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IN THE SUPREME COURT OF FLORIDA

MARY EVELYN ELLIS, individually and as guardian of Gilbert D. Ellis, incompetent,

Petitioner,

v.

CASE NO. 76,267

N.G.N. OF TAMPA, INC., and NORBERT G. NISSEN,

Respondents.

Discretionary Proceedings to Review a Decision of the District Court of Appeal, Second District

INITIAL BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS' ASSOCIATION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
THE EXCEPTION CONTAINED IN SECTION 768.125 TO THE ABSOLUTE BAR ON LIABILITY FOR THE SALE OF ALCOHOLIC BEVERAGES WHICH APPLIES TO A PERSON WHO "KNOWINGLY SERVES A PERSON HABITUALLY ADDICTED TO THE USE OF ANY OR ALL ALCOHOLIC BEVERAGES" MUST BE STRICTLY CONSTRUED AND REQUIRES THAT, BEFORE A VENDOR MAY BE SUBJECTED TO CIVIL LIABILITY FOR A PATRON'S SELF-INFLICTED INJURIES OR INJURIES TO ANOTHER BECAUSE OF THE PATRON'S DRUNKEN CONDITION, THE VENDOR MUST HAVE HAD WRITTEN NOTIFICATION THAT THE PERSON SERVED ALCOHOLIC BEVERAGES IS A PERSON HABITUALLY ADDICTED.	
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF CITATIONS

Cases

Bankston v. Brennan, 507 So.2d 1385
(Fla. 1987) 5, 7, 9, 12

Checker Cab Operators v. Castleberry,
68 So.2d 353 (Fla. 1953) 14

Clyde Bar, Inc. v. McClamma,
10 So.2d 916 (Fla. 1942) 14

Davis v. Shiappacossee, 155 So.2d 365
(Fla. 1963) 5

Dowell v. Gracewood Fruit Co.,
559 So.2d 217 (Fla. 1990) 5, 8, 12

Ellis v. N.G.N. of Tampa, Inc.,
561 So.2d 1209 (Fla.2d DCA 1990) 1, 10, 11

Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District,
274 So.2d 522 (Fla. 1973) 6

Goodell v. Nemeth, 501 So.2d 36
(Fla. 2d DCA 1986) 14, 15

Lonestar Florida, Inc. v. Cooper,
408 So.2d 758 (Fla.4th DCA 1982) 5

Magaw v. State, 537 So.2d 564, 566-67 (Fla. 1989) 10

Migliore v. Crown Liquors of Broward, Inc.,
448 So.2d 978 (Fla.1984) 5, 7, 8

Pritchard v. Jax Liquors, Inc., 499 So.2d 926
(Fla. 1st DCA 1986), *cert. denied*,
511 So.2d 298 (Fla. 1987) 4, 12

Reed v. Black Caesar's Forge Gourmet Restaurant Inc., 165 So.2d 787
(Fla. 3d DCA 1964) 14, 15

Sabo v. Shamrock Communications, Inc.,
566 So.2d 267 (Fla. 5th DCA 1990) 1, 3, 5, 7, 9, 12

State ex rel McClure v. Sullivan,
43 So.2d 438 (Fla. 1949) 10

Florida Statutes

Section 562.11 . . . . 5, 7, 9, 12

Section 562.50 . . . . 2, 3, 4, 5, 6, 7, 9, 10, 11, 12

Section 562.51 . . . . 8, 10, 11, 14

Section 768.125 . . . . 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14

Laws of Florida

Chapter 80-37, Laws of Florida 2, 6, 8

Chapter 16774, section 11, Laws of Florida (1935) 5

Chapter 22633, Laws of Florida (1945) 5

PREFACE

Having been permitted Amicus Curiae status in this case by Order of this Court, the Florida Defense Lawyers' Association files this brief in support of the position asserted by Respondents, N.G.N. of Tampa, Inc. and Robert G. Nissen, that the complaint against them as vendors of alcoholic beverages was properly dismissed by the Trial Court and that the district court correctly affirmed the dismissal of the Complaint for the reason recited by Respondents in their motion to dismiss but not given by the Trial Court, as well as for the reason recited by the Trial Court.

In this brief, Mary Evelyn Ellis, Plaintiff/Appellant below, will be referred to as Petitioner. N.G.N. of Tampa, Inc. and Robert G. Nissen will be referred to as Respondents. The record on review will be referred to as (R.p.#).

STATEMENT OF THE CASE AND FACTS

This Court accepted jurisdiction on the basis of conflict between the present decision of the District Court of Appeal, Second District, and the decision of the Fifth District in *Sabo v. Shamrock Communications, Inc.*, 566 So.2d 267 (Fla. 5th DCA 1990), on the issue of whether the commercial provider of liquor must have written notice of the drunkard's addiction before the vendors may be subjected to civil liability for the patron's self-inflicted injuries or injuries to others because of the patron' drunken condition. In the present case the additional issue exists of whether there is a cause of action against the vendor of intoxicants under section 768.125 for injuries received by an intoxicated adult of drinking age as the result of a one car accident. This case involves the interpretation and application of section 768.125, Florida Statutes with regard to the liability *vel non* of the seller of alcoholic beverages for injuries sustained by an intoxicated person of lawful drinking age to whom the alcoholic beverages were sold.

Amicus Curiae, the Florida Defense Lawyers Association, relies upon the Statement of the Case and Facts recited in the Answer Brief on the merits of Respondents, N.G.N. of Tampa, Inc and Norbert G. Nissen.

The relevant facts are summarily and cogently stated in the decision of the District Court of Appeal, Second District, in *Ellis v. N.G.N. of Tampa, Inc.*, 561 So.2d 1209 (Fla.2d DCA 1990), review of which is presently sought to this Court by the nonprevailing plaintiff in a liquor vendor liability suit. Succinctly stated, the facts as gleaned from Petitioner's complaint are that Gilbert Ellis, after consuming twenty alcoholic drinks served him by Respondents, and while in an intoxicated state, drove his automobile in such a manner as

to cause it to overturn and crash. The crash resulted in his sustaining severe permanent brain damage, his being declared an incompetent, and the appointment of Petitioner as his legal guardian. (R.16-24). Petitioner sued for compensatory and punitive damages and alleged that Respondents served Mr. Ellis knowing that he was a person addicted to the use of any or all alcoholic beverages. (R.1-7,16-23). Upon motion of Respondents, the cause was dismissed on the basis that there is no cause of action against the vendor of intoxicants under section 768.125 for injuries received by an intoxicated adult driver as the result of a one car accident. Respondents had moved to dismiss on the additional basis that the complaint did not allege that the bar had received *written notice* from the habitual drunkard's family required as a predicate to liability by section 562.50, Florida Statutes (1987). (R.8,25,45). The District Court affirmed the Trial Court's dismissal of Petitioner's complaint for failure to state a cause of action for the reason that the Complaint did not allege, nor under the facts of the case could it be alleged, that the Respondents had written notice from Ellis' family of Ellis' addiction.

SUMMARY OF ARGUMENT

The Second District in the present case properly construed the language of the statutes, correctly applied the provisions of section 768.125 (originally enacted as part of the beverage law, i.e., section 562.51, Chapter 80-37, Laws of Florida) to the present case, and thus correctly affirmed the Trial Court's dismissal of the Complaint against Respondents on the basis that section 768.125 read in conjunction with section 562.50 requires that a commercial provider of liquor to a habitual drunkard must have written notice of the

drunkard's addiction before the vendor may be subjected to civil liability for the patron's self-inflicted injuries or injuries to others because of the patron's drunken condition.

This Court should approve the present decision of the Second District court and adopt its well-reasoned opinion. The present decision correctly holds that section 768.125 must be read in conjunction with section 562.50 to determine what pleading and proof is required to establish liability on the part of a seller of alcoholic beverages to a person of lawful drinking age. This Court should quash the decision of the Fifth District in *Sabo v. Shamrock Communications, Inc.*, 566 So.2d 267 (Fla. 5th DCA 1990), as being inconsistent with this Court's prior precedent and as being a misapprehension of the controlling statutes, this Court's precedent, and legislative intent.

Moreover, even were this Court were to find that there need not be written notice in accordance with the specific notice requirements of section 562.50, this Court should hold that the district court correctly affirmed the Trial Court's dismissal of Petitioner's Complaint with prejudice because Florida law does not allow a Plaintiff of lawful drinking age to recover damages resulting from his own act of becoming intoxicated and because section 768.125 does not provide a first party cause of action for the Plaintiff in this case.

ARGUMENT

THE EXCEPTION IN SECTION 768.125 TO THE ABSOLUTE BAR ON LIABILITY FOR THE SALE OF ALCOHOLIC BEVERAGES WHICH APPLIES TO A PERSON WHO "KNOWINGLY SERVES A PERSON HABITUALLY ADDICTED TO THE USE OF ANY OR ALL ALCOHOLIC BEVERAGES" MUST BE STRICTLY CONSTRUED AND REQUIRES THAT, BEFORE A VENDOR MAY BE SUBJECTED TO CIVIL LIABILITY FOR A PATRON'S SELF-INFLICTED INJURIES OR INJURIES TO ANOTHER BECAUSE OF THE PATRON'S DRUNKEN CONDITION, THE VENDOR MUST HAVE HAD WRITTEN NOTIFICATION THAT THE PERSON SERVED ALCOHOLIC BEVERAGES IS A PERSON HABITUALLY ADDICTED.

The District Court of Appeal, Second District, correctly affirmed the Trial Court's dismissal of Petitioner's Complaint with prejudice on the basis that commercial providers of liquor to a habitual drunkard must have written notice of the drunkard's addiction before the vendors may be subjected to civil liability for the patron's self-inflicted injuries or injuries to others because of the patron's drunken condition. Petitioner in arguing otherwise misapprehends the statutory intent and the decisional authority construing the relevant statutes at issue in this case. For the reasons stated below, *Pritchard v. Jax Liquors, Inc.*, 499 So.2d 926 (Fla. 1st DCA 1986), cited as authority by Petitioner, is not controlling and in fact has been superseded by subsequent decisions of the Florida Supreme Court.

In the present case, the District Court correctly rejected Petitioner's argument that there was a difference in focus of section 768.125 and section 562.50 and for that reason they should not be read *in pari materia* and instead determined that they were clearly *in pari materia* and thus must be construed together. The Second District also correctly rejected Petitioner's contention that section 768.125 creates a separate independent cause of action.

Consistent with the Second District's decision, this Court has expressly held that section 768.125 does not create a separate cause of action. *Dowell v. Gracewood Fruit Co.*, 559 So.2d 217 (Fla. 1990); *Bankston v. Brennan*, 507 So.2d 1385 (Fla.1987); *Migliore v. Crown Liquors of Broward, Inc.*, 448 So.2d 978 (Fla.1984). Further, *Sabo v. Shamrock Communications, Inc.*, 566 So. 2d 267 (Fla. 5th DCA 1990), with which the present case appears to be in conflict, was wrongly decided by the Fifth District Court of Appeal as will be further explained herein.

There was no cause of action at common law against the dispenser of alcohol for injuries caused to another by the intoxicated recipient, and Florida had not enacted a Dram Shop Act to create one. *Davis v. Shiappacossee*, 155 So.2d 365 (Fla. 1963); *Lonestar Florida, Inc. v. Cooper*, 408 So.2d 758 (Fla.4th DCA 1982). Furthermore, Florida law has never permitted a plaintiff of lawful drinking age to recover for damages resulting from his own act of becoming intoxicated.

The Florida Legislature, within two years after ratification of the Twenty-first Amendment repealing prohibition, enacted chapter 16774, section 11, Laws of Florida (1935) (now section 562.11), making it a crime to sell intoxicants to persons not of lawful drinking age. In 1945, the legislature enacted chapter 22633, Laws of Florida (1945) (now section 562.50), making it a crime to dispense alcoholic beverages to a person habitually addicted to the use of any or all intoxicating liquors, after having been given *written notice* by wife, husband, father, mother, sister, brother, child, or nearest relative that said person so addicted is an habitual drunkard.

Section 562.50 provides:

> **Habitual drunkards; furnishing intoxicants to, after notice.** —Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to any person habitually addicted to the use of any or all such intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child or nearest relative that said person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 768.125 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.

Section 768.125 was enacted in its present form by the legislature as section 562.51 by Chapter 80-37, Laws of Florida, and was thus intended by the legislature to directly follow section 562.50 in the Florida Statutes, both of which sections were in the chapter entitled "Beverage Law: Enforcement." It is axiomatic that statutes *in pari materia* must be construed in conjunction with each other. *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District*, 274 So.2d 522 (Fla. 1973). The legislative history of section 768.125, correctly related by the Second District in its decision in the present case, makes it clear

that the legislature intended the provisions of section 562.50 and section 768.125 to be read in conjunction with each other.

This Court in *Migliore v. Crown Liquors of Broward, Inc.*, 448 So.2d 978 (Fla. 1984), held that creation of any new cause of action, which did not exist at common law, occurred with the enactment of sections 562.ll and 562.50. That case involved the illegal sale of liquor to a minor and the ensuing damages sustained by a third party injured by the intoxicated minor. This Court read section 562.11 and 562.50 *in pari materia* with section 768.125 *ne* 562.51 and expressly held, contrary to Petitioner's present assertion, that section 768.l25 does not create a cause of action for third persons against dispensers of alcoholic beverages for injuries caused by an intoxicated person. Rather, this Court concluded, section 768.125 limits the broadened liability created by sections 562.ll and 562.50. Id. at 980.

This Court in *Migliore* pointed to the very enacting title of the act to demonstrate the legislature's clear intent not to create a broader liability than already existed but to limit the existing liability of liquor vendors. This Court expressly stated:

> 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. 562.51 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 . . . ."

Furthermore, the recent decisions of this Court support the Second District's interpretation of the subject statute and contradict the Fifth District's decision in *Sabo*. This Court in *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987), held that by the enactment of

section 768.125, the legislature did not intend to create a new and distinct cause of action because this statute was intended to be a limitation of liability device. In that case this Court was asked to address the certified question of whether section 768.125 creates 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. This question turned solely on the meaning which must be given to section 768.125. To determine this meaning, this Court looked among other things to the history of this legislation and prior court precedent, the knowledge of which the legislature is charged. The Court explained that as was specified in the enacting title of this legislation, Chapter 80-37, Laws of Florida (1980), the legislature clearly intended section 562.51 (codified by the Joint Legislative Management Committee as section 768.125) to be included within Chapter 562 ("Beverage Law: Enforcement"), and that without any legislative direction, 80-37 was codified by the Joint Legislative Management Committee as section 768.125 in the chapter entitled "Negligence." This Court reiterated its holding in *Migliore* that section 768.125 represents a *limitation* on a vendor's liability. It refused to attach any legal significance to the placement of chapter 80-37 in the Negligence chapter, instead of its placement in the chapter on Beverage Law Enforcement as directed by the legislature when it enacted 80-37, because to hold otherwise would effectually allow the Joint Legislative Management Committee to alter the substance of a statute. This they cannot do. *Id.* at 1387.

Again and most recently in *Dowell v. Gracewood Fruit Company*, *supra*, this Court again addressed the limitation of liability nature of section 768.125 in a lawsuit brought against the server of alcoholic beverages by a person injured when struck by an automobile

whose driver was allegedly intoxicated. The plaintiff alleged that the driver was a known alcoholic who should not have been served alcoholic beverages. In that case the question certified was whether, under the law of Florida, a social host may be liable for serving alcohol to a known alcoholic. Summary judgment had been entered against the plaintiff on the authority of *Bankston*, and the Fourth District had affirmed the summary judgment. This Court approved the decision of the district court and the trial court in favor of the defendant. This Court reiterated and reaffirmed its earlier decisions that section 768.125 constitutes a *limitation* on the liability of vendors and does not create a cause of action.

Section 768.125 must be strictly construed in conjunction with section 562.50. Section 768.125 does not speak in terms of "known" or "should have known" which would allow for constructive notice. Contrary to the holding of the Fifth District in *Sabo*, the subject enactment, the context in which it was enacted, and its express language reveal that the legislature clearly intended that for there to be liability on the part of the seller of alcoholic beverages to a person of lawful drinking age, the plaintiff in a suit against that seller must allege and prove written notification to the vendor of alcoholic beverages that the person to whom it sold alcoholic beverages was habitually addicted to alcohol.

Because this Court has explicitly held that section 768.125 limited rather than broadened liability, this Court must look to the existing law relating to liability to determine how actual knowledge is to be proven. Relying upon and reciting the rationale of the recent decisions of this Court, the second district in present case correctly opined,

> As the evolution of the law of liquor vendor liability presently stands in Florida, the liability and causes of action founded on sections 562.ll and 562.50 (initially only criminal liability

> expanded by case law also to mean civil liability) is constricted by section 768.125.

Ellis, 561 So.2d at 1213.

This Court has recently reiterated that legislative intent can be illuminated by consideration of comments made by proponents of a bill of amendment. *Magaw v. State*, 537 So.2d 564, 566-67 (Fla. 1989). In addition to relying on this Court's prior controlling decisions, the Second District properly buttresses its holding with regard to the imposition of written notice requirements contained in section 562.50 into section 768.125 with an accurate recitation of the legislative history, including comments made by proponents of section 768.125 illuminating the legislature's intent to continue the written notice prerequisite to liability of a vendor. Contrary to Petitioner's assertion as to what the legislative history including debate demonstrates, the Second District properly determined that House members' discussion alluded to by Petitioner shows exactly the opposite intent than that espoused by Petitioner. *Ellis*, 561 So.2d at 1213-14. The legislative intent is clear that the conviction requirement was being eliminated as a predicate to civil liability, not that the written notice requirement was being eliminated.

Overlooked by the Academy of Trial Lawyers in its amicus curiae brief when it recites that courts cannot add words to a statute is the fundamental axiom of statutory construction that statutes *in pari materia*, as are sections 768.125, *ne* 562.51, must be construed in conjunction with each other to establish the meaning of the laws. *State ex rel McClure v. Sullivan*, 43 So.2d 438 (Fla. 1949). The Second District did not overlook this maxim and it properly concluded:

> Regarding notice as a prerequisite to civil liability, the legislature retained in section 562.51 (i.e., 768.125) the other integral component of section 562.50 (besides the conviction) by requiring that the server of liquor must *knowingly* serve the habitual drunkard. The legislature was, of course, cognizant of the manner necessary to impart the requisite knowledge in order to impose liability under section 562.50, ie.e., written notice. In 1980, it merely added the next following provision, section 768.125 (ne 562.51), as a limitation to the existing liability which already had a written notice prerequisite. Since these sections directly followed one another in the same chapter, and related to the same subject, we read them together to conclude that the legislature intended that the vendor's "knowledge" be obtained in the same manner in both sections, to wit, written notice.

Ellis, 561 So. 2d at 1215.

This Court should adopt the following holding of the Second District which is supported by controlling decisions of this Court and legislative history illuminating the legislature's intent in enacting section 768.125:

> Since section 768.125 is a *limiting* provision and does not create any cause of action, it could not broaden, or make easier, the way in which the existing liability under section 562.50 would attach. It would, indeed be anomalous for us to allow, after and in spite of the legislatively mandated limitation upon liability, such a loophole through which plaintiffs could sue to impose liability upon a vendor without written notice where such suit could not proceed before the 1980 limitation was in place.
>
> In sum, we hold that the commercial providers of liquor to a habitual drunkard must have written notice of the drunkard's addiction before the vendors may be subjected to civil liability for the patron's self-inflicted injuries or injuries to others because of the patron's drunken condition.

Ellis, 561 So. 2d at 1215.

The First District's contrary holding in *Pritchard v. Jax Liquors, Inc.*, 499 So.2d 926 (Fla. lst DCA 1986), *cert. denied*, 511 So.2d 298 (Fla. 1987), relied upon by Petitioner, should be disapproved. The Court in this latter decision overlooked and in fact did not discuss the controlling decisions of this Court with regard to the limiting nature of section 768.125 and the already-existing civil actions created by sections 562.11 and 562.50. Moreover, the First District did not have the advantage of this Court's controlling decisions in *Bankston v. Brennan*, 507 So.2d 1385 (Fla. 1987), and *Dowell v. Gracewood Fruit Company*, 559 So.2d 217 (Fla. 1990), when it decided *Pritchard*. These subsequent decisions would have compelled the First District to reach a different decision in *Pritchard* and, in fact compel the result reached by the Second District in the present case. *See Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

This Court should quash the decision of the Fifth District in *Sabo v. Shamrock Communications, Inc.* wherein the Fifth District has effectively created a cause of action not contemplated by the legislature in its enactment of section 768.125, which statutory provision was intended by the legislature to be a limitation of liability device. In that case, Ms. Sabo alleged that Daniel Hoag, a person of lawful drinking age, had been served alcoholic beverages at defendant restaurant and that she had sustained injuries in an automobile accident caused by Daniel Hoag who was intoxicated at the time of the accident. She alleged entitlement to damages against the defendant restaurant pursuant to section 768.125. The trial court correctly entered summary judgment for defendants on the basis that there can be no liability on their part for the sale of alcoholic beverages to an intoxicated client in the absence of actual knowledge by defendant that the purchaser was habitually addicted

to alcohol. Ms. Sabo offered no proof that Peoples Restaurant or its employees had actual knowledge of Hoag's habitual addiction to alcohol as required by the statute as a predicate to liability. On appeal, the district court reversed the summary judgment and held that the record created material issues of fact as to whether defendants knowingly served Hoag sufficient alcoholic drinks to render him intoxicated with the knowledge that Hoag was habitually addicted to the use of alcoholic beverages as is required by section 768.125. The Fifth District court framed the issue as whether the knowledge required by section 768.125 to establish liability on the part of a bar establishment can be proven by circumstantial evidence and whether the record in that case established a jury question whether Hoag was habitually addicted to alcohol at the time of the accident. The Fifth District held that this statute imposed no requirement that a plaintiff such as Sabo allege and prove by direct evidence that the bar employee(s) knew that person of lawful drinking age was habitually addicted to alcohol when he or she was served. The court then reviewed the circumstantial evidence presented and concluded that there was sufficient circumstantial evidence upon which a jury could find that the employees of Peoples knew of Hoag's addiction to alcohol.

The Fifth District failed to recognize the distinction made by the legislature itself with regard to liability which may arise from serving alcoholic beverages to persons not of lawful drinking age and from serving persons of lawful drinking age. The Fifth District erroneously determined that the different language used by the legislature with regard to persons of an unlawful drinking age and with regard to persons of a lawful drinking age was a distinction without a difference.

When the legislature drafted this statute and expressly used different standards of "willfully and unlawfully sells or furnishes" with regard to persons not of lawful drinking age and "knowingly serves a person habitually addicted," it clearly appears from the face of the statute that it intended a different, more stringent standard when it used the phrase "knowingly serves a person habitually addicted" as a predicate for establishing liability of a seller of alcoholic beverages for injuries or damages caused by or resulting from the intoxication of such a person. Consistent with the prior decisions of this Court and the clear legislative intent, this Court should not construe section 768.125 in such a manner as to create a greater liability than existed prior to this statute's enactment.

The Fifth District premised its decision on an erroneous interpretation of section 768.125 which effectually and improperly broadened the scope of the exception to the bar to liability contained in section 768.125, *ne* section 562.51 (see chapter 80-37), and the district court thereby created a new and more expansive standard of liability than contemplated by the legislature when it enacted this law.

Even were written notice not required, Petitioner's Complaint was properly dismissed by the Trial Court because Florida law does not permit a plaintiff to recover from his own act of becoming intoxicated. *See, e.g.*, *Goodell v. Nemeth*, 501 So.2d 36 (Fla. 2d DCA 1986); *Reed v. Black Caesar's Forge Gourmet Restaurant Inc.*, 165 So.2d 787 (Fla. 3d DCA 1964); *Checker Cab Operators v. Castleberry*, 68 So.2d 353 (Fla. 1953); *Clyde Bar, Inc. v. McClamma*, 10 So.2d 916 (Fla. 1942).

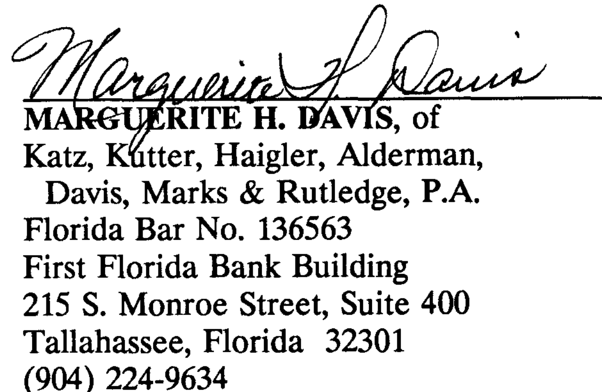
The Second District Court of Appeal held that no cause of action was stated by plaintiff who, while voluntarily intoxicated in defendant's home, was alleged to have shot himself with defendant handgun. *Goodell v. Nemeth*, 501 So.2d 36 (Fla. 2d DCA 1986).

> We can conclude as a matter of law the injury was shown to be the proximate result of the plaintiff's own negligence and that the plaintiff cannot shield himself from his own negligence by his voluntary intoxication. See *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*, 165 So. 2d 787, 788 (Fla. 3d DCA 1964), cert. denied, 172 So.2d 597 (Fla. 1965) ("The death of the plaintiff's husband was the result of his own negligence or his voluntary act of rendering himself incapable of driving a car rather than the remote act the defendant did in dispensing the liquor, or delivering the ignition keys in possession of the automobile.")

Therefore, this Court should approve the decision of the Second District Court of Appeal.

CONCLUSION

This Court should approve the decision of the District Court of Appeal, Second District, affirming the Trial Court's dismissal of Petitioner's complaint with prejudice.



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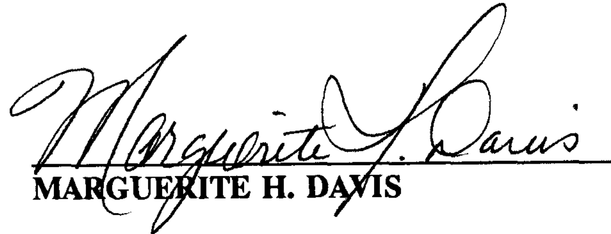
<u>**CERTIFICATE OF SERVICE**</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to STEVAN T. NORTHCUTT, ESQ., Post Office Box 3429, Tampa, Florida 33601-3429; THOMAS S. MARTINO, ESQ., 1729 East 7th Avenue, Tampa, Florida 33605; SCOTT W. DUTTON, ESQ., Santos and Dutton, P.A., Old Hyde Park Office Center, 1509 West Swann Avenue, Suite 210, Tampa, Florida 33606, and NANCY LITTLE HOFFMAN, 4419 West Tradewinds Avenue, Suite 100, Fort Lauderdale, Florida 33308, this 23rd day of January, 1991.



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