not performing any administrative duties on Sheahan's behalf during the relevant time period. At the time of the shooting, David had not used or touched the handgun in question for nearly a year, as he did not need it for his job during

that entire time span. Moreover, David's alleged actions in storing the handgun in an unlocked gun box along with ammunition violated Sheahan's prohibitions. This is not a case, such as *Gaffney*, where the accessible mode of storage in any way served the purposes of the master, such that it is improper to state that Sheahan's training or expectations of David in anyway contributed to allow access to the handgun, and from there the shooting. Further, the record is clear that David retained his employment despite never retrieving the handgun following the shooting and, even if David left Sheahan's employment for whatever reason, he still would have retained the handgun. Such facts do not at all support a finding that David's storage of the handgun was incidental to his employment.

The Appellate Court should have rejected Plaintiffs' arguments predicated upon *Gaffney*. That case has absolutely no bearing on this Court's duty analysis. Indeed, whether a duty exists in this case (which one does not where Sheahan is concerned) is governed by the special relationship, foreseeability and other public policy factors analyses set forth above. Per this Court's pronouncements in *Bagent*, the Appellate Court erred in determining on the instant record that Adames' shooting occurred within the course and scope of David's employment as a Sheriff's deputy. The Appellate Court's decision should be reversed and the trial court's summary judgment ruling in Sheahan's favor should be reinstated.

II. SUMMARY JUDGMENT IN SHEAHAN'S FAVOR IS ALSO WARRANTED BECAUSE THE MANNER IN WHICH THE HANDGUN WAS STORED WAS NOT THE PROXIMATE CAUSE OF ADAMES' SHOOTING, BUT MERELY FURNISHED A CONDITION THAT MADE SHOOTING POSSIBLE.

None of David's or Sheahan's alleged negligent acts or omissions were the proximate cause of Adames' shooting. At most, David's alleged failure to store the handgun in a locked gun box separate from ammunition did nothing more than furnish a condition upon which Billy's own independent, actions operated to produce Adames' fatal injury. Where the negligence of the party charged does nothing more than furnish a condition by which an injury is made possible, and that condition causes an injury by a subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *A.P. Munsen v. The Ill. Northern Utils. Co.*, 258 Ill. App. 438, 443 (2d Dist. 1930). The evidence of record demonstrates that Billy's own reckless and/or criminal acts were the legal, proximate cause of Adames' injury. For this reason also, Sheahan is entitled, as a matter of law, to summary judgment on Plaintiffs' claims.

In order for Sheahan's alleged negligent acts or omissions to be actionable, they must have been the proximate cause of Adames' injury. To establish proximate cause, a plaintiff's injury must be "the natural and probable consequence of [a negligent act], and be of such character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the [negligent act.]" *Seith v. The Commonwealth Elec. Co.*, (1909), 241 Ill. 252, 259, 89

N.E. 425, 428. Further, proximate cause is established only where there is a reasonable certainty that a defendant's actions caused the injury. *Whitman v. Lopatkiewicz*, 152 Ill. App. 3d 332, 338, 504 N.E.2d 243 (1987). No such reasonable certainty exists in this case.

Billy's intervening actions – and not David's storage of the handgun or any conduct on Sheahan's part – proximately caused the subject May 5, 2001 shooting incident. Indeed, Billy's reckless and criminal conduct broke any causal link that might have otherwise existed between David's and Sheahan's conduct and Adames' death. Further, neither David nor Sheahan reasonably could have anticipated that Billy would have shot Adames as a natural and probable consequence of David's own alleged negligence in (purportedly) storing the handgun in an unlocked gun box and storing ammunition in that same or a nearby location.

This is not a case where the gun was left plain view or in a location and condition (i.e., loaded) where one should conclude it likely that Billy would find it and accidentally fire it. The gun was stored in an area of the house where Billy was prohibited to enter. Likewise, Billy had never previously disobeyed David's instructions regarding entry into the master bedroom and inviting guests into the house.

Moreover, Billy was at all times fully aware of the risks of severe or fatal injury associated with gun usage. Billy knew at all times relevant that he was handling a real firearm and loading it with live ammunition. The circumstances

surrounding the storage of David's weapon simply did not cause Adames' injury through any natural and continuous sequence of events. Indeed, the handgun was *inert* and threatened no harm to anyone until acted upon by Billy.

That David's and Sheahan's alleged negligent acts or omissions, if any, did nothing more than furnish a condition that made Adames' shooting possible is aptly illustrated by *Johnson v. Mers*, 279 Ill. App.3d 372 (2nd Dist. 1996). In *Johnson*, the plaintiff brought a negligence action against several defendants - plaintiff's girlfriend, the village that employed her as a police officer, and a restaurant that served her alcohol - after the girlfriend shot the plaintiff. The shooting occurred during a domestic dispute after the girlfriend had been drinking at a restaurant. The girlfriend owned the gun and was not acting as a police officer at the time of the incident. The trial court granted summary judgment for the village/employer. The plaintiff appealed and the Appellate Court affirmed. It found that the village's actions were not the proximate cause of the plaintiffs' injuries, the village did not provide her with her firearm, her possession of the firearm was not contingent on her status as a police officer, and she was not acting in any manner as an agent of the village at the time of the shooting.

On the proximate cause issue, the Appellate Court noted the plaintiff's arguments that: (1) the officer needed a firearm as a condition of her employment; (2) she did not yet have a FOID card; (3) the chief of police wrote a letter on village's letterhead to the gun shop verifying that she was a police

officer; and (4), the ILPD trained her in the use of a firearm. The Appellate Court took notice of those facts, but reasoned that even if the village had discharged the officer/girlfriend, she still would have retained her firearm. Thus, the Appellate Court held that the shooting and resulting injuries were not a result of a "natural and continuous sequence of events" set in motion by the village's negligence and "unbroken by any effective intervening cause." *Johnson*, 279 Ill. App. 3d at 377.

Just as in *Johnson*, there is no basis in the instant case to conclude that David's possession of or mode of storing the handgun proximately caused the subject shooting. Significantly, David's handgun could not harm anyone until Billy intervened by going somewhere he was prohibited and not expected to enter, locating the gun, manipulating the gun, loading the gun, pointing the gun at Adames and pulling the trigger, at all times knowing his actions were prohibited and could lead to serious injury and death. The conditions giving rise to the incident strictly militates against imposing any duty running from David or Sheahan to Adames.

It is David's express prohibition of Billy's access to the guns, the bedroom, and guests during his parents' absence and Billy being fully cognizant of the risks attendant with his conduct on the date in question that render his acts an unforeseeable intervening cause breaking any causal link to Sheahan's or David's alleged negligent acts or omissions. For this alternative reason, the trial court's summary judgment ruling in Sheahan's favor was correct and should be affirmed upon further review.

CONCLUSION

For all the foregoing reasons, the Appellate Court's opinion of November 29, 2007 should be reversed and vacated and the trial court's August 23, 2005 summary judgment order in Sheahan's favor should be reinstated and/or affirmed.

WHEREFORE, Defendant-Appellant, MICHAEL F. SHEAHAN, in his official capacity as Cook County Sheriff, by and through his attorneys, respectfully requests that this Court reverse and vacate that portion of the Appellate Court's November 29, 2007 opinion reversing the trial court's August 23, 2005 summary judgment order in Sheahan's favor and reinstate and/or affirm the judgment of the trial court. Sheahan further requests any other or additional relief that this Court deems just, equitable or appropriate in the premises.

Respectfully submitted this 30th day of April, 2008

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IN THE
SUPREME COURT OF ILLINOIS

HECTOR ADAMES, JR., and ROSALIA DIAZ, as Co-Special Administrators of the Estate of JOSHUA ADAMES, Deceased, Plaintiffs-Appellees, vs. MICHAEL F. SHEAHAN, in his official capacity as Cook County Sheriff and BERETTA U.S.A. CORP., Defendants-Appellants, and DAVID SWAN, CHICAGO RIDGE GUNSHOP AND RANGE, INC., and FABBRICA D'ARMI PIETRO BERETTA S.P.A., Defendants.	On Appeal from the Illinois Appellate Court, First Judicial District Case No. 1-05-3911 There Heard on Appeal from the Circuit Court of Cook County, Illinois No. 01 L 05894 Honorable Carol Pearce McCarthy, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this **BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT** conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Appendix, is 50 pages.

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