IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,404

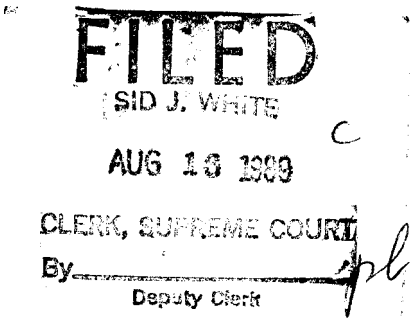
KIMBERLY DOWELL,

Petitioner,

vs.

GRACEWOOD FRUIT COMPANY,

Respondent.



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

BRIEF OF AMICUS CURIAE,
ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

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

CERTIFIED QUESTION

UNDER THE LAW OF FLORIDA MAY A SOCIAL HOST BE HELD LIABLE FOR SERVING ALCOHOL TO A KNOWN ALCOHOLIC?

SUMMARY OF ARGUMENT

Section **768.125,** Florida Statutes **(1980)** states that a person who "knowingly serves" an alcoholic beverage to an alcoholic may be liable for injury or damage resulting from the intoxication of the alcoholic. There is only one conclusion which can be drawn from the clear and unambiguous wording of the statute, and that is that the certified question should be answered in the affirmative.

ARGUMENT

Section **768.125,** Florida Statutes **(1980)** 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 beverases may become liable for injury or damase caused bv or resultins from the intoxication of such minor or Person. (Emphasis added)

If this statute means what it says the certified question must be answered in the affirmative. In Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), this court held that this statute does not mean what it says. This court held that a person who served alcoholic beverages to a minor would not be liable as a result of the minor's drunk driving and injuring a third person. If this court adheres to Bankston then the certified question should be answered in the negative. With all due respect, we believe this court's decision in Bankston was erroneously decided, and that this court should recede from it.

The essence of our argument is that the wording of Section 768.125, Florida Statutes (1980) is perfectly clear. The statute says that a person "who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable...." The statute is not restricted to a vendor of alcoholic beverages, nor is it applicable only to sales of alcoholic beverages. The statute uses the words "person", "sells or furnishes" and "serves."

In Bankston this court did not even quote the statute in its opinion. Rather this court only referred to the statute by number, and then relied on legislative intent and legislative history to come up with a result which is plainly contrary to the wording of the statute. This court overlooked that where the wording of a statute is clear, legislative history is irrelevant. Volunteer

State Life Insurance Company v. Larson, 2 So.2d 386 (Fla. 1941) and Rinker Materials Corporation v. City of North Miami, 286 So.2d 552 (Fla. 1973).

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....

In Kelly v. Gwinnell, **96** N.J. **538,** 476 A.2d 1219 **(1984),** the New Jersey Supreme Court extended the common law to hold 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.

In the present case it is unnecessary for this court to change the common law of this state. The wording of this statute makes

it perfectly clear that any "person" who "serves" alcohol to an alcoholic may be held liable for injuries to a third person. This court should hold that this statute means what it says and answer the certified question in the affirmative.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 15th day of August, 1989, to:

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