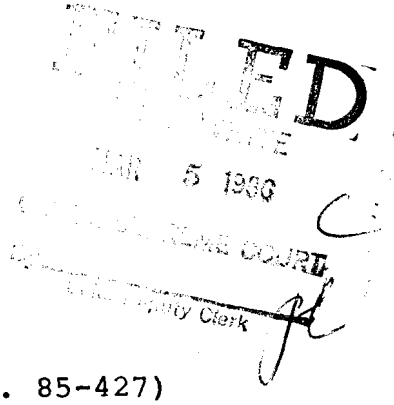
IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 68,281



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

Petitioners,

vs. (DCA-4 NO. 85-427)

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

Respondents.
_____/

ON CERTIFIED QUESTION FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

ARNOLD GREVIOR CHARTERED
100 Southeast Sixth Street
Fort Lauderdale, FL 33301
(305) 462-8394
and
RALPH PELAIA, JR.
633 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-1700
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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PREFACE

The parties will be referred to as the plaintiff and defendants.

The following symbol will be used:

R - Record

A - Petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

The facts are contained in the Third Amended Complaint (R 233). It was alleged that defendants gave a party and invited Brian Brennan, whom they knew was a minor. They knowingly furnished Brennan alcoholic beverages, as a result of which he became intoxicated, drove a motor vehicle, and injured plaintiff. Plaintiff sued defendants for damages and the trial court dismissed for failure to state a cause of action (R 255).

Plaintiff appealed to the Fourth District which affirmed but certified the question as one of great public importance (A 1).

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, 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.

Even if this court determines the statutes does not create a cause of action in this case, 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.

ARGUMENT

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?

Section 768.125 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. (Emphasis added)

The complaint alleged that the defendants "knowingly, willingly and intentionally furnished alcoholic beverages to Brian Francis Brennan, who they knew, or should have known, was a minor under the age of 18."

The trial judge and the Fourth District felt compelled to dismiss the case because of this court's decisions in Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984), and Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984). At the conclusion of the hearing on

defendants' motion to dismiss (R 259-279), the trial judge stated that he hoped he was reversed, that he wished the law was to the contrary, that there should be a cause of action, but he felt bound by this Court's language in the above cases.

In Migliore v. Crown Liquors of Broward, Inc., supra, plaintiff was injured in an automobile accident by a 17-year old who was driving while intoxicated. Plaintiff sued Crown Liquors alleging that it sold the minor liquor without asking for identification, resulted in him becoming intoxicated and causing the accident. The statute on which we rely, Section 768.125, was not in effect at the time of the accident in Migliore, however in dicta this Court stated on page 980 of Migliore:

> 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. (Emphasis added)

Defendants have successfully argued that based on the above, Section 768.125 only applies to vendors. We submit this is a misinterpretation of the language in that opinion. Migliore involved a vendor, not a social host. In discussing the liability of a vendor it was only natural for

this Court to say that the statute is a limitation of "liability of vendors", because vendors previously had greater liability, as this court noted in Armstrong, supra.

In Armstrong v. Munford, Inc., there was no allegation that the selling or furnishing of the alcoholic beverage to the minor was done willfully. In Armstrong the accident occurred after the effective date of Section 768.125. This Court stated on page 481:

> In our recent decisions of Migliore and Barber, we held that prior to the effective date of section 768.125, a third party who could establish proximate causation for his injuries did have a cause of action against the person who furnished alcoholic beverages to a minor in violation of section 562.11. 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. The district court correctly held that section 768.125 requires that the selling or furnishing of the alcoholic beverage must be done willfully. Section 768.125 controls in those cases arising after its effective date. (Emphasis added)

Armstrong also involved a vendor, not a social host.

The language of this Court in both Armstrong and Migliore thus relates only to vendors of alcoholic beverages, because vendors had a pre-existing liability for

selling alcohol to minors under Section 562.11, Florida Statutes. This is why this Court stated that the subsequently enacted Section 768.125 constituted a limitation on the pre-existing liability of vendors. Neither of the cases dealt with social hosts, and the language of Section 768.125 is not limited to vendors or sales. The statute makes a "person who willfully and unlawfully sells or furnishes" liable. Unlike Section 562.11 (the pre-existing liability) which is applicable only to "licensed premises" there is no such limitation in Section 768.125.

That this statute created additional remedies was recognized by the First District in Barnes v. B. K. Credit Service, Inc., 461 So.2d 217 (Fla. 1st DCA 1984), wherein 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, the mother alleged that Section 768.125 was unconstitutional, denying equal protection because it gave a remedy where a minor was involved but not to an adult. It was also argued that the statute was unconstitutional as denying access to the courts to adults. The First District rejected that argument, stating on page 221:

> ... 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. We therefore hold that section 768.125 does not deny access to courts. (Emphasis added)

Defendant also argued in the lower court that the furnishing of alcoholic beverages had to be done "willfully and unlawfully" and that it was not done unlawfully under the facts alleged. This is not true. It is clearly against the law to furnish a minor with alcoholic beverages, and this was alleged in the complaint. Section 562.111 provides:

> It is unlawful for any person under the age of 19 years, except a person employed under the provisions of s. 562.13 acting in the scope of his employment, to have in his possession alcoholic beverages, ...

It is thus clearly a misdemeanor for a minor to possess alcoholic beverages.

Section 777.011 provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

Certainly one who gives alcohol to a minor, thus causing the minor to commit a misdemeanor, has aided or abetted in the commission of the misdemeanor and has therefore also committed a crime.

In addition to being a principal in the first degree, under Section 777.011, the defendant has also contributed to the delinquency of a minor. Section 827.04(3) provides:

> Any person who commits any act which thereby causes or tends to cause or encourage any person under the age of 18 years to become a delinquent or dependent child, as defined under the laws of Florida, or which contributes thereto, or any person who shall, by act, threats, commands, or persuasion, induce or endeavor to induce any person under the age of 18 years to do or to perform any act, to follow any course or conduct, or so to live, as would cause or tend to cause such person under the age of 18 years to become or to remain a dependent or delinquent child, as defined under the laws of this state, is guilty of a misdemeanor of the first degree, ...

Section 39.01(8) provides that a delinquent child is one who has committed a felony or a misdemeanor.

Defendants, by serving alcohol to a minor, have thus committed two separate misdemeanors. They are principals in the first degree to the misdemeanor involving possession of alcohol by a minor, and they have contributed to the delinquency of a minor.

If the legislature had not intended to make a social host responsible it would have used vendor instead of person and would not have said "sells or furnishes". In Neu v. Miami Herald Publishing Company, 462 So.2d 821 (Fla. 1985), the Court stated on page 825:

> ...In construing legislation, courts should not assume that the legislature acted pointlessly....

The language of the statute involved in the present case could not be more clear. In State v. State Racing Commission, 112 So.2d 825 (Fla. 1959), this Court said on page 828:

> ...one of the cardinal rules of statutory construction is that where the language of a statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, admitting of but one meaning, courts in construing it may not depart from the plain and natural language employed by the legislature.

In an analogous situation, where the meaning of the precise language of a statute was in controversy, in Lee v. Gulf Oil Corporation, 4 So.2d 868 (Fla. 1941), this Court stated on page 870:

> ... If it was not the intention of the legislature to make the Act apply to filling stations where any merchandise except gasoline and petroleum products were sold, then the learned members of that august body would certainly have used some other language, or would have left out the word "exclusively" in

> the passage of the Act. See Smith v. State, 80 Fla. 315, 85 So. 911; State v. Tunnicliffe, 98 Fla. 731, 124 So. 279. If the language of the statute is plain and clear, and free of ambiguity so as to be susceptible of but one meaning, then it becomes the duty of the courts to follow the plain meaning of the statute and not to depart therefrom....

Defendants argued below that the legislative history is persuasive that the legislature did not intend this statute to apply to social hosts. The legislative history does not support defendant's argument. Moreover it is well-established that where the wording of a statute is clear, the legislative history is irrelevant. Volunteer State Life Insurance Co. v. Larson, 2 So.2d 386 (Fla. 1941) and Rinker Materials Corporation v. City of North Miami, 286 So.2d 552 (Fla. 1973).

COMMON LAW LIABILITY OF SOCIAL HOST

Even if this Court concludes that Section 768.125 does not apply to social hosts, liability need not be based solely on the statute. The modern trend is to hold the social host liable based on ordinary negligence.

In Migliore, supra, this Court stated on page 979:

> We agreed with the holding and rationale of the Second District in Prevatt. Providing alcoholic beverages to minors involves the obvious foreseeable risk of the minor's

intoxication and injury to himself or a third person. (Emphasis added)

In Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976) the issue, as in the instant case, was whether a social host who furnished intoxicating liquors to a minor could be held liable for the intoxicated minor's negligent acts which caused injury to a third party. The New Jersey Supreme Court held that a social host could be held liable on the theory of negligence:

> [P]laintiff should be given his day in court to prove that (a) Rand was a minor, (b) Nacnodovitz knew she was a minor, knew she intended to drive her car, and nevertheless served her alcoholic beverages to the degree that she was unfit to drive, and (c) it was reasonably foreseeable that Rand might injure herself, or others, and that his negligence was a proximate cause of the accident and plaintiff's injuries. It makes little sense to say that the licensee in Rappaport [v. Nichols, 156 A.2d 1, 31 N.J. 188 (1959)] is under a duty to exercise care, but give immunity to a social host who may be guilty of the same wrongful conduct merely because he is unlicensed.
>
> Our courts have not hesitated to place responsibility for tortious acts upon the person committing the wrong, nor have they refrained from removing old common law doctrines which granted immunity to wrongdoers. Why should a social host be given the special privilege of immunity from liability if he acts negligently with resulting harm to others?
>
> * * *
>
> Applying the philosophy expressed above to the facts in this case, a jury might well determine that a social host who serves

> excessive amounts of alcoholic beverages to a visibly intoxicated minor, knowing the minor was about to drive a car on the public highways, could reasonably foresee or anticipate an accident or injury as a reasonably foreseeable consequence of his negligence in serving the minor. This becomes devastatingly apparent in view of the ever-increasing incidence of serious automobile accidents resulting from drunken driving. 356 A.2d at 18, 19.

In Sutter v. Hutchings, 254 Ga. 194, 327 S.E. 2d 716 (1985) the defendant hostess served alcoholic beverages at her seventeen year-old daughter's party. This is exactly the same factual situation as in the present case, a party for high school students with alcohol being served. A minor guest, Christopher Turner, became intoxicated at the party, drove away in his car, and killed plaintiff's decedent, David Sutter. The Georgia Supreme Court recognized that historically there has been no cause of action under these circumstances, but decided henceforth there would be liability, stating:

> [W]here one provides alcohol to a noticeably intoxicated 17 year old knowing that he will soon be driving his car, it is foreseeable to the provider that the consumer will drive while intoxicated and a jury would be authorized to find that it is foreseeable to the provider that the intoxicated driver may injure someone. That is to say, a jury would be authorized to find that providing alcohol to a noticeably intoxicated 17 year old automobile driver was one of the proximate causes of the negligence of the driver and of the injures to the deceased. Id. at 719

The court concluded:

> Finally, we pose this question: Which is the more valuable right, the right to serve alcohol to one's underage high school friends, or the right not to be killed by an intoxicated underage driver? There is no right to serve alcohol to one's underage high school friends.
>
> * * *
>
> [W]e hold that a jury, under appropriate instructions, would be authorized to find that a person who encouraged another, who was noticeably intoxicated and under the legal drinking age, to become further intoxicated and who furnished to such other person more alcohol, knowing that such person would soon be driving a vehicle, is liable in tort to a person injured by the negligence of such intoxicated driver. Id. at 720.

In Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) the New Jersey Supreme Court extended the common law even further. In that case, the court held a social host liable for serving liquor to an adult guest who became drunk and injured a third person in an automobile accident.

The court recognized that New Jersey had no statutes imposing liability on the provider of alcoholic beverages, and common law liability had previously been extended to a social host only where the guest was a minor. Nevertheless, it imposed liability on the defendant host, based on negligence:

> A reasonable person in Zak's position could foresee quite clearly that this continued provision of alcohol to Gwinnell was making it more and more likely that Gwinnell would not be able to operate his car carefully. Zak could foresee that unless he stopped providing drinks to Gwinnell, Gwinnell was likely to injure someone as a result of the negligent operation of his car. The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable. Under those circumstances the only question remaining is whether a duty exists to prevent such risk or, realistically, whether this Court should impose such a duty. 476 A.2d at 1222.

The court concluded that such a duty did exist based on public policy:

> Unlike those cases in which the definition of desirable policy is the subject of intense controversy, here the imposition of a duty is both consistent with and supportive of a social goal--the reduction of drunken driving--that is practically unanimously accepted by society.
>
> While the imposition of a duty here would go beyond our prior decisions, those decisions not only point clearly in that direction but do so despite the presence of social considerations similar to those involved in this case--considerations that are claimed to invest the host with immunity. Id.

Finally, the court commented on the lack of statutory authority for its decision:

> We do not agree that the issue addressed in this case is appropriate only for legislative resolution. Determinations of the scope

> of duty in negligence cases has traditionally been a function of the judiciary....
>
> * * *
>
> We are satisfied that our decision today is well within the competence of the judiciary. Defining the scope of tort liability has traditionally been accepted as the responsibility of the courts. Indeed, given the courts' prior involvement in these matters, our decision today is hardly the radical change implied by the dissent but, while significant, is rather a fairly predictable expansion of liability in this area. Id. at 1223, 1226, 1228.

The Wisconsin Supreme Court, has recently held that a social host may be liable when he serves a minor guest alcoholic beverages. In Koback v. Crook, 123 Wis.2d 259, 366 N.W.2d 857 (1985) the court explained that the fault principle applicable to a negligent liquor vendor is equally applicable to a social host because both stem from the same negligent conduct. See also Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971) wherein the Oregon Supreme Court recognized the common law liability of a social host for the negligent furnishing of alcohol to a minor when the host knew the minor would be driving.

It cannot be argued that every element of negligence is not present where the defendants gave a party in their home in which alcohol is served to minors in violation of the

law. Nor can it be argued that reducing drunk driving is important. The trend in the United States is to recognize a right of recovery against those who negligently furnish alcoholic beverages, especially to minors. It is difficult to conceive of an issue which could be more timely than the one presented in this case. The statute plainly provided for the imposition of liability and other states are imposing liability under ordinary negligence principles, even without a statute such as ours.

CONCLUSION

The decision of the Fourth District should be reversed.

ARNOLD GREVIOR CHARTERED
100 Southeast Sixth Street
Fort Lauderdale, FL 33301
(305) 462-8394
and
RALPH PELAIA, JR.
633 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-1700
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By John Beranek
For LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 3rd day of March, 1986, to:

JAMES M. HENDERSON
One Financial Plaza
Suite 1318
Fort 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
Fort Lauderdale, FL 33302

ARNOLD GINSBERG, of
HORTON, PERSE & GINSBERG
401 Concord Building
66 West Flagler Street
Miami, FL 33130

TOM CAREY
622 Bypass Drive
Clearwater, FL 33546

John Beranek
for LARRY KLEIN