IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,281

EDMUND CARL BANKSTON,
ET UX., ET AL.,

PETITIONERS,

v.

FRANCIS J. BRENNAN, JR.,
ET AL.,

RESPONDENTS.
_____/

BRIEF OF AMICUS CURIAE,
ACADEMY OF FLORIDA TRIAL LAWYERS

THE ACADEMY OF TRIAL LAWYERS

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TABLE OF CONTENTS

INDEX OF CITATIONS AND AUTHORITIES

INDEX OF CITATIONS AND AUTHORITIES (Continued)

I.

INTRODUCTION

This Amicus Curiae brief is filed by the Academy of Florida Trial Lawyers in support of the position advanced by the petitioners, EDMUND CARL BANKSTON, MARY BANKSTON, his wife, and LORI BANKSTON, a minor child.

In this brief the parties litigant will either be referred to as they appeared in the trial court or by name and the proponent of this brief as "THE ACADEMY."

The symbol "R" will refer to the record on appeal. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

THE ACADEMY adopts the Statement of the Case and Facts contained in the petitioner's main brief.

III.

QUESTION CERTIFIED

> 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?

IV.

SUMMARY OF ARGUMENT

Section 768.125, Florida Statutes, provides that ". . .a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age

. . .may become liable for injury or damages caused by, or resulting from, the intoxication of such minor or person." This statute provides a cause of action where a social host knowingly furnishes a minor alcohol and a third party is injured as a result of the minor's driving while intoxicated. For the reasons to be specified in the argument portion of this brief, THE ACADEMY respectfully urges this Honorable Court to answer the certified question in the affirmative.

Assuming this Court should determine that Section 768.125 does not create a cause of action under the facts and circumstances herein presented, this Court should follow the trend in other jurisdictions and hold that one who knowingly furnishes alcohol to a minor is liable under ordinary principles of negligence. In this regard THE ACADEMY would urge this Court to quash the opinion rendered by the District Court of Appeal, Fourth District, to reverse the trial court's order dismissing the plaintiffs' complaint, with directions to that Court to require the defendants to answer.

V.

ARGUMENT

SECTION 768.125, FLORIDA STATUTES, CREATES 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. ASSUMING THE NON-EXISTENCE OF THE STATUTORY CAUSE OF ACTION, THIS COURT SHOULD HOLD THAT ONE WHO KNOWINGLY FURNISHES ALCOHOL TO A MINOR IS LIABLE UNDER ORDINARY PRINCIPLES OF COMMON LAW NEGLIGENCE FOR INJURY SUSTAINED BY A THIRD PARTY AS A RESULT OF THE MINOR'S CONDUCT.

A.

THE STATUTE, THE COMMON LAW AND THE PERCEIVED "IMPEDIMENT" TO THE EXISTENCE OF THE DESIRED CAUSE OF ACTION

The opinion which led to the question certified to this Court does much to distinguish prior Florida case law purportedly on the subject matter but (it) does not come close to affirmatively addressing the subject issue. Recently, the Supreme Court of the State of Georgia, in the case of SUTTER v. HUTCHINGS, 254 Ga. 194, 327 S.E. 2d 716 (1985), also came to grips with not only the subject issue but with Court of Appeals treatment of the issue. The Georgia Supreme Court stated:

> "The Court of Appeals relied upon a series of cases (citation omitted). . .in holding that one who furnishes alcohol to another who in turn injures a third person is not liable to the injured party. Each of those cases is distinguishable, but distinguishing them does not answer the question at issue: Is there a cause of action? For the answer to this question, we must examine common law principles. . ." 327 S.E. 2d at p. 717.

Likewise, in this state there appears to be a line of recent cases which deal with the instant subject matter although the precise question herein involved is one which, as Judge Levy noted in the opinion herein sought to be reviewed:

> ". . .has not been specifically addressed before. . ."

If, as was concluded above, the issue has not "been specifically addressed before", THE ACADEMY will, in a two-pronged manner, address the question certified:

1. Section 768.125, Florida Statutes, specifically created the cause of action herein contended for; and

2. Assuming same is not established pursuant to the subject statute, it is time to change the common law.

B.

RESOLUTION OF THE QUESTION CERTIFIED, THIS COURT'S AUTHORITY TO ACT

THE ACADEMY need not, for this Court's comprehension, underscore the serious problem extant in the State of Florida as pertains to the instant subject matter. As was recognized by the District Court of Appeal, First District, in BARNES v. B. K. CREDIT SERVICE, INC., 461 So. 2d 217 (Fla.App.1st 1984):

> "We are acutely aware 'of the terrible toll taken, both in personal injury and property damage, by drivers who mix alcohol and gasoline,' (citation omitted) and grieve for those families, and for plaintiff, who have lost loved ones to the carnage caused by drunken drivers. . ." 461 So. 2d at p. 218.

Indeed, the trend in this country--whether it be through legislative enactment or through judicial changes to the state common law--has been to recognize a right of recovery against those who negligently furnish alcoholic beverages, especially to minors. See, for example: ANNOTATION, COMMON-LAW RIGHT OF ACTION FOR DAMAGE SUSTAINED BY PLAINTIFF IN CONSEQUENCE OF SALE OR GIFT OF INTOXICATING LIQUOR OR HABIT-FORMING DRUG TO ANOTHER, 97 ALR 3d 528, and cases cited therein. See also: LING v. JAN'S LIQUORS, 703 P. 2d 731 (Kansas 1985), an opinion of the Kansas Supreme Court which opinion, although rejecting a request to alter its state's extant common law by judicial fiat, the Court's opinion appended to it a compilation of the

positions now taken by the courts of the states in this country.

That this Court has the authority, the power and indeed the precedent, to establish the existence of the subject cause of action is clear. In point of fact, this Court, in HOFFMAN v. JONES, 280 So. 2d 431 (Fla. 1973), stated:

> ". . .We have in the past, with hesitation, modified the common law in justified instances, and this is as it should be. . ." 280 So. 2d at p. 435.

In HOFFMAN v. JONES, supra, utilizing language exceptionally pertinent in its application to the subject matter of this case, this Court stated:

* * *

> "All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile. Our society must be concerned with accident prevention and the compensation of victims of accidents. The legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.
>
> "The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. . .

* * *

> "We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken [. . .in regard to contributory negligence] and to alter the rule we have adopted previously in light of current 'social and economic customs' and modern 'conceptions of right and justice.'"

* * *

The words uttered above echo and highlight Florida appellate court concern for the need to adjust to changing conditions. See, specifically, MORRISON v. THOELKE, 155 So. 2d 889 (Fla. App.2d 1963), wherein the Court stated:

> "Outmoded precedents may, on occasion, be discarded and function of justice should not be the perpetuation of error but, by the same token, traditional rules and concepts should not be abandoned save on compelling ground." 155 So. 2d at pp. 904 and 905.

With "concern" in both Florida and the remainder of the United States for the tragic rise in death, injury and property damage occasioned as a result of drunk driving and alcohol connected injuries, this Court should answer the certified question in the affirmative or, at the very least, establish for this state a common law cause of action as contended for by the subject petitioners.

C.

SECTION 768.125, FLORIDA STATUTES, CREATES A CAUSE OF ACTION AGAINST A SOCIAL HOST AND IN FAVOR OF A PERSON INJURED BY AN INTOXICATED MINOR WHO IS SERVED ALCOHOLIC BEVERAGES BY THE SUBJECT HOST.

In MIGLIORE v. CROWN LIQUORS OF BROWARD, INC., 448 So. 2d 978 (Fla. 1984), plaintiff, who was injured in an automobile accident with a minor who had been provided with intoxicating

liquors by a vendor prior to the existence of the accident, brought a law suit alleging that Crown Liquors of Broward, Inc. was responsible for the injuries sustained. Plaintiff therein --having lost in the trial court and in the District Court of Appeal, Fourth District--petitioned this Court for review. In rejecting vendor's arguments, this Court stated:

> ". . .We do not agree that the legislation making it unlawful to sell intoxicating beverages to minors is intended to protect only the limited class of intoxicated minors who injure themselves. We find that those persons killed or injured by the intoxicated minor to whom the intoxicating beverages were illegally sold are also within the class of persons to be protected by this legislation. . ." 448 So. 2d at p. 979.

In quashing the decision of the District Court of Appeal, Fourth District, and in remanding the cause for further proceedings, this Court once again emphasized:

> ". . .Providing alcoholic beverages to minors involves the obvious foreseeable risk of the minor's intoxication and injury to himself or a third person. . ." 448 So. 2d at p. 980.

It is important to remember that at all times pertinent to MIGLIORE, supra, Section 768.125, Florida Statutes, was not in effect. Yet, at all times relevant, defendants (herein) have successfully argued that based on the language in MIGLIORE, supra, and this Court's decision in ARMSTRONG v. MUMFORD, INC., 451 So. 2d 480 (Fla. 1984), that Section 768.125, Florida Statutes, only applies to vendors. THE ACADEMY will emphasize to this Court the fact that MIGLIORE, supra, involved a vendor and not a social host. Because vendors had a pre-existing

liability for selling alcohol to minors under Section 562.11, Florida Statutes, it is neither surprising nor legally detrimental to the arguments advanced by the subject petitioners to acknowledge the language (and holdings) of MIGLIORE, supra, and ARMSTRONG, supra. Since neither of the cases dealt with social hosts, and the language of Section 768.125, Florida Statutes, is not limited to vendors or "sellers", "simple" application of the subject statute to the instant cause provides legal justification for this Court to answer the certified question in the affirmative. Indeed, as previously noted in SUTTER v. HUTCHINGS, supra, (merely) distinguishing prior authority does not answer the question at issue:

Is there a cause of action?

Section 768.125, Florida Statutes, provides:

> "A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person. . ."

It must, at the inception, be emphasized, as was noted by this Court in CITIZENS OF THE STATE OF FLORIDA v. PUBLIC SERVICE COMMISSION, 435 So. 2d 784 (Fla. 1983):

> "Where the words of a statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent. . ." 435 So. 2d at p. 786.

Further, as this Court emphatically pointed out in THAYER v. STATE, 335 So. 2d 815 (Fla. 1976), to determine legislative intent we look to the plain language of the statute. As this Court stated:

> "The law clearly requires that the legislative intent be determined primarily from the language of the statute because the statute is to be taken, construed and applied in the form enacted (Citations omitted). The reason for this rule is that the legislature must be asssumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute." 335 So. 2d at p. 817.

In PHIL'S YELLOW TAXI CO. OF MIAMI SPRINGS v. CARTER, 134 So. 2d 230 (Fla. 1961), this Court again emphasized that where the language of the legislative pronouncements are quite clear--where there is definite phraseology in statutes--the courts will be bound. THE ACADEMY would respectfully suggest to this Court such is the instant cause!

The subject statute imposes liability upon a "person who willfully and unlawfully sells or furnishes." The legislature saw fit to make a distinction between the "selling" and the "furnishing"" of alcoholic beverages. The sole issue in this case relates to the existence vel non of a cause of action against the social host and in favor of a person injured by an intoxicated minor who was served alcoholic beverages by the social host. Under legislative pronouncement, the words chosen by the legislature, and this Court's prior decisions recognizing that injuries to third parties are foreseeable, there is little room to doubt that the certified question should be answered in

the affirmative.

THE ACADEMY would proffer the inquiry: Why would the legislature enact Section 768.125, Florida Statutes, with exceptions if it were aware of the prior decisions of this Court? While the defendants would argue in response it was the intent of the legislature "to limit" the liability of a seller (indeed, since that was the situation involved in MIGLIORE, supra), THE ACADEMY would suggest the more appropriate and logical answer would be that the legislature intended to both limit the extant liability of a seller and to create a cause of action against a social host. This "interpretation" (indeed, not an interpretation but merely an application of the statute in respect of the words chosen by the legislature) poses a more correct assessment without resorting to either construction or interpretation. The legislature made the specific distinction between "sellers" and persons who "furnish." There is no need to resort to principles of statutory construction when the words chosen are clear and have definite, ascertainable meaning.

In an abundance of appellate caution and in respect of the defendant's potential arguments that the subject statute should not be "viewed this way" (nor should this Court change the common law, See arguments advanced, infra), THE ACADEMY would point out to this Court one of the main impediments to any state adoption of the subject cause of action (irrespective of its adoption by statute or judicial fiat) was the duty owed by a

business proprietor versus the duty owed by a social host. However, in Florida, same is not a problem. In 1972, in POST v. LUNNEY, 261 So. 2d 146 (Fla. 1972), this Court abandoned the "economic benefit test" and in 1973 this Court did, in WOOD v. CAMP, 284 So. 2d 691 (Fla. 1973), expand the POST v. LUNNEY rule and completely abandoned "status and corresponding duty classifications" in a manner directly pertinent herein:

> "We resolve our dilemma in a troublesome area by concluding, and we so hold, that the class of invitees now under the present definition in LUNNEY as entitled to reasonable care is expanded to include those who are 'licensees by invitation' of the property owner, either by express or reasonably implied invitation. WE THEREBY ELIMINATE THE DISTINCTION BETWEEN COMMERCIAL (BUSINESS OR PUBLIC) VISITORS AND SOCIAL GUESTS UPON THE PREMISES, APPLYING TO BOTH THE SINGLE STANDARD OF REASONABLE CARE UNDER THE CIRCUMSTANCES. . ." 284 So. 2d at p. 695.

Hence, it may be seen there exists no impediment to the adoption of the cause of action as the duty owed would be uniform irrespective of "sale" or "social host" "furnishing."

In BARNES v. B. K. CREDIT SERVICE, INC., 461 So. 2d 217 (Fla.App.1st 1984), a 20-year old was killed in an accident after she drove while drinking, and her mother brought a wrongful death action against the bar that served her. Since her daughter was not a minor (hence, Section 768.125, Florida Statutes, would not apply), the mother alleged that the subject statute was unconstitutional in that it denied equal protection because it gave a remedy where a minor was involved but not an adult. In rejecting the argument advanced, the District Court of Appeal, First District, stated:

> "As stated earlier, Florida law has not recognized a cause of action against a furnisher of intoxicants for injuries sustained as a result of an intoxicated adult, because it has observed the common law rule of non-liability. By enacting Section 768.125, the legislature did not abolish a right to redress for an injury, it created one. . ." 461 So. 2d at p. 221.

THE ACADEMY would respectfully suggest to this Court there exists no legal, factual, moral or public policy impediment to an affirmative response to the question certified. As a consequence, it is respectfully urged this Court so rule.

D.

THE COMMON LAW IN THE STATE OF FLORIDA SHOULD BE CHANGED

As this Court noted in the case of STATE v. MCINTOSH, 340 So. 2d 904 (Fla. 1977):

> ". . . To attain true justice the written law must be seasoned with a proper amount of common sense. . ." 340 So. 2d at p. 910.

THE ACADEMY need not ask this Court to "take judicial notice" of the serious problems attendant with drinking and driving. Reported case law is replete with instances involving the subject situation irrespective of decisions regulating "liability/no liability." In point of fact, as noted by the Court in RAPPAPORT v. NICHOLS, 31 N.J. 188, 156 A. 2d 1 (1959):

> "When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent. . ." 156 Atl. 2d at p. 8.

As a consequence of this situation, the Courts in numerous states throughout this country have, by judicial fiat, created the subject cause of action.

In KOBACK v. CROOK, 366 N.W. 2d 857 (Wis. 1985), the Court, in holding [where there is sufficient proof at trial] that a social host who negligently serves or furnishes intoxicating beverages to a minor guest and the intoxicants so furnished cause the minor to be intoxicated or cause the minor's driving ability to be impaired shall be liable to third persons, rejected defense contentions that there exists any real distinction between social hosts and commercial vendors:

> ". . .There is no reason why a different rule of tort law should apply to a social host where liquor or other intoxicants are furnished to a minor guest." 366 N.W. 2d at p. 861.

In carefully addressing all of the arguments (pro and con) concerning judicial adoption of the subject cause of action, the Court in KOBACK, supra, noted:

> "To have 'carefree' social affairs where the host does not exercise care, is to invite injury, suffering and death and, as a matter of social policy, liability for the consequences." 366 N.W. 2d at p. 865.

In abrogating the common law non-liability rule in respect to vendors of alcoholic beverages, the Wisconsin Supreme Court did not have to involve itself in any contorted reasoning. The Court caused the creation of a common law rule of liability:

> ". . .by expressly rejecting the outdated common law notion that it was only the consumption of the alcoholic beverages and not the negligent furnishing of them that was the cause of injury. . ." 366 N.W. 2d at p. 859.

As THE ACADEMY has pointed out previously in this brief there exists appended to the opinion in LING v. JAN'S LIQUORS, supra, a compilation of the positions presently extant in other jurisdictions. In truth and in fact, there exists no legal impediment to the establishment of the subject cause of action. This Court has already held, in MIGLIORE, supra, that the injuries are foreseeable. The duties owed by "vendors" and "social hosts" under the facts and circumstances herein extant are the same. Under traditional Florida tort law principles "foreseeability" is a question of fact for the trier of fact. Indeed, this Court has, since its decision in VINING v. AVIS RENT-A-CAR SYSTEMS, INC., 354 So. 2d 54 (Fla. 1977), emphasized its belief that (given the existence of a duty and evidence of its breach) if the harm that occurs is within the scope of danger created by the defendant's negligent conduct, then such harm is a reasonably foreseeable consequence of the negligence. See, for example: STEVENS v. JEFFERSON, 436 So. 2d 33 (Fla. 1983). Compare: SUTTER v. HUTCHINGS, supra; LINN v. RAND, 140 N.J. Super. 212, 356 A.2d 15 (1976); and KELLY v. GWINNELL, 96 N.J. 538, 476 A.2d 1219 (1984).

THE ACADEMY would emphasize to this Court the trend in the United States is to recognize a right of recovery against those who negligently furnish alcoholic beverages, especially to minors. As the Court in SUTTER v. HUTCHINGS, supra, asked (and then answered):

> "Which is the more valuable right, the right to serve alcohol to one's underage highschool friends, or the right not to be killed by an intoxicated underage driver? There is no right to serve alcohol to one's underage highschool friends." 327 S.E. 2d at p. 720.

Assuming Section 768.125, Florida Statutes, does not create the subject cause of action, THE ACADEMY would respectfully urge this Court to recede from prior precedent and reject the outdated common law notion that it is only the consumption of alcoholic beverages and not the negligent furnishing of them that constitutes the cause of injury. THE ACADEMY would ask this Court to recognize, by judicial fiat, that there exists in the State of Florida a cause of action against the social host, and in favor of a person injured by an intoxicated minor who was served alcoholic beverages by the social host.

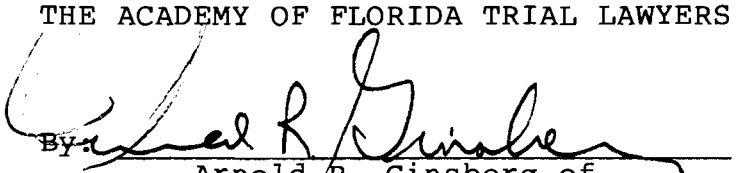
VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, THE ACADEMY respectfully urges this Honorable Court to adopt the position as contended for by the subject petitioners and to answer the certified question in the affirmative.

Respectfully submitted,

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: 

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I HEREBY CERTIFY that a true copy of the foregoing Amicus Curiae Brief was furnished, by U.S. mail, this 3rd day of March, 1986, to the following counsel of record:

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