12-998

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,281

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.

FILED
SID J. WHITE
MAR 31 1986
CLERK, SUPREME COURT
By
Chief Deputy Clerk

RESPONDENT, STEVEN LADIKA'S, ANSWER BRIEF ON THE MERITS

REX CONRAD, ESQ.
VALERIE SHEA, ESQ.
CONRAD, SCHERER & JAMES
Attorneys for Respondent Ladika
633 South Federal Highway
Post Office Box 14723
Fort Lauderdale, Florida 33302
Telephone: (305) 462-5500

TABLE OF CONTENTS

CONRAD, SCHERER & JAMES, EIGHTH FLOOR, 633 SOUTH FEDERAL HIGHWAY, FT. LAUDERDALE, FL 33301 • TEL. 462-5500

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES
(continued)

PAGE

CONRAD, SCHERER & JAMES, EIGHTH FLOOR, 633 SOUTH FEDERAL HIGHWAY, FT. LAUDERDALE, FL 33301 • TEL. 462-5500

TABLE OF AUTHORITIES
(continued)

CONRAD, SCHERER & JAMES, EIGHTH FLOOR, 633 SOUTH FEDERAL HIGHWAY, FT. LAUDERDALE, FL 33301 • TEL. 462-5500

STATEMENT OF THE CASE AND FACTS

Respondent/defendant Steven Ladika accepts petitioners/plaintiffs' statement of the case and facts.

SUMMARY OF ARGUMENT

Section 768.125, Florida Statutes (1981) does not create a cause of action against social hosts. The statute's language, its legislative history, evidence of preemptive legislative intent, and this court's prior interpretation of it belie plaintiffs' claims to the contrary. The question certified to this court should be answered in the negative.

Florida does not recognize a common-law cause of action against social hosts, and it would be improper for this court to create one. Forceful arguments can be made both for and against expanded liability, and their resolution is a legislative, rather than judicial, prerogative.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL PROPERLY HELD THAT SECTION 768.125, FLORIDA STATUTES (1981) DOES NOT CREATE A CAUSE OF ACTION IN FAVOR OF A PERSON INJURED BY AN INTOXICATED MINOR WHO WAS SERVED ALCOHOLIC BEVERAGES BY A PRIVATE PARTY HOST.

The issue presented in this appeal is whether, under section 768.125, Florida Statutes (1981), a party injured by an intoxicated minor driver can recover from a social host who served alcohol to the minor.[1] The District Court of Appeal correctly answered this question in the negative. Although section 768.125 contains general language which may, at first

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[1] Section 768.125, Florida Statutes (1981) provides:

> Liability for injury or damage resulting from intoxication. 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.

blush, appear to authorize a cause of action against social hosts, it does not. This conclusion is compelled by four reasons, discussed in detail below: (a) a more careful reading illustrates that, even on its face, the scope of the statute is confined to vendors; (b) the legislative history confirms that it was passed with the purpose of being a limitation on the liability of vendors; (c) a liberal construction of the statute is foreclosed by the legislature's intent to occupy the field; and (d) the Florida Supreme Court, in Migliore v. Crown Liquors, Inc., 448 So.2d 978 (Fla. 1984) and other decisions, correctly interpreted section 768.125 as a limiting rather than remedial statute, which is confined to vendors in scope. Section 768.125 does not affect the law respecting social hosts. Consequently, the decision of the district court should be affirmed because Florida recognizes no cause of action against social hosts for injuries caused by minors to whom they have served alcohol.

A. The Language of Section 768.125 Demonstrates its Inapplicability to Social Hosts, or at Least Creates a Sufficient Ambiguity to Warrant Consideration of Legislative History and Intent.

Plaintiffs and their amicus contend that the plain language of section 768.125 shows that it applies to non-vendors, including private party hosts. Their contention is based on the fact that the statute uses the term "person" rather than vendor, and includes "furnishings," as well as sales of alcohol.

We maintain, however, that a careful reading of the statute leads to the opposite conclusion, i.e., that by its terms the statute is inapplicable to parties other than vendors or their agents. At the very least, the legislature's failure to define key terms creates an ambiguity which the section's history resolves.

The fact that section 768.125 employs the terms "furnishes" in addition to "sells" ("any person who sells or furnishes") presents no impediment to the conclusion that social hosts are not included. Section 562.11, Florida Statutes (1981) employs terms other than "sells." That statute begins, "[i]t is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages ... ." Nonetheless, section 562.11 has been consistently construed as applying only to vendors. See, e.g., Bryant v. Pistulka, 366 So.2d 479 (Fla. 1st DCA 1979); United Services Automobile Association v. Butler, 359 So.2d 498, 499-500 (Fla. 4th DCA 1978).

Likewise, use of the word "person," rather than "vendor" or "licensee," does not establish that section 768.125 is intended to reach non-vendors. Section 562.11 also speaks to "any person," but courts construing it found that subsequent use of the term "licensee" in the same statute limited "person" to vendors or their agents. Butler, 359 So.2d at 500.

Section 768.125 also contains a modifying word, which limits the statute's reach to vendors and their agents. That word is "unlawful." For liability to attach under section 768.125,

the furnishing must be both willful and unlawful. Unless both these elements are met, the statute declares that there shall not be liability.

Section 768.125 does not make the furnishing unlawful, yet it requires that liability be predicated on an unlawful furnishing. To give effect to this language, section 768.125 must be read in conjunction with a penal statute. It is unlawful for a vendor to serve a minor by virtue of section 562.11. United Services Automobile Association v. Butler, 359 So.2d 498, 500 (Fla. 4th DCA 1978); Prevatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967). There is no analogous statutory provision prohibiting non-vendors from serving alcoholic beverages to minors.

Plaintiffs allege that the unlawfulness requirement is met because: (1) possession of alcohol by a minor is a misdemeanor under section 562.111; (2) defendant, by serving alcohol at the party, either aided and abetted the minor's possession, in violation of section 777.011, Florida Statutes (1983); or (3) contributed to his delinquency, in violation of section 827.04(3), Florida Statutes (1983).

The contention that tort recovery can be predicated on these vague penal statutes is not tenable. When the common law recognizes the violation of a penal statute as creating common-law liability, it presupposes a specific statute which directly and unequivocally makes an act a crime and describes the class of persons that the statute is intended to protect. deJesus v.

Seaboard Coast Line Railroad Co., 281 So.2d 198 (Fla. 1973). Social host liability, which is without precedent in Florida, cannot emanate from such a dubious source. This is eminently clear, since both the "contributing to delinquency" and "aiding and abetting" statutes have been in force for years, yet were never regarded as creating a cause of action analogous to that under section 562.11. As noted by the Butler court:

> [S]ince there was no cause of action at common law for damages against one for unlawfully dispensing intoxicants to a minor and since Florida has no statute authorizing such a recovery, we find no cause of action stated in the appellant's third party complaint.

Id. at 500 (emphasis added).

Other states' courts finding that statutory causes of action have been created rely on far more precisely-worded statutes. The Florida legislature could have readily enacted a far more explicit statute, if indeed it intended to create a cause of action against social hosts:

-- It could have enacted a separate provision specifically defining a person as including any natural person, firm, partnership, association, or corporation, as did Michigan and Indiana. Mich. Comp. Laws, section 436.2K; Mich. Stat. Ann., section 18.972(11), cited in Longstreth v. Gensen, 377 N.W.2d 804, 806 (Mich. 1985); Ind. Code, section 7.1-1-3-30-31, cited in Ashlock v.

Norris, 475 N.E.2d 1167 (Ind. App. 1985).

-- It could have addressed the "unlawfulness" issue by passing a statute such as Georgia's, which prohibits any person from furnishing any alcoholic beverage to a minor, except for medical or religious purposes, or in the home with parental consent. Ga. Code, section 3-3-23(a)(1). In Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716, 719 (Ga. 1985), this statute was construed as an adequate predicate for imposition of liability on non-vendors who serve alcohol to minors in a social setting. If Florida had a similar statute, the argument for violations as negligence per se would be much stronger, particularly in light of section 768.125.

-- Alternatively, it could have defined furnishing as including gratuitous furnishings, as is the case in Wis. Stat., section 66.054(20)(a), cited in Koback v. Crook, 366 N.W.2d 857, 860 (Wis. 1985). This would have distinguished the scope of the statute from section 562.11, which also contains words in addition to sale, but is restricted to vendors.

The terms "person," "furnishing" and "unlawfully" do not lead inexorably to the conclusion that social hosts are within the scope of section 768.125, particularly under the canons re-

quiring strict construction of statutes derogating from common law. Defendant maintains that social hosts are facially outside the statute's scope; at worst, an ambiguity is created which can best be resolved by consideration of legislative intent.

A legislative history of section 768.125 is available, and it would be remiss for the court not to consider it. The construction plaintiffs and their amicus urge represents a sweeping departure from prior law, in an area which courts have repeatedly referred to as the province of the legislature. See, e.g., United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978). This court has previously recognized the value of section 768.125's legislative history, because it extensively discussed it in Migliore v. Crown Liquors, Inc., 448 So.2d 978 (Fla. 1984).[2] There is no reason to ignore the legislative history.

That history demonstrates that social hosts were not intended to be within the ambit of the statute. Rather, section 768.125 was promulgated by the liquor lobby and enacted to narrow vendors' standard of care.

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[2] Moreover, in Migliore the court arrived at a construction inconsistent with plaintiffs' analysis. This point is developed in section D, infra.

B. The Legislative History of Section 768.125 Affirmatively Shows the Legislature Considered and Rejected an Attempt to Impose Liability on Social Hosts Through This Statute.

The legislative history of section 768.125 is available. Counsel presented it to the trial court and it was incorporated in the record. (R. 221-31; A. 1-8) This history is illuminating in several telling respects: It reveals that the Committee on Regulated Industries and Licensing sponsored the bill; that it was enacted as an addition to Chapter 562 (entitled "Beverage Law: Enforcement"); and, importantly, that an amendment which expressly extended the statute to social hosts was offered but defeated prior to its final passage. In all respects, the history supports the conclusion that section 768.125 was an attempt to curtail vendors' liability rather than a sweeping remedial action designed to extend liability to social hosts.

The bill dates back to the 1980 session of the Florida legislature. In its initial draft, the bill (A. 1-2) is entitled, "An act relating to the Beverage Law; creating s. 562.51, Florida Statutes ... ." and in substance begins: "Section 562.51, Florida Statutes, is created to read ... ." The language of then-designated Proposed Committee Bill 19 is nearly identical to the language of section 768.125. It is important to bear in mind that this bill was proposed after decisions such as United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978). Butler and like cases held

that, notwithstanding use of the word "person," section 562.11 applied only to vendors.

It follows, therefore, that, in describing the bill as an addition to Chapter 562, the drafters intended its application to be exclusively to vendors and those acting for vendors, i.e., their agents. This interpretation is supported by the fact that the bill originated in the Committee on Regulated Industries and Licensing, which concerns itself with the liquor industry. The Committee's staff analysis (A. 3) describes the bill's impact as reducing premiums paid by alcoholic beverage licensees for liability insurance, and mentions difficulties licensees were having in obtaining liability coverage.[3]

Proposed Committee Bill 19 was unanimously approved in the Subcommittee on Alcoholic Beverages and Tobacco and in the full Committee. (A. 4-5) The intended placement of the bill, its origination in the particular committee, and the staff reference to insurance problems strongly suggest that this was a measure proposed by the liquor industry, intended to define and limit its liability. The language of the bill further supports this construction, as it is phrased in the negative:

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[3] Although the staff analysis describes the bill as applying to private citizens, as does the staff report done for the Governor (A. 10), we believe this description to be an error on staff's part, or, in any event, a presumed intent the legislature contradicted.

there shall not be liability, except in two specific circumstances.[4]

The most telling aspect of the history is its revelation that the legislature rejected a proposal to extend liability to social hosts. The bill progressed from committee to the Senate. (A. 6) There it passed, still as section 562.51, but with an amendment adding this sentence: "It is the intent of the Legislature that this provision applies to any person including, but not limited to, private party hosts as well as licensees under chapter 562."

Had the bill been signed into law with this amendment, there would be no question that the statute was intended to reach private party hosts. However, the amendment adding this provision was defeated by the House of Representatives. The Journal of the House of Representatives indicates that an

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[4] Courts and commentators have acknowledged this as the motivation behind the bill. As one critic notes:

> Apparently realizing the problem with standard dram shop acts, Florida has elected to follow a different path--a statute that limits the civil liability for those selling liquor even more than did the common law. Under section 768.125, unless a purveyor of alcohol willfully dispenses liquor to a minor or known alcoholic, no person injured by the purchaser can sustain a cause of action against the purveyor.

Richmond, Vicarious Liability of Purveyors of Liquor for the Torts of Their Drunken Minor Patrons, 13 Stetson L. Rev. 267, 271 (1984).

"amendment to the amendment" was adopted which eliminated the final sentence. (A. 6) The bill, without the social host provision, passed in the House by a 105-3 vote, to be later signed into law.

In the legislative process it is common for controversial amendments to be tacked on to more routine matters, and just as common for these attempts to fail. The fact that an amendment applying the statute to social hosts was proposed and then voted down defeats any argument that the legislature intended the statute to be a broad imposition of liability on private party hosts. To the contrary, this chronology shows that the legislature had the opportunity to enact such a measure, and refused to do so.[5]

The final piece of legislative history available is a report on the bill, following its passage, by a member of the Governor's staff. (A. 10) This report characterizes the fiscal effect as

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[5] It is extremely unlikely that, as plaintiffs argued below, this sentence was merely eliminated as redundant. Other states passing such statutes have pointedly included clarifying language, and emphasis of the scope of the statute would seem to be in order if the legislature had actually intended to enact a dramatic reform measure. Presumably, the legislature is aware of the canon that requires strict construction of any statute derogating from common law and would have realized the need to make any remedial intent particularly clear.

> No effect on government. Could possibly reduce premiums paid by beverage licensees for liability insurance. Reportedly, some licensees are experiencing difficulty in obtaining liability coverage and premiums have been increasing in recent years.

Surely, if the bill were intended to create an entirely new area of social host liability, there would have been some mention of this in the statement of effect prepared for the Governor.

In any event, the legislature passed the bill as an addition to Chapter 562, and voted down the amendment which would have extended the scope of the statute to social hosts. Had the bill been codified in Chapter 562, as intended, it would have flowed quite logically from section 562.11, and its intended scope would have been clear:

> It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 19 years of age or to permit a person under 19 years of age to consume said beverages on the licensed premises. Anyone convicted of a violation of the provisions hereof shall be guilty of a misdemeanor of the second degree, punishable as provided for in s. 775.082 or s. 775.083.
>
> A person who sells or furnishes alcoholic beverages ... shall not thereby become liable ... except 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 damage caused by or resulting from the intoxication of such minor or person.

The law's eventual placement in Chapter 768, rather than in Chapter 562 as it was enacted, is apparently attributable to the Revision Committee, which is authorized by section 11.242, Florida Statutes (1981) to make decisions regarding placement of particular statutes. In this instance, the revisioner's exercise of discretion ran afoul of the legislature's intent, and complicated an inquiry which would have been rendered unnecessary had the statute been codified in Chapter 562.

C. Section 768.125 and its History Demonstrate the Legislature's Intent to Occupy the Field.

Section 768.125 and its history incisively reveal the legislature's intent to control decisions relating to civil liability for conduct of intoxicated persons. The legislature spoke on this subject when it expressly defined, through section 768.125, the standard for and scope of vendors' liability.

By virtue of the limited remedy it has enacted, the legislature has effectively preempted the area. The need for restraint in such circumstances was acknowledged in Lone Star v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982). There the court rejected an invitation to create a malum prohibitum cause of action based on a municipal ordinance which prohibited serving alcoholic beverages to an obviously intoxicated person. It held, in essence, that a municipality cannot assume to create a civil cause of action when to do so would be inconsistent with the common law and a statute on the subject.

Clearly, the common law in Florida recognizes no cause of action against a social host. Lone Star, 408 So.2d at 759; Butler, 359 So.2d at 500. Plaintiffs' statutory construction argument requires the court to ignore section 768.125's legislative history and resort to bootstrapping vague, unrelated criminal statutes in order to satisfy that section's requirement of unlawful service. The language of the statute is not clear and unequivocal, as a statute derogating from common law must be. City of Pensacola v. Capital Realty Holding Co., Inc., 417 So.2d 687 (Fla. 1st DCA 1982). Moreover, plaintiffs' position is inconsistent with the legislature's obviously conservative view towards civil liability for conduct of intoxicated persons.

It is impossible to reconcile the legislative history with the intent that plaintiffs and their amicus ascribe to section 768.125. If the legislature intended to impose an entirely new species of civil liability on the unsuspecting citizenry, it certainly would not have foisted it on them in such oblique fashion. Moreover, it is unlikely that this great expansion of liability would have been kept so secret that it is only now, in 1986, that the supreme court has an opportunity to consider it. Plaintiffs' contentions are unsupported by the language of the statute and its history. They are further undercut by this court's previous treatment of section 768.125, discussed in the section which follows.

D. This Court's Previous Interpretations of Section 768.125 Refutes Plaintiffs' Argument that it Creates a Statutory Cause of Action Against Social Hosts.

This court has construed section 768.125 several times. In the process, the court has made eminently clear that section 768.125 does not create a cause of action for third persons against dispensers of intoxicants, including private party hosts, for injuries caused by intoxicated minors. Rather, section 768.125 operates as a limitation on the liability vendors already were subject to by virtue of section 562.11. Specifically, section 768.125 eliminated the possibility that vendors may be liable for a merely negligent sale of an alcoholic beverage to a minor who subsequently injures a third party. Migliore v. Crown Liquors, Inc., 448 So.2d 978 (Fla. 1984); Barber v. Jensen, 450 So.2d 830 (Fla. 1980); Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984).

In Migliore, the supreme court held that a vendor who sells intoxicating beverages to a minor, contrary to section 562.11, is liable to third persons injured by the minor's operation of a car. In examining the legislative history of section 768.125, the supreme court defined its scope:

> Moreover, contrary to the Fourth District's holding in the present case that Section 768.125 creates a cause of action for third persons against dispensers of intoxicants for injuries by intoxicated minors, we find that Section 768.125 is a limitation on the

liability of vendors of intoxicating beverages.

Section 768.125, Fla. Stat. (1981) 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 damages caused by or resulting from the intoxication of such minor or person.

When the legislature enacted this statute, it was presumed to be acquainted with the judicial decisions on the subject, including Davis and Prevatt. Moreover, the legislative intent that this statute limit the existing liability of liquor vendors is clear from its enacting title which reads: "An act relating to the Beverage Law; creating s. 562.11, Florida Statutes [codified as s. 768.125] providing that a person selling or furnishing alcoholic beverages to another person is not thereby liable for injury or damage caused by or resulting from the intoxication of such other person; providing exception; providing an effective date.

As this quote shows, section 768.125 did not create a new and separate cause of action, apart from section 562.11. Rather, the Migliore/Barber/Armstrong trilogy endorses the view that section 768.125 was enacted to tighten the requirements for a suit against a vendor. Prior to the effective date of

section 768.125, a merely negligent sale could give rise to liability on a vendor's part. Barber v. Jensen, 450 So.2d 830 (Fla. 1980). If the accident occurred after the effective date of section 768.125, the plaintiff must prove that the vendor willfully sold alcohol to a minor. Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984). The Armstrong court noted:

> We also stated, however, that although section 768.125 did not create a cause of action for third persons against dispensers of intoxicants for injuries caused by intoxicated minors, it does constitute a limitation on the already existing liability of vendors of intoxicating beverages.

Id. at 481. This interpretation was again confirmed in Forlaw v. Fitzer, 456 So.2d 432 (Fla. 1984). There the court refused to acknowledge liability on the part of a doctor who prescribed Quaaludes to a known drug addict. Section 562.11, it conceded, recognized a cause of action in a somewhat analogous situation; however, section 768.125 "limited the cause of action previously recognized by the courts." Id. at 433-34.

Barnes v. B. K. Credit Services, Inc., 461 So.2d 217 (Fla. 1st DCA 1984), relied on by plaintiffs for the proposition that section 768.125 creates new remedies, does not advance the inquiry in this case. The First District was meeting a challenge that the statute violated an adult plaintiff's access to courts because she was not within the scope of sections 562.11 and 768.125. In upholding the constitutionality of section 768.125, the court noted that this was an exception to the rule of non-

liability, carved out for minors, and therefore not a denial of any rights to adults. It does not follow that private party hosts, as well as vendors, are covered within the statute.

Although, as plaintiffs and their amicus point out, this court has discussed section 768.125 only with reference to vendors, it would be inconsistent for the court to construe it as intended to limit vendors' liability, and at the same time as creating a whole new cause of action against private party hosts. The court's prior analysis does not appear susceptible to such a dichotomous construction.

The combined effect of section 768.125's language, its legislative history and this court's earlier interpretations leave no doubt that section 768.125 did not create far-reaching liability on the part of social hosts, but instead, qualified the preexisting liability of vendors. The question certified by the District Court of Appeal should be answered in the negative.

POINT II

THE COURT SHOULD NOT RECOGNIZE A COMMON-LAW CAUSE OF ACTION IN PLAINTIFFS' FAVOR.

There are procedural and substantive reasons why this court should not recognize a common-law cause of action in plaintiffs' favor.

A. The Question is not Properly Presented in this Appeal.

It is axiomatic that a court can only answer questions which are properly presented to it, and which are necessary to the determination of the case. Shands Teaching Hospital and Clinics, Inc. v. Smith, 11 F.L.W. 81 (Fla. 1st DCA Dec. 30, 1985) (Barfield, J., concurring). The question of whether a common-law cause of action should be created is not properly presented in this appeal. Although plaintiffs initially pled a common-law cause of action, their appeal confined itself to the question of whether liability existed pursuant to section 768.125. This was the only issue argued to and ruled on by the district court, and the only question certified to this court. By failing to present the common-law question to the intermediate court, plaintiffs have waived their right to seek its adjudication in this forum. See Stewart v. Mack, 86 So.2d 143 (Fla. 1956) (point not argued in brief abandoned); Polyglycoat Corporation v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1983) (issue cannot be raised for first time on rehearing).

B. Limits on the Court's Power, Expressions of Legislative Intent and Policy Considerations Militate Against Judicial Creation of a Cause of Action.

In a recent concurring opinion, Judge Barfield of the First District Court of Appeal undertook a scholarly analysis

of the contours of a court's power to alter the common law. Shands Teaching Hospital and Clinics, Inc. v. Smith, 11 F.L.W. 81 (Fla. 1st DCA Dec. 30, 1985). His analysis offers enlightenment in the instant case, for it acknowledges the pressures courts are under to reform "anachronistic" common-law precepts, and emphasizes the importance of resisting those pressures.

Judge Barfield's thesis regarding the proper role of the judiciary is this: The power of a court to alter a common-law rule is confined to those situations in which the rule is inconsistent with constitutional or statutory law. Unless such an inconsistency is present, the court must honor the common law as it existed in England prior to July 4, 1976. Even if a court is properly presented with a challenge to a common-law rule, and finds it inconsistent with statutory or constitutional provisions, there remains the question of whether the court should alter the rule. It may be that the question is a policy decision of such fundamental proportions that it can only be properly determined by the legislature, in which case the court should exercise restraint notwithstanding its power to act. Indications of legislative preemption may be another factor in favor of restraint.

Judge Barfield's message is extremely pertinent in the instant case. The "carnage" caused by drunk drivers has received intense publicity in recent years. Sympathy generated for victims of drunk driving has created a climate in which imposition of civil liability on anyone arguably responsible for the in-

toxicated persons' condition may seem the next logical step. Given the clamorous outcry, the court may feel it would be abdicating its responsibility were it not to create the cause of action urged by plaintiffs and their amicus.

The principles expressed in Judge Barfield's opinion militate against judicial activism in this area of law. Drunk driving and related problems are eminently suited for the legislature, because they involve sensitive public policy issues and a host of conflicting interests. Forceful arguments can be made both for and against social host liability. Clark v. Mincks, 364 N.W.2d 226, 230 (Iowa 1985). The legislature is best equipped to draft statutes meeting the needs of the public in general while balancing the interests of specific sectors. Defendant urges the court to exercise restraint and insist the creation of any new sources of liability for the conduct of intoxicated persons be relegated to the legislature.

That the legislature intends to regulate conduct and liability associated with alcoholic beverages is clear. Chapter 562 sets forth a wide-ranging regulatory scheme. Section 768.125 is itself an expression of the legislature's desire to make decisions relative to the scope of civil liability. Plaintiffs rely on a New Jersey case, Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), in which common-law liability was judicially acknowledged. Kelly is distinguishable because its court confronted no legislative impediments to its analysis of common law. Unlike New Jersey, where there existed no dram

shop act or other legislative intent to occupy the field, Florida has long enforced a rule of liability against vendors. Its supreme court does not have the freedom of the Kelly court because it does not have a clean slate on which to write.

There can be no argument that creating a new cause of action would simply be judicial expression of a real, yet nascent, legislative intent. Its history reveals that section 768.125 was enacted with the very opposite intent, i.e., to constrict rather than expand liability. It would be inconsistent with this expressed intent for the court to recognize a common-law cause of action. The Kansas Supreme Court, dealing with a similar argument, deferred to the legislature on grounds that its apparent intent was against expanded liability and that it should make the value judgments associated with a change in the law. Ling v. Jan's Liquors, 703 P.2d 731, 739 (Kan. 1985). Other suits have declined to recognize common-law liability for like reasons. See, e.g., Holmes v. Circo, 196 Neb. 496, 504-05, 244 N.W.2d 65 (1976).

The history of social host liability in California offers further enlightenment. In Coulter v. Superior Court of San Mateo, 21 Cal. 3d 144, 145 Cal. Rptr. 534, 577 P.2d 669 (1979), the supreme court found that social host liability existed under modern negligence law. The cause of action was short-lived. California's legislature expressly abrogated this holding by enacting a statute reinstating the common-law principle that furnishing alcohol is not the proximate cause of injuries

inflicted by the intoxicant. Section 1714, Cal. Civil Code.

The issue of whether there should be a common-law cause of action against social hosts has been repeatedly considered and rejected by Florida courts.[6] In Butler, a case factually on all fours with the instant case, the Fourth District opined that creating such a cause of action was a legislative prerogative. That prerogative remains as strong in 1986. Section 768.125 did not impose liability on social hosts, and this court cannot justify doing so.

Should the court decide to grapple with expanded liability on an ad hoc basis, the Pandora's box it will be opening may soon be expected to divulge related questions such as: Should a person be liable who has bought drinks for a friend and then permitted him to drive in an intoxicated state? E.g., Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985). Should a host be liable to third persons injured by an adult guest? E.g., Klein v. Raysinger, 470 A.2d 507 (Pa. 1983). The permutations are endless. Uncertainty and case-by-case inequities will be inevitable by-products of an ad hoc judicial approach. See also Edgar v. Kajet, 375 N.Y.S. 2d 548 (Sup. Ct. 1975) (discussing

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[6] The Georgia case on which plaintiffs rely is also distinguishable. In Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985), the court construed, as a matter of first impression, a statute similar to 562.11. It concluded that liability extended to social hosts. In Florida, however, section 562.11 has been judicially confined to vendors.

the factors which must attend any consideration of expanding liability, and concluding that the public policies involved must be examined in the legislative process).

In the chorus of contentions that expanded liability is necessary to ensure victim compensation, a more sinister note can be detected. This recent excerpt from a lawyers' bulletin exposes a distasteful aspect of the state of law for which plaintiffs and their amicus campaign:

> Your client was injured by a drunk driver. Whom can you sue? It used to be that you could only sue the driver and maybe a tavern. But the law is changing ... and in 1986 innovative lawyers will be finding new ways to recover for their clients.
>
> They [sic] key is to investigate the entire chain of incidents that led up to the driver's accident, and see who else can be made into a defendant. In the past year, everyone from the American Legion to the host of a wedding reception has been successfully sued ... this trend shows every sign of expanding further ... . [It has given] plaintiffs' lawyers a new opportunity for recovery, especially useful where the drunk himself is judgment-proof, and opened up a new defense for lawyers representing drunk drivers: bringing in the social host as a joint tortfeasor.

5 Law. Alert 108 (January 27, 1986). It is clear that a segment of those favoring creation of new common-law liabilities has personal economic interests in mind. Surely unsuspecting would-be defendants and the societal interests they represent are deserving of greater consideration than is evident from the above excerpt.

This court should eschew the plaintiffs' invitation to legislate in the arena of social host liability. Judicial restraint is militated by (1) the nonexistence of any inconsistency or other appropriate basis for altering common law; (2) indications of legislative preemption in this area; and (3) reasons of public policy which discourage ad hoc expansion of liability. The court's analysis should be confined to a consideration of whether section 768.125, Florida Statutes (1981) creates a cause of action against Mr. Ladika; its conclusion should be that it does not.

CONCLUSION

The question certified by the District Court of Appeal should be answered in the negative, and its decision affirmed.

Respectfully submitted,

CONRAD, SCHERER & JAMES
Attorneys for Respondent Ladika
633 South Federal Highway
Post Office Box 14723
Fort Lauderdale, Florida 33302
Telephone: (305) 462-5500

By: VALERIE SHEA for
REX CONRAD
VALERIE SHEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent, Steven Ladika's, Answer Brief on the Merits has been furnished by mail, this 28th day of March, 1986, to:

ARNOLD R. GINSBERG, ESQ.
Horton, Perse & Ginsberg
410 Concord Building
66 West Flagler Street
Miami, Florida 33130

ARNOLD GREVIOR CHARTERED
100 Southeast Sixth Street
Fort Lauderdale, Florida 33301

RALPH PELAIA, JR., ESQ.
633 South Andrews Avenue
Fort Lauderdale, Florida 33302

LARRY KLEIN, ESQ.
Klein & Beranek, P.A.
Suite 503, Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401

JAMES M. HENDERSON, ESQ.
One Financial Plaza
Suite 1318
Fort Lauderdale, Florida 33394

H. JACKSON DORNEY, ESQ.
Fourth Floor
450 North Park Road
Hollywood, Florida 33021

MARJORIE GADARIAN GRAHAM, ESQ.
Jones & Foster, P.A.
Post Office Drawer E
West Palm Beach, Florida 33402-3475

Valerie Shea for
REX CONRAD
VALERIE SHEA