IN THE SUPREME COURT OF FLORIDA

APPEAL NO.: 74,404

KIMBERLY DOWELL,

Petitioner,

v.

GRACEWOOD FRUIT COMPANY,

Respondent.

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

ANSWER BRIEF OF RESPONDENT, GRACEWOOD FRUIT COMPANY

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CITATIONS OF AUTHORITY

MISCELLANEOUS:

STATEMENT OF THE CASE AND OF THE FACTS

This case comes before this Court upon a question certified by the Fourth District Court of Appeal to be one of great public importance: Under the law of Florida may a social host be held liable for serving alcohol to a known alcoholic? The question as phrased assumes for its predicate that it was factually established that the Respondent knowingly served alcoholic beverages to the tortfeasor. Abbey, and that the Respondent knew that Abbey was habitually addicted to alcohol. In fact, those allegations were conclusively refuted in the record below.

By amended complaint (R-29-31;A-1-3), Plaintiff alleged that she was injured May 16, 1981, when the motorcycle on which she was a passenger was struck by a vehicle driven by Bernard Abbey. Abbey was alleged to be the employee of Defendant, Gracewood Fruit Company (Gracewood) who had attended Gracewood's company party given between noon and 3:30 p.m. at which alcoholic beverages were served. Defendant's liability as Abbey's social host was predicated on its alleged negligence in serving Abbey who it knew or should have known was habitually addicted to alcohol. After leaving the company party, it was alleged that Abbey purchased further alcoholic beverages at a 7-11 convenience store, consumed same, and later collided with Plaintiff's vehicle.

By answer, Gracewood denied liability and asserted the complaint's failure to state a cause of action under F.S. 768.125 (R-32,33;A-4,5). Plaintiff's reply was a general denial (R-35;A-6).

The only facts in the record are contained in the affidavits of J. C. Griffen (R-42,43;A-7,8) and Donald Louis (R-44,45;A-9,10), which were the basis for Defendant's motion for summary judgment (R-39-41;A-11-13). Griffen, Gracewood's plant manager on the date of the accident. testified that Abbey had been employed temporarily by Gracewood as a forklift driver from April 6, 1981 through April 19, 1981. His employment terminated almost one month before the accident occurred. According to Griffen, Abbey had **not** been invited to Gracewood's company party, nor had he been seen there by Griffen. During Gracewood's employment of Abbey, Griffen testified that he never observed nor was he advised of any consumption of alcohol by Abbey indicative of habitual addiction (R-42,43;A-7,8).

Donald Louis testified that he had known Abbey socially and also worked with Abbey for three years prior to Gracewood while both were working at another grove in Vero Beach. Louis also worked with Abbey during Abbey's temporary employment with Gracewood. At the time of the accident, Louis was an employee of Gracewood who attended the company party and observed Abbey there. Louis did **not** consider Abbey to be intoxicated while at the party. Significantly, during the entire period of time Louis had worked with Abbey and known him socially, Louis never knew Abbey to be habitually addicted to the use of alcohol (R-44,45;A-9,10). Thus, not only did these affidavits establish that Abbey was not an employee of Gracewood on the date in question (as was conceded by Plaintiff at trial and the District level; R-9,10;A-22,23), but also that he was **not** habitually addicted to alcohol (which fact is ignored by Petitioner here).

Gracewood moved for summary judgment (R-39-41;A-11-13) on the basis that F.S. 768.125 precludes civil liability of any person who furnishes alcoholic beverages to a person of lawful age unless that person knowingly serves a person habitually addicted to alcohol, where the record conclusively established that Abbey was **not so** habitually addicted and even if he was, Gracewood had no knowledge that that may have been **so**. The secondary basis for the motion was this **Court's** decision of Bankston V. Brennan[1] which refused to apply F.S. 768.125 to a social host in favor of limiting its application, due to its legislative history, to a vendor of intoxicants. Plaintiff filed no affidavits in opposition to Gracewood's motion for summary judgment.

At the hearing on said motion (R-1-14;A-14-27), Plaintiff conceded that Abbey was not in Gracewood's employ on the date in question and that summary judgment for Gracewood was proper on the employment theory (R-9,10;A-22,23). As to her social host theory, Plaintiff sought to distinguish Bankston as being limited to a situation involving service of alcohol by a social host to a minor, urging that the Supreme Court might use its "quasi-legislative powers to...legislate where you've got a habitual offender as opposed to when you've got just a minor" (R-10;A-23).

The trial judge noted that Bankston held any change in public policy by creating social host liability was up to the

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1. 507 So.2d 1385 (Fla. 1987).

legislature to accomplish, not the courts (R-11;A-24). The trial court relied on Bankston as precluding liability of Gracewood as a matter of law even on a pure social host theory (R-13;A-26). Finding no genuine issue of material fact and noting that no opposing affidavits were filed, the trial court entered summary final judgment for Gracewood (R-48;A-28).

Contrary to Plaintiff's assertion, the trial court never ruled that Abbey was an employee of Gracewood. In fact, the Plaintiff conceded below that summary judgment for Gracewood was proper on that ground (R-9,10;A-22,23). Plaintiff misstates the issue presented to the trial court as a social host's duty to refrain from serving alcohol to a person known to be habitually addicted to alcohol for the simple reason that this record conclusively refutes both the allegation that Abbey was habitually addicted to alcohol and that Gracewood knew this when it served alcohol to him.

The Fourth District Court of Appeal agreed that Bankston compelled affirmance of the summary judgment for Gracewood in the social host setting. It certified the question of whether Florida law allows a social host to be held civilly liable for serving alcohol to a known alcoholic. In so framing the question, the District Court ignored Gracewood's contention that such an issue need not be reached on a record which conclusively establishes that Abbey was neither a minor nor habitually addicted to alcohol as known by Gracewood and as such, fell outside both exceptions to the rule of non-liability created by F.S. 768.125.

SUMMARY OF ARGUMENT

The certified question of whether Florida law imposes civil liability on a social host for serving alcohol to a known alcoholic is phrased in ignorance of the unrefuted facts established in the record. The record establishes that the tortfeasor who injured the Plaintiff, Abbey, was not a habitual drunk. Assuming arguendo that he was, the record further establishes that Gracewood had no knowledge of that when Abbey attended its company party as an uninvited guest and consumed liquor there. The first reason for answering the certified question in the negative is because the question presented seeks nothing more than an advisory opinion from this Court because the factual predicate necessary to raise the issue as framed is lacking.

The second basis for answering the certified question in the negative is because **F.S. 768.125** was never intended by the legislature to create a cause of action against a social host for the service of alcohol to an adult or minor. Despite the broad wording of the statute and the fact that the statute does not expressly restrict its operation to vendors, this Court has held on repeated occasions that the enacting title to the act is clear evidence that the legislature intended to restrict the statute's operation to a vendor context. Furthermore, in Bankston v. Brennan, this Court specifically refused to interpret **F.S. 768.125 as** creating civil liability of a social host. Though Bankston dealt factually with the social host's serving liquor to a minor, nothing in the opinion suggests the

holding turns on that fact. Instead, the opinion in its entirety clearly rejects social host liability as stemming either from F.S. 768.125 or the common law. This Court concluded in Bankston that any decision to create social host liability is best left to the legislature.

The legislature has in fact spoken since the enactment of F.S. 768.125, after the Supreme Court decisions restricting that statute to a vendor context and rejecting its application to a social host. Far from choosing to create social host liability, the legislature left intact all of the Supreme Court precedent and legislated only against adults allowing open house parties if any alcoholic beverages or drugs are possessed or consumed by any minor. No protection is extended under the new act to an adult, whether that adult be a habitual drunk or not.

In light of existing Florida law refusing to judicially create social host liability and the legislature's clear choice to leave intact such decisions, the certified question should be answered in the negative. Social host liability should be rejected as a cause of action in Florida, either statutory or otherwise.

ISSUE ON APPEAL

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

It is respectfully submitted that based on the artful framing of the certified question by the District Court, the first reason for answering the certified question in the negative is because the issue as framed improperly seeks an advisory opinion as to whether this Court will judicially create social host liability where the factual predicate necessary to raise the issue is lacking. It is patently incongruous for the Plaintiff to seek "reinstatement of her complaint" against Gracewood where she made absolutely no showing below by opposing affidavit or otherwise that Gracewood knowingly served Abbey after it knew that he was a person known to be habitually addicted to alcohol. Both are requirements for F.S. 768.125 to apply before this Court can address the contention of whether the statute was intended to apply to a social host.

The sole evidence in the record is from Donald Louis, Abbey's friend and co-worker for three years, who testified that Abbey was **not** habitually addicted to the use of alcohol (R-44,45;A-9,10). Moreover, the affidavit of Gracewood's plant manager established that he never observed Abbey's consumption of alcohol before the company party or during it, nor was he ever advised that Abbey was habitually addicted to alcohol (R-42,43;A-7-8). Thus, this Court need not reach the issue of whether F.S. 768.125 applies to a social host where it was shown that Abbey was not a habitual drunk and that Gracewood did

not know that he was a habitual drunk at the time it served him alcohol.

The second basis for answering the certified question in the negative is that F.S. 768.125 creates no cause of action against a social host for the serving of alcohol to an adult. The conclusion requires an understanding of the development of the law of liquor liability in Florida both at common law and by statute.

At common law, neither vendors' of alcoholic beverages nor social hosts who served alcohol to their guests,[3] whether minor or adult, were liable for injuries either to the person served or to another injured by the person served. The premise for non-liability was that the proximate cause of injury was the voluntary act of imbibing the liquor, not the serving of it.

After ratification of the twenty-first Amendment to the U.S. Constitution, Florida's first legislative response to the common law doctrine was the enactment of F.S. 562.11 in 1935 and F.S. 562.50 in 1945. These statutes made it a crime to serve or sell alcoholic beverages to a minor or habitual drunkard, respectively. The purpose of these statutes was to protect classes of people who were uniquely unable to protect themselves, the former due to immaturity[4] and the latter due

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2. Lonestar Florida, Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982).

3. United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978).

4. Davis vs. Shiappacossee, 155 So.2d 365 (Fla. 1963).

to the disease of alcoholism.[5] Neither statute prohibited the furnishing of liquor to an adult not shown to be habitually addicted to alcohol.[6]

Significantly, even though both statutes were broadly written to prohibit the serving or giving of alcohol, they were uniformly interpreted to create vendor liability only, **not** liability of a social host.[7] The reason for restricting the operation of the criminal statutes to a vendor was recognition by the judiciary that should the common law rule be abrogated as to social hosts, such a change should be accomplished by the legislature, not the courts.[8]

In 1980, the legislature spoke again through the enactment of F.S. 768.125. This statute reiterated the common law rule of non-liability of one who sells or furnishes liquor unless the liquor was furnished to a minor or to a person habitually addicted to alcohol. Though the statute began "An act relating to the Beverage Law; creating s. 562.51, Florida Statutes...",[9] it was subsequently codified in the negligence chapter by the Joint Legislative Management Committee. Despite the fact that the statutory language was broadly written and did

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5. Lonestar Florida, Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982); Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1987). rev.den., 511 So.2d 298 (Fla. 1987).

6. Lonestar Florida, Inc. v. Cooper, id.

7. United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978).

8. Butler, id.

9. Ch. 80-37, Laws of Florida (1980).

not expressly restrict the statute's operation to vendors, this Court held that the enacting title provided clear evidence of the legislature's intent to restrict its operation to the vendor context in Migliore v. Crown Liquors of Broward, Inc..[10] F.S. 768.125 was interpreted there to be a limitation on the liability of vendors which had been judically expanded before its enactment to include civil liability for injuries to minors and to third parties which resulted from illegal sales to minors.[11] Like the criminal statutes before it, F.S. 768.125 has been held to impose liability on vendors of intoxicants who furnish them either to minors[12] or to habitual drunks,[13] but no court has extended it to a social host context.

In Bankston v. Brennan,[14] this Court relied on its 1984 decisions of Migliore, Armstrong, and Forlaw in rejecting the contention that F.S. 768.125 creates a cause of action against a social host. Chief Justice Ehrlich, writing for the majority, specifically rejected the arguments made here by Plaintiff and amicus curiae that the plain language of the statute (or its

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10. 448 So.2d 978 (Fla. 1984).

11. Migliore, id. See also Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984); Forlaw v. Fitzer, 456 So.2d 432 (Fla. 1984) for the same holding.

12. Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984).

13. Flanigan's Enterprises, Inc. v. Can ley, 83 So.2d 895 (Fla. 4th DCA 1986).

14. 507 So.2d 1385 (Fla. 1987).

comparison to the language of F.S. 562.11 and F.S. 562.50)[15] could be broadly read to include social hosts. This position was adopted by Justice Adkins in the dissent but was rejected by the majority. It did *so* because of the indicia of legislative intent provided by the enacting title of F.S. 768.125. This most telling fact is ignored by Plaintiff and amicus curiae here.

This Court also noted in Bankston that the legislature is presumed to be aware of the opinions which restrict F.S. 768.125 to vendor liability. Such Supreme Court precedent had been rendered first in 1984 followed by the Bankston decision in 1987 which specifically held that the statute did **not** extend to social host liability. Since Bankston, it is significant to note that the legislature has not seen fit to overrule that opinion or the prior Supreme Court precedent. Instead, effective July 1, 1988, the legislature has only seen fit to prohibit adults from allowing an open house party at a residence if any alcoholic beverages or drugs are possessed or consumed

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15. A comparison of the language of F.S. 768.125 and 562.50 as they deal with habitual drunks provides no support for Plaintiff's position because the statutes are significantly similar. The criminal statute requires knowledge by the server that the alcoholic is "habitually addicted" which knowledge is obtained by written notice of this condition by the alcoholic's family. The civil statute imposes liability on the server only when the person served is habitually addicted. Neither statute contemplates liability for a one time sale or the singular furnishing of liquor to an intoxicated adult if the adult is not known by the server to be habitually addicted to alcohol.

there by any minor.[16] Though the legislature could have chosen to create social host liability for service of alcohol to an adult **or** minor, its most recent enactment does nothing of the kind, thus leaving Bankston intact.

This statute is recent evidence, however, of the legislature's continued active participation in the field of liability arising from the service of alcohol. Such legislative action was the justification accepted by this Court in Bankston in deciding to leave to the legislature the task of creating any new cause of action against a social host (***507*** So.2d at page 1387).

In Bankston, this Court refused to fashion a cause of action against a social host under F.S. 768.125 or under the common law by judicial fiat. It adhered to the view that the legislature is the best equipped of the three governmental branches to receive public input and to resolve the intricate and myriad public policy questions presented by this issue of great magnitude. The vast majority of other state courts have determined that the imposition of social host liability is such a radical departure from previous law, with such extraordinary effects on the average citizen, that the issue is best left to a legislative determination. A list of these decisions from fourteen states is included in the appendix. In other states, the judiciary has deferred to the legislature even on the

16. Ch. 88-196, Laws of Florida (1988).

question of recognizing vendor liability. Other states have simply adhered to the common law in rejecting social host liability in its entirety.[17]

The reasons supporting judicial deference to legislative action is best articulated by the Supreme Court of Washington in Burkhart v. Harrod,[18] in which it concurred with Bankston as follows:

> "The nature of the judicial role prevents us from capably deciding the relative merits of social host liability. Evaluating the overall merits of social host liability, with its wide sweeping implications, requires a balancing of the costs and benefits for society as a whole, not just the parties of any one case. Yet because judicial decision-making is limited to resolving only the issues before the court in any given case, judges are limited in their abilities to obtain the input necessary to make informed decisions on issues of broad societal impact like social host liability. In this regard, we fully concur in the statement [from Bankston] that 'of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus.' It is for this very reason that public policy usually is declared by the Legislature, and not by the courts.
>
> The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests. It can balance the relative importance of compensating the victims of drunk drivers with the burdens that liability would place on social hosts. Time can be taken to investigate a whole range of issues that are not before the court in any given case, such as the amount of

17. These cases are also set forth in the appendix.

18. 110 Wash.2d. 381, 755 P.2d 759 (1988).

> damage caused by drunk drivers, the percentage of that damage for which a social host was at some point involved, the extent to which automobile insurance of all types already provides a remedy to victims, the effect that the added liability would have on homeowners' and renters' insurance rates, the possibilities of alternative remedies such as having drunk drivers contribute to a statewide fund for victims, the possibilities of limiting the host's liability, and proscribing standards of conduct for social hosts. If substantial financial liability is to be attached to the hosting of a social gathering, heretofore considered an innocuous act, it should only be done after careful consideration of all the effects on society and it should be imposed as a comprehensive measure. The Legislature can do this, we cannot." (at page **761** of the opinion; citations omitted)

The only case cited by amicus curiae to entice this Court to judicially create social host liability is Kelly v. Gwinnell.[19] That case should not be followed for a number of reasons. First, it was specifically considered but rejected by this Court in Bankston (see footnote at **507** So.2d **1387** and concurring opinion of Justice Barkett at page **1388).** Secondly, not only did the majority opinion in Kelly acknowledge that its adoption of social host liability was unprecedented anywhere else in the country **(476** A.2d at **1225),**[20] but its effect was short-lived at best. Three years later, the New Jersey

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19. 96 N.J. **538, 476** A.2d **1219 (1984).**

20. Before Kelly was decided, one court had previously determined that **no** jurisdiction had recognized social host liability for serving alcohol to an intoxicated adult, absent a statutory expression by the legislature allowing same. Cartwright V. Hyatt Corp., **460** F.Supp. **80,82** (D. D.Col. **1978).**

legislature overruled Kelly by enacting a law which insulated social hosts from liability to adult guests.[21]

Judicial precedent in New Jersey differed from Florida because the courts there had already recognized social host liability where a minor was served. Moreover, the New Jersey legislature had taken no action indicating its disagreement with existing caselaw on that subject. In contrast, the Florida judiciary has declined to recognize such a cause of action and legislative precedent restricts civil liability to vendors. Additionally, the majority in Kelly conceded that had the New Jersey legislature acted to restrict liability to vendors (as Florida did by enacting Ch. 80-37 within the context of the Beverage Law), it would interpret such an action as the legislature's intent **not** to impose social host liability (476 A.2d at 1226,1227).

Lastly, in the unlikely event that this Court were to consider adopting the rule of law espoused in Kelly, it would avail Plaintiff nothing. Kelly imposed social host liability **only** where the social host directly served an adult guest in a one-on-one setting (not a company party with many guests), where the host knew that the guest was visibly intoxicated, and where the host knew that the guest would be operating a motor vehicle. No such proof has been adduced in this case to support any of the required criteria.

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21. Ch. 404, Laws of New Jersey (1987); N.J.S.A.2A:15-5.7. See Finer v. Talbot, 230 N.J. Super. 19, 552 A.2d 626 (App. 1988) in this regard.

Without presenting any convincing reasons to do so, Plaintiff and amicus curiae request that this Court not extend Bankston to a social host who serves liquor to an adult, though nothing in the opinion suggests the holding turns on the minority of the person served. In essence, they ask this Court to recede from all of its previous decisions, not only of Bankston, but also from Migliore, Armstrong, and Forlaw which formed the basis for the Bankston holding. Such a position directly contravenes the legislature's intent in enacting F.S. 768.125 and should not be considered. It is respectfully submitted that if this Court refused to interpret F.S. 768.125 as creating social host liability for unlawfully serving alcohol to a minor, no reason exists to apply the statute to a social host who serves liquor to an adult. Minors have historically been better protected than adults under the law because of their immaturity. Certainly this record provides no impetus to recognize this cause of action as to an adult but not as to a minor.

In summary, where the person served intoxicants is an adult, Florida has uniformly refused to impose liability on the server, either under the common law or by criminal or civil statutes, including F.S. 768.125. Plaintiff's argument that F.S. 768.125 should apply to a social host who serves liquor to a habitual drunk is misplaced where on the facts, Abbey was neither a habitual drunk nor did Gracewood "knowingly" serve alcohol to a habitual drunk. Thus, Plaintiff should not be able to call into play either one of the two statutory exceptions which have been limited by judicial interpretation to a vendor context. Where

neither the requirement of **"knowing"** service nor service to a "habitual drunk" has been established, this Court need not reach the issue of whether F.S. 768.125 applies to a social host who serves alcohol to a habitual drunk. Even if that issue is addressed, the legislative history of the statute and this Court's previous precedent compel rejection of Plaintiff's position here. For all the foregoing reasons, the certified question should be answered in the negative and summary final judgment entered in Gracewood's favor should be affirmed.

CONCLUSION

Where the person served intoxicants is an adult, Florida has uniformly refused to impose liability on the server, either under the common law or by criminal or civil statutes, including F.S. 768.125. Plaintiff's argument that F.S. 768.125 should apply to a social host who serves liquor to a habitual drunk is misplaced where on the facts, Abbey was neither a habitual drunk nor did Gracewood "knowingly" serve alcohol to a habitual drunk. Thus, Plaintiff should not be able to call into play either one of the two statutory exceptions which have been limited by judicial interpretation to a vendor context. Where neither the requirement of **"knowing"** service nor service to a "habitual drunk" has been established, this Court need not reach the issue of whether F.S. 768.125 applies to a social host who serves alcohol to a habitual drunk. Even if that issue is addressed, the legislative history of the statute and this Court's previous precedent compel rejection of Plaintiff's position here. For all the foregoing reasons, the certified question should be answered in the negative and summary final judgment entered in Gracewood's favor should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 5th day of September, 1989, to NOLAN CARTER, Post Office Box 2229, Orlando, Florida, 32802; and LARRY KLEIN, 501 South Flagler Drive, Suite 503, West Palm Beach, Florida, 33401.

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