IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 74,404

LOWER TRIBUNAL NO. 88-1231

KIMBERLY DOWELL,

Petitioner

-vs-

GRACEWOOD FRUIT COMPANY,

Respondent.

FILED
AUG 1989
CLERK, SUPREME COURT
By
Deputy Clerk

PETITIONER INITIAL BRIEF

NOLAN CARTER, ESQUIRE
LAW OFFICE OF NOLAN CARTER, P.A.
Post Office Box 2229
Suite 1245, 200 E. Robinson St.
Orlando, Florida 32802
Telephone: (407) 425-1621
Florida Bar No. 103730

TABLE OF CONTENTS

	Pase
Table of Citations	ii
Statement of the Case	1
Statement of the Facts	2
Issues on Appeal	3
Summary of Argument	4 - 6
Argument	7 - 13
Conclusion	14
Certificate of Service	15

TABLE OF CITATIONS

Pase

INDEX OF CASES

Bankston v. Brennan 507 So.2d 1385 (Fla. 1987)	1, 2, 7, 8, 12
Davis v. Shiappacossee 155 So.2d 365 (Fla. 1963)	7, 8, 10, 11
Pervatt v. McClennan 201 So.2d 780 (Fla. 2d DCA 1967)	7, 8, 10, 11
United Services Automobile Association v. Butler 359 So.2d 498 (Fla 4th DCA 1978)	9, 11

INDEX OF OTHER AUTHORITIES

Florida Statutes Section 562.11	8, 10
Florida Statutes Section 562.50	8, 11
Florida Statutes Section 768.125	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

STATEMENT OF THE CASE

Kimberly Dowell was severely injured when she was struck by an automobile operated by one Bernard Abbey, not a party to this action.

Suit was filed against Mr. Abbey's employer, or former employer, on the theory that Mr. Abbey was a known alcoholic and should not have been served alcoholic beverages at a company picnic or outing sponsored by Defendant.

The trial court ruled that even if he was an employee, the employer was a social host and suit was barred by the holding in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). Judgment was granted and appeal was taken to the Fourth District Court of Appeals.

The Fourth District affirmed but agreed with Appellant that the issue was one of great public importance and certified the question:

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

STATEMENT OF THE FACTS

The facts are set forth in the Complaint and essentially can be summarized by stating that Plaintiff alleged that (1) Bernard Abbey was an agent, servant or employee of Defendant, GRACEWOOD FRUIT COMPANY, and further that he was a known alcoholic. (R 29-30) Plaintiff further alleged that Mr. Abbey was served alcoholic beverages while attending a company sponsored function, became severely intoxicated and subsequently struck the Plaintiff and a companion, causing the Plaintiff serious and grievous injuries. (29-30)

Plaintiff filed suit alleging that the Defendant, as a social host, owed the Plaintiff the duty not to serve alcoholic beverages to a person known to be habitually addicted to the use of alcohol. (R 29-30), citing Florida Statutes Section 768.125.

Plaintiff contends that because of a breach of this duty, this Defendant, social host, is liable to her for damages caused to her by Bernard Abbey, the alleged known alcoholic. (R 29-30)

The issue thus presented to the trial court was whether a social host owes a duty to refrain from serving alcoholic beverages to a person known to be habitually addicted to the use of alcohol. The trial court felt that this case was controlled by this Court's opinion in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987) and granted Defendant's Final Summary Judgment. (R 48)

ISSUE

Whether, Section 768.125, Florida Statutes, creates liability against a social host for serving alcoholic beverages to a known alcoholic.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether a social host should be liable for serving a known alcoholic alcoholic beverages. This Court held a social host is not liable for serving a minor and has but not addressed the issue of whether liability extends to a social host serving an alcoholic.

Florida Statute Section 768.125 covers liablity for vendors and social hosts. This Court felt this to be a limiting statute as it applies to a host's liability for serving a minor but, Petitioner submits, it is a liability creating statute when it speaks to a social host's duty toward serving a known alcoholic alcoholic beverages.

The wording of 768.125 contains additions and deletions not found in the criminal statutes that were used by this Court to expand liability for vendors who served minors. There are no previous decisions of this Court touched on the issue of a social host's liability for serving an alcoholic. Therefore, the passage of 768.125 was intended by the Legislature to create a new cause of action.

It is secondarily important to note that 768.125 was passed only one year after the Fourth District Court Of Appeals ruled

that a social host was not liable for sewing alcohol to a minor. Specifically the Court held that if such a change was to be made it should be done by the Legislature and not the Courts.

Petitioner submits that is exactly what the Legislature did one year later by enacting Section **768.125.**

Analysis clearly shows that the Legislature left out certain key phrases that are included in the criminal statutes, when they enacted **768.125.** By eliminating the phrase **"on** the licensed premises" and "prior written notice" it is clear the Legislature intended to create liability against a social host for serving a known alcoholic. Had it been otherwise, the Legislature could have simply adopted the same language as found in the two criminal statutes already on the books.

Even the wording itself of **768.125** shows a clear intent on the part of the Legislature to create liability against a social host for serving a known alcoholic. Specifically, the only requirement for liability is that the social host "knowingly serves" as opposed to "selling or furnishing" as is required when the duty is discussed as regards serving a minor.

Lastly, the word **"person"** is in the context of serving the alcoholic is not modified by the word **"unlawfully"** as it is when speaking to the exception dealing with serving a minor.

The above analysis shows clearly that the Legislature intended to create liability against a social host by the passage of 768.125 as regards the serving of alcoholic beverages to a known alcoholic.

ARGUMENT

The first question this Court will likely ask when reviewing the above issue is "Didn't we decide this question in Bankston v. Brennan,"? [1] Petitioner submits the answer is no.

The Bankston decision turned solely on the belief by this Court that since the Legislature had acted in an area of prior judicial decisions, expanding vendor liability for serving minors, Section 768.125 was enacted to limit the liability of all persons for serving a minor alcoholic beverages. [2]

How this Court interpreted Section 768.125 as a limiting statute rather than as simply a codification of the common law is unclear to Petitioner. The only apparent change in the statute from the case law is the additional requirement in the statute that the sale be **"willful".** It seems debatable how one could unlawfully sell alchohol without it being done **"willfully".**

---

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

2. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963) and Pervatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967)

In any event, that issue is not squarely before the Court. However, if the addition of wording in a statute is considered to be a limitation on prior judicial decisions, Petitioner submits that the same reasoning is the answer to why Bankston did not resolve the issue now before the Court. Simply put, in enacting Section 768.125, that the Legislature eliminated certain very crucial wording that is contained in the criminal statutes that were used by this Court to expand liability in Davis and Prevatt.[3] Specifically, Section 768.125 eliminates the requirement of "written notice" that is contained in Section 562.50 and it then adds the phrase **"a** person who **...** furnishes **....**" a phrase not found in either Section 562.11 or 562.50.

Additionally, there is no requirement in Section 768.125 that the person who furnishes alcohol to the alcoholic do so **"unlawfully"** as is required in 562.11.

Thus Section 768.125 as it applies to social hosts serving a known alcoholic:

1. eliminates the "written notice" predicate found in Section 562.50.

---

3. Florida Statutes Section 562.11 and Florida Statutes Section 562.50

2. adds as a class of potential defendants: persons who <u>furnish</u> alcohol to an alcoholic, and,

3. does not require that the furnishing be done <u>willfully</u> or <u>unlawfully</u>.

Petitioner submits that these eliminations and additions indicate a clear Legislative intent that Section 768.125 create liability for a social host serving an alcoholic.

Also of significance to Petitioner is the fact that by enacting Section 768.125, the Legislature was enacting law in an area where there were no prior judicial decisions. As of May 24, 1980 (the effective date of Section 768.125), there were no decisions in Florida even remotely touching upon the issue of either vendor or social host liability for serving an known alcoholic. Because of this dearth of common law regarding either a vendor or social host, Petitioner submits the conclusion is clear that the Legislature intended to create liability against both vendors and social hosts for serving known alcoholics.

<u>When</u> Section 768.125 was enacted is as equally important as the fact that there were no judicial decisions in this area at the time of enactment.

Specifically, only one year prior to the passage of Section 768.125, the Fourth District had issued its' opinion in <u>United Services Automobile Association v. Butler</u>, 359 So.2d 498 (Fla.

4th DCA 1978). There they refused the opportunity to extend the reasoning of Davis and Prevatt to a social host serving a minor by ruling that Section 562.11 only applied to vendors. The Court reasoned that by inclusion of the language "... on the licensed premises ..." in Section 562.11 the Legislature intended it to apply only to business establishments.

In affirming the nonliability for social hosts serving alcohol to a minor, the Court said at page 500:

> "as we pointed out earlier, the common law rule precluded liability attaching to a social host for dispensing intoxicants to a minor. If that rule is to be abroaated it should be done by the Leqislature." (Emphasis added).

In Petitioner's view, this is exactly what the Legislature did one year later by enacting Section 768.125. Since the Legislature is presumed aware of the judicial decisions and statutes of this state, Petitioner submits that by eliminating the phrases "on the licensed premises" and "prior written notice" from the wording of Section 768.125, the Legislature fully intended to extend liability where none had existed before: to-wit, to social hosts serving a known alcoholic.

By way of summary, Petitioner believes that what the Legislature left out of Section 768.125 is as critical to the proper interpretation of Legislative intent as to what was included therein.

This analysis has shown that Section 768.125 eliminated "on the licensed premises" found to be crucial in Butler; the requirement of "prior written notice", the crux of the criminal responsibility under Section 562.50; and, the predicate of "willfully serving", substituting instead "knowingly" when addressing the issue of serving a known alcoholic.

What was added to the statute was a direct addressing of the liability for selling or furnishing liquor to an alcoholic. It must be assumed that had this, or any lower Court, been faced with the question of vendor liability for serving an alcoholic, Davis and Prevatt would have been extended to create civil liability in the event that a vendor had received "prior written notice". The fact remains that this issue was never raised to any appellate level regarding either a vendor or social host prior to the enactment of Section 768.125.

This, Petitioner submits, clearly shows the Legislature intended to enter the field and create a new cause of action where none existed before. Without the limiting phrases of "on the licensed premises" and "prior written notice" in Section 768.125, it also seems clear the Legislature intended the burden of proving liability to be easier than required under the criminal statute.

For these reasons, Petitioner submits that Bankston should be limited to its facts (or revisited altogether) and this Court should reinstate Plaintiff's Complaint against this Defendant.

The next question Petitioner feels she will face is "Why should we extend liability to a social host for serving an alcoholic but exempt the host when serving a **minor?"**

Again, Petitioner submits the answer is found in the plain wording of Section **768.125** and what was omitted/included therein.

When dealing with serving a minor, the language of Section **768.125** requires the selling or furnishing to be willful and unlawful. The key here is that **"selling"** is included as part of the **"unlawful"** action.

On the other hand, when addressing liability regarding the alcoholic, the only predicate proof required is that the person "knowingly serve". By eliminating the words **"sells** or furnishes" in the exception set forth in Section **768.125,** it logically follows the Legislature intended "knowingly serves" to be a much broader term than just "selling or furnishing".

In addition, it is evident that "knowingly serves" is a less stringent duty requirement applied to serving an alcoholic as opposed to the more stringent requirement of **"willfully** and unlawfully selling or furnishing" when setting forth the duty for serving a minor.

Lastly, the wording of Section **768.125** differs when discussing the alchoholic versus the minor. **"Person"** in the context of serving the alcoholic is not modified by the word **"unlawfully"** as it is in the exception dealing with serving a minor.

Thus, Petitioner submits this Court should interpret Section **768.125** as creating liability for a social host for serving a known alcoholic and should therefor reinstate Plaintiff's Complaint.

CONCLUSION

Petitioner submits Section 768.125 was intended by the Legislature to create liability against a social host **who** knowingly serves alcohol to one habitually addicted to alcohol. Therefore, this Court should order reinstatement of Plaintiff's Complaint in this action.

NOLAN CARTER, ESQUIRE
Law Office of Nolan Carter, P.A.
Post Office Box 2229
Suite 1245, 200 E. Robinson St.
Orlando, Florida 32802
Telephone: (407) 425-1621
Florida Bar No. 103730
ATTORNEY FOR PETITIONER

CERTIFICATE)F SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petitioner's Brief have been mailed on this 16th day of August, 1989 by First Class U.S. Mail to Janet LeLaura Harrison, Esq., Post Office Box 695, Rockledge, Florida 32955 and Larry Klein, Esq., of 501 South Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 33401.

NOLAN CARTER, ESQUIRE
Attorney for Petitioner