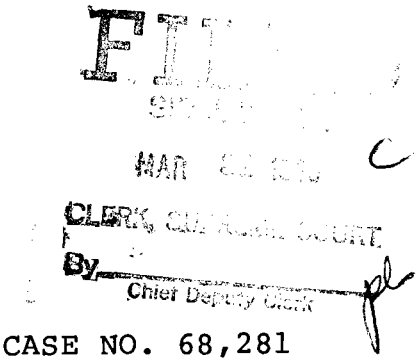
IN THE SUPREME COURT OF FLORIDA



EDMUND CARL BANKSTON and
MARY BANKSTON, his wife, and
LORI BANKSTON, a minor child,

Petitioners,

vs.

FRANCIS J. BRENNAN, JR.,
BRIAN FRANCIS BRENNAN and
STEVEN LADIKA,

Respondents.

CASE NO. 68,281
DCA-4 No. 85-427

CERTIFIED QUESTION FROM THE DISTRICT
COURT OF APPEAL, FOURTH DISTRICT

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION

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PREFACE

This is a certified question of great public importance. The petitioners, Edmund Carl Bankston and Mary Bankston, his wife, and Lori Bankston, a minor child, were the plaintiffs before the trial court and the appellants before the Fourth District Court of Appeal. The appellees, Francis J. Brennan, Jr., Brian Francis Brennan and Steven Ladika, were the defendants before the trial court and the appellees before this court.

In this brief the parties will be referred to as plaintiffs and defendants. The amicus curiae, Academy of Florida Trial Lawyers, will be referred to as the "Academy." This amicus curiae, the Florida Defense Lawyers Association, will be referred to as the "FDLA."

STATEMENT OF THE CASE AND FACTS

The FDLA adopts the statement of the case and facts contained in the defendants' main brief.

CERTIFIED QUESTION

DOES SECTION 768.125, FLORIDA STATUTES, CREATE A CAUSE OF ACTION AGAINST A SOCIAL HOST, AND IN FAVOR OF A PERSON INJURED BY AN INTOXICATED MINOR WHO WAS SERVED ALCOHOLIC BEVERAGES BY THE SOCIAL HOST?

SUMMARY OF ARGUMENT

Section 768.125 does not create a cause of action against a social host who serves liquor to a minor or to a person habitually addicted to the use of any or all alcoholic beverages. The legislature clearly intended Section 768.125 to apply only to vendors. The common law rule of no liability of a social host who dispenses liquor to a guest, either adult or minor, has not been abrogated by the legislature. If public policy mandates such change, the change should be made by the legislature after careful study of its potential ramifications.

ARGUMENT

Section 768.125 does not create a cause of action against a social host who serves alcoholic beverages to a minor who later injures a third person. Although the question certified by the Fourth District Court of Appeal pertains only to minors, the statute also addresses serving liquor to one habitually addicted to the use of any or all alcoholic beverages. Thus, the issue presented to this court, of necessity, includes serving liquor to both minors and adults.

The statute is restricted in scope to liquor vendors. The common law rule precluded liability attaching to a social host for dispensing intoxicants to a minor or an adult. As the Fourth District Court of Appeal recognized in United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978) if that rule is to be abrogated, it should be done by the legislature, not the courts. The Fourth District Court of Appeal commented that judicial restraint is a worthwhile practice when the proposed new doctrine may have implications far beyond the perceptions of the court. In such circumstances the proper procedure is for the legislature to make the change after it has conducted the appropriate surveys, hearings and investigations to ascertain the need for change and the expected consequences to follow.

Thus far the Florida legislature has declined to apply Section 768.125 to social hosts. As this court recognized in

Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984) the legislative intent that this statute limit the existing liability of vendors is clear from its enacting title which reads "an act relating to the Beverage Law; creating s. 562.51, Florida Statutes [codified as s. 768.125]." As the Fourth District Court of Appeal recognized in USAA v. Butler, supra, Chapter 562 applies to business establishments, even though the statutory language used, like that used in Section 768.125, sounds all inclusive.

The majority of the courts which have interpreted language similar to that contained in section 768.125 have interpreted that language to be restricted to persons associated with a business establishment dispersing alcoholic beverages. An annotation found at 8 ALR 3d 1412, "Liability, Under Dram Shop Acts, Of One Who Sells Or Furnishes Liquor Otherwise Than In Operation Of Regularly Established Liquor Business" collects and analyzes those cases. The general, well-established rule is that such statutes were not intended to and do not create a right of action against one who gives another an alcoholic beverage as a mere act of hospitality or social courtesy and without pecuniary gain. The general rule is that such statutes instead provide a right of action only against those in the business of selling liquor.

In Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 199 NE 2d 300, 8 ALR 3d 1402 (1964) the court construed a statute similar to the Florida law. It commented that extension of the act to include the defendant social host would open

limitless implications as to the liability that might arise if the act were held to apply to anyone who gives liquor to another solely as a gesture of friendship or fellowship.

The plaintiffs' suggestion that defendants' acts were unlawful and can form the basis of a civil liability action is without merit. An annotation found at 14 ALR 3d 1186, "Serving Liquor to Minor in Home As Unlawful Sale or Gift" collects the cases on that topic. The author recognizes that in the absence of clear legislative intention, whether intoxicating liquors may be supplied to a minor in a social and non commercial context turns on the legislative intention.

In People v. Bird, 138 Mich. 31, 100 NW 1003 (1904) the title of the statute, like our Florida Statute, pertained to the regulation of the business of manufacturing, etc., intoxicating liquors. The text of the statute, similar to our statute, referred to "any person." The court held that reading of the title of the statute and text together showed it was not applicable to the defendant who permitted a minor guest to share a beer with him in his home.

In People v. Martell, 264 NYS 2d 913, 212 NE 2d 433 (1965) the statute prohibited selling or giving alcoholic beverages to children under 18. The court applied the principle of ejusdem generis and held no more was intended by the statute than certain activities as to children when carried on in certain resorts or by people in certain businesses.

The same rationale is applicable in this case. The language used in Chapter 562 speaks of "licensees." Section

768.125 was enacted as relating to the Beverage Law (Chapter 562). The terms "person" and "furnish" as used in Section 768.125 must be strictly construed. Under the principles of ejusdem generis the language must be construed as applicable only to those situations enumerated in and contemplated by the legislature in enacting Chapter 562.

The plaintiffs' suggestion that this court ought to hold defendants liable on principles of ordinary negligence should to be rejected. Such a change in the common law rule, which remains in force in this state where the constitution is silent or the legislature has failed to act, ought to be made only by the legislature. The ramifications of such a change are far reaching and involve important questions of public policy. As the court recognized in Ling v. Jan's Liquors, 237 Kan. 629 703 P.2d 731 (Kan. 1985) declaration of public policy is normally the function of the legislative branch of government.

Whether Florida should abandon the old common law rule and align itself with the trend of cases which impose civil liability upon social hosts who serve alcoholic beverages to guests depends ultimately upon what best serves the societal interest and need. This is a matter of public policy which the legislature is best equipped to study and to handle.

CONCLUSION

The certified question should be answered "No."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. mail to: Arnold Grevior Chartered, 100 Southeast Sixth Street, Ft. Lauderdale, FL 33301; Ralph Pelaia, Jr., 633 South Andrews Avenue, Ft. Lauderdale, FL 33301; Larry Klein, of Klein & Beranek, P.A., Suite 503 - Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401; James M. Henderson, One Financial Plaza, Suite 1318, Ft. Lauderdale, FL 33394; H. Jackson Dorney, 450 N. Park Road, 4th Floor, Hollywood, FL 33021, Rex Conrad, and Valerie Shea, of Conrad, Scherer & James, P.O. Box 14723, Ft. Lauderdale, FL 33302; Arnold Ginsberg, of Horton, Perse & Ginsberg, 401 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Tom Carey, 622 Bypass Drive, Clearwater, FL 33546 this 27 day of March, 1986.

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