O.A. 3-7-91 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,267

MARY EVELYN ELLIS, individually, and as guardian of GILBERT D. ELLIS,

Petitioner,

vs.

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

Respondents.

_____/

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE MOTHERS AGAINST DRUNK DRIVING FLORIDA ON BEHALF OF PETITIONER

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PREFACE

This brief is submitted on behalf of Mothers Against Drunk Driving Florida, appearing as Amicus Curiae supporting the position of the Petitioner, Mary Evelyn Ellis, individually, and as guardian of Gilbert D. Ellis. Reference to the parties will be referred to either by name or as Petitioner and Respondent.

STATEMENT OF THE CASE AND FACTS

Mothers Against Drunk Driving Florida adopts the statement of the case and facts as set forth in the Petitioner's brief and supplemented by the Respondent.

SUMMARY OF ARGUMENT

I. The common law is not static and unresponsive to the changing needs of society. This Court has made it quite clear that the common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. A commercial liquor vendor is under a duty to avoid creating situations which pose an unreasonable risk of harm to others. This duty flows from general principles of negligence law. Under a negligence approach to liability, commercial liquor vendors have a duty to protect the public from unreasonable risk of harm by not serving individuals alcoholic beverages when it is reasonably foreseeable that the alcohol may cause injury to the patron or to others. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). The commercial vendor of liquor is under a duty not to sell liquor where the sale creates a foreseeable risk of harm to the customer or to others. This is a duty owed to society; a duty that emanates from a body of law entirely apart from any statute. Florida courts have previously held that injury caused by an intoxicated minor is a reasonably foreseeable consequence of the vendor's decision to serve one of limited judgement, due to his youth. There can be no logical distinction drawn between the foreseeability of damage from the unreasonable conduct of a commercial vendor serving a person who by virtue of their age is a child and unable to responsibly say no to a drink because of his immaturity and a person who by virtue of his age is an adult and unable to responsibly say no to a drink because of his addiction.

By allowing the common law principles of negligence to apply to the commercial liquor vendors who pour liquor irresponsibly does not conflict with the common law rule of non-liability in serving liquor to the able-bodied, non-addicted adult. Mothers Against Drunk Driving Florida loathes the thought that a commercial vendor of liquor would be immune from accountability for its irresponsible participation in putting an intoxicated youth or alcohol addict behind the wheel of a car traveling through the community. The needs of society decree that it is unjust, unacceptable and has become bad public policy for the commercial vendor to be immune from the pouring of liquor irresponsibly to youths and alcohol addicts. The commercial liquor vendor must be responsible for conducting itself with reasonable care and prudence. Mothers Against Drunk Driving Florida advocates the responsive application of the judge-made common law negligence principles and the utilization of the reasonable person standard to the conduct of commercial liquor purveyors in the serving of alcoholic beverages.

II. The meaning of Section 768.125, Fla.Stats. is clear and unambiguous on its face. Its clairvoyant intention can be unequivocally interpreted from within its four corners. The Fifth District's decision in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990), should be affirmed. The Sabo court correctly held that its plain meaning dictates that circumstantial evidence may establish that the commercial liquor vendor knowingly served a person habitually addicted to the use of any or all alcoholic beverages as required by Section 768.125, Fla.Stats.

The Second District's decision in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 267 (Fla. 2d DCA 1990), contradicts both the plain language of the statute and its purpose. The Legislature's deliberate amendment of the bill eliminated the language requiring written notice. In Ellis, the court erroneously jammed a written notice requirement as a predicate to commercial vendor civil liability under Section 768.125, Fla.Stats., which imposes civil liability upon a liquor vendor who "knowingly serves a person habitually addicted to the use of any or all alcoholic beverages". The Legislature's plan to safeguard the public by holding the commercial liquor vendor liable for serving alcohol to minors and habitual alcohol addicts, promotes the reasonable and responsible serving of alcohol. The language was deliberately chosen by the Legislature to provide an important deterrent to the irresponsible commercial serving of alcohol that results in violent carnage of citizens. This important deterrent would be destroyed if the insurmountable prerequisite of written notice was required. The plain meaning of the language selected by the Legislature deliberately excluded the insurmountable prerequisite of written notice.

Mothers Against Drunk Driving Florida urges this Court to approve the Sabo court's decision holding that circumstantial evidence may establish that the commercial vendor knowingly served a person habitually addicted to the use of any or all alcoholic beverages, without the insurmountable prerequisite of written notice.

ARGUMENT

I. THE SECOND DISTRICT ERRED IN HOLDING THAT IN THE ABSENCE OF A STATUTE PROHIBITING THE SALE OF LIQUOR TO A PERSON HABITUALLY ADDICTED THERETO, A VENDOR CANNOT BE HELD LIABLE FOR INJURIES RESULTING FROM THAT PERSON'S INTOXICATION NOTWITHSTANDING THE COMMON LAW'S LONG STANDING PRINCIPLES OF NEGLIGENCE.

Mothers Against Drunk Driving Florida, as Amicus Curiae, asserts that irrespective of the existence of a statute prohibiting the sale of liquor to a person habitually addicted, there also exists an independent common law duty of reasonable care. The complaint under the common law principles of negligence does state a good cause of action. Therefore, the judgment below must, accordingly, be reversed and the cause reinstated.

The Second District Court affirmed the Respondent's Summary Judgement on the basis that, for the commercial vendor of liquor, there is no common law liability. Moreover, if negligence per se is alleged for a statutory violation under Section 768.125, liability will be imposed only if the commercial vendor received written notice of the patron's addiction to alcohol. Mothers Against Drunk Driving Florida, as Amicus Curiae, believes that the trial court took an unnecessarily narrow view of the facts, and that the common law is indeed up to the task of independently affording Petitioner a cause of action on the allegations alleged in the present case.

Florida, of course, has no Dram Shop Act which specifically affords a statutory cause of action against a liquor vendor for damages resulting from the commercial selling of alcohol. An "Anti-

Dram Shop Act", Section 768.125, Florida Statutes went into effect on May 24, 1980. There the Legislature limited the pre-existing negligence per se civil liability of the commercial liquor vendors predicated on the violation of either of the two criminal statutes, Section 562.11 and 562.50. Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978, 981 (Fla. 1984).

In the absence of any applicable statute, one must look to the common law to determine whether the complaint has a cause of action; Mothers Against Drunk Driving Florida submits that the common law is adequate to supply a cause of action based on long standing principles of negligence, and that there exists a general common law duty requiring liquor vendors to conduct themselves with reasonable care and prudence when dispensing alcohol. This common law duty is independent of the two aforementioned criminal statutes which provide civil liability via negligence per se for their violation.

Typical of numerous cases around the country which have reached the same conclusion, the Supreme Court of Alaska in Nazareno v. Urie, 638 P.2d 671 (Alaska 1981) pointed out that a vendor is under a duty not to sell liquor where the sale creates a risk of harm to the customer or to others. The court noted that this conclusion flows from general principles of negligence law, and that every person is under a duty to avoid creating situations which pose an unreasonable risk of harm to others. The court continued, "In selling liquor to an intoxicated customer, where it is evident that the customer may injure himself or others as a

result of the intoxication, a vendor is not acting as a reasonable person would." Id. at 674. The court quoted from the leading case of Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550, 553 (1964) wherein the Pennsylvania Supreme Court stated:

> The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute.

Similarly, where it is evident to the commercial liquor vendor that the selling of liquor to a patron habitually addicted to the use of any or all alcoholic beverages, and who may injure himself or others as a result of the intoxication, the vendor is not acting as a reasonable person would. This is true because the habitually addicted patron has lost control of his judgement and the ability to say no to the serving of an alcoholic drink. Thus, Florida may independently apply the common law negligence principles and utilize the reasonable man standard to the conduct of the commercial liquor purveyors under such circumstances. This is true even though Florida has enacted a criminal statute prohibiting the commercial vendor from serving liquor to a patron habitually addicted to the use of any or all alcoholic beverages. Violation of the criminal statutory provision has been judicially recognized as negligence per se forming the grounds for civil liability. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963). The requirements for the imposition of negligence per se when violation of either statute Section 561.11 or 568.50 were legislatively modified in 1980 by

enactment of 768.125.

The trend of responsible authority around this nation clearly points in the direction of applying the common law negligence principles and applying the reasonable man standard to the conduct of commercial liquor vendors under such circumstances. When the commercial liquor vendor sells liquor to a minor or adult habitually addicted to alcoholic beverages, it is foreseeable that the immature or addicted customer may injure himself or others as a result of such service. Under these circumstances the commercial liquor vendor is not acting as a reasonable person would. Courts in other jurisdictions that impose either common law or statutory liability have begun to grant recovery in cases where it previously had been denied to the injured victims. Many courts have overruled prior decisions restricting liability and have extended common law liability to commercial liquor vendors where they had previously deferred their authority to that of the legislatures. The court stated in McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983):

> "We note that several courts have bemoaned the fact that an injured third party had no cause of action, even though they have continued to defer to the legislature. We do not choose to stand by and wring our hands at the unfairness which ourselves have created."

In some of the decisions, notwithstanding either a Dram Shop Act or an act prohibiting sale to a patron who does not have the ability to say no to the serving of an alcoholic drink, a common law cause of action may exist independently. The court in each instance has held that irrespective of the existence of such a statute, there also exists a common law duty of reasonable care.

Representative of these cases are the following: Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); McClellan v. Tottenhoff, 666 P.2d 408 (Who. 1983); Rees v. Albertson's Inc., 587 P.2d 130 (Utah 1978); Young v. Caravan Corporation, 99 Wash.2d 655, 663 P.2d 834 (1983); Mitchell v. Ketner, 393 S.W.2d 755 (Tenn. 1965); Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983); Jardine v. Upper Darby Lodge No. 1973, Inc., supra; Bernhard v. Harrah's Club, 128 Cal.Rptr. 215, 546 P.2d 719 (1976); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977).

The litigant would of course be required to plead and ultimately prove the traditional elements of negligence, including the question of the reasonableness of the commercial liquor vendor's conduct. Where the facts of a particular case establish negligence per se for the violation of a criminal statute, then the reasonableness of the conduct becomes irrelevant. The necessity of the jury determining whether the standard of conduct expected of a reasonable person had been breached would be simply eliminated, since the conduct evidencing the violation of statute had been set forth. Nazareno, supra at 675. For example, Florida courts have held that where a vendor sells liquor to a minor in violation of Section 562.11, such activity constitutes negligence per se. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963). Many of the cases cited above discuss the history of the common law in this area, pointing out that until fairly recently, the common law had held

that a purveyor of alcoholic beverages should not be liable for injuries caused by an intoxicated customer, because it was thought that the patron was capable of making the volitional decision to drink and not the sale of the liquor was the proximate cause of injury. All of the cited cases, however, have found liability, where personal injury is an eminently foreseeable consequence of serving an intoxicated customer more liquor, reasoning that the patron had succumbed to the effects of the alcohol, losing the capability to make a responsible, volitional decision of whether or not to take the next drink. See, e.g., Nazareno, supra at 673. Mothers Against Drunk Driving Florida asserts that it is the identical reasoning that should prompt liability for the commercial liquor vendor who serves alcohol to a minor, because the immaturity limits the child's ability to make a responsible, volitional decision of whether or not to drink an alcoholic beverage. Similarly, a person habitually addicted to the use of any or all alcoholic beverages has lost the ability to make a responsible, volitional decision of whether or not to drink an alcoholic beverage. The addiction has paralyzed the commercial vendor's patron's ability to make a responsible, volitional decision about alcohol consumption.

Florida courts have recognized that the proximate cause of injury is the sale rather than the consumption of liquor where the patron lacked the ability to make a responsible, volitional decision of whether or not to drink an alcoholic beverage. Prevatt v. McClennan, 201 So.2d 780, 781 (Fla. 2d DCA 1967). In Prevatt a

tavern sold beer to two minors who were acting unruly and fighting, "The very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making." Id. at 781. That decision was approved by the Supreme Court in Migliore, supra at 980.

Florida case law allows a common law cause of action for the sale of alcohol to a patron whose limited ability prevents the patron from making a responsible, volitional decision of whether or not to drink. Florida courts have begun to move toward the more enlightened view of the common law with the Supreme Court's decision in Davis, supra. There, the Supreme Court took the first step by saying that a Dram Shop Act or Civil Damage Act was not a prerequisite to recovery, and that it was foreseeable that the sale of intoxicants to the minor plaintiff in that case would probably result in injury. In that case, because there was a statute prohibiting the sale to minors, it was not necessary to prove that the vendor was negligent, since violation of the statute constituted negligence per se. However, the court did not address the situation where no statute existed, nor did it hold that no cause of action would exist under such circumstances.

More recently, this Court, in Migliore, adopted the Second District's ruling in Prevatt, supra, and extended its Davis holding further to include liability to third persons injured by intoxicated minors. The court once again did not address the question of whether a sale to an adult of limited decision-making ability, such as a habitual addicted person, would violate a common

law standard of reasonable care. In Migliore, the court pointed out that the law prior to the adoption of Section 768.125 imposed a broader liability, and that 768.125 was a limitation thereon and the negligence, per se liability, for the violation of an existing statute. Although the court did not spell it out, it certainly left room for a holding of common law liability. That is, in a proper case, where a vendor could reasonably foresee the pending catastrophe and was in a superior position to see that its commercial serving of alcoholic beverages to the patron of such limited decision-making ability would likely result in injury, the commercial liquor vender should be held responsible for its breach of duty of reasonable care.

Mothers Against Drunk Driving Florida, as Amicus Curiae, respectfully submits that this is the proper case to present that question. Moreover, it should be resolved in favor of imposing common law liability for the vendor's negligence imposing the reasonable man standard of conduct to commercial liquor vendors who pour drinks to the person habitually addicted to the use of any or all alcoholic beverages where the harm is foreseeable. Section 768.125, Florida Statutes is a limitation on the pre-existing statutory liability imposed as negligence per se for the violation of Florida criminal law Section 562.11 or 562.50. However, these Florida Statutes are not declarative of the entire body of common law negligence. Where foreseeability of injury is present, that is where the commercial liquor vendor is pouring alcohol to a patron suffering under a disability such as an addiction or immaturity

which prevents a responsible, volitional decision, then the legal cause of injury is the sale rather than the consumption. The Supreme Court, in Migliore, made it clear that the newly enacted statute was a limitation on broader pre-existing liability, and not declarative of existing law. Migliore, supra at 980-981. Furthermore, the continued viability of the statement that "At common law there was no cause of action against the dispenser of alcohol for injuries caused to another by the intoxicated recipient" must be qualified. This is true only for the patrons who are in full possession of mature mental facilities to make a responsible, volitional decision of whether or not to drink. However, it does not prevent the application of common law negligence where the patron is addicted or immature.

"Since the Florida Legislature has not passed a Dram Shop Act or Civil Damages Act regarding alcohol, the common law remains in effect." Lonestar Florida Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982). While we agree that the common law controls in the absence of statute, it by no means follows that the common law is static and unresponsive to society's changing needs. It does follow that irrespective of a cause of action for negligence per se for the violation of a statute, a cause of action can and does independently exist for the common law breach of duty imposing reasonable care. This Court has made it quite clear that the common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. For example, the Court

did not hesitate to recede from its earlier contributory negligence rule once it became apparent that comparative negligence provided a more equitable system of determining liability. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). See also Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975), abolishing the no-contribution among joint tortfeasors rule. Similarly, this Court has made it clear that the judiciary need not await action by the Legislature to modernize Florida law. The Court stated recently in Insurance Company of North American v. Pasakarnis, 451 So.2d 447, 451 (Fla. 1984):

> In the past, this Court has not abdicated its continuing responsibilities to citizens of this state to ensure that the law remains both fair and realistic as society and technology change. In fact, the law of torts in Florida has been modernized, for the most part, through the courts.

Id. at 451 (citations omitted). Similarly, in Gates v. Foley, 247 So.2d 40, 43 (Fla. 1971) this Court stated:

> It may be argued that any change in this rule should come from the legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule.

The judiciary cannot avoid being aware of the death and destruction caused by drunken driving on the roads of Florida and elsewhere. In the face of that knowledge, it is difficult to understand what possible justification may exist for granting the commercial liquor vendor's immunity from the duty of reasonable

care which each person owes all others in our society.

It has long been held in Florida that a person is negligent if he does something that a reasonable and prudent person would not ordinarily have done under the same or similar circumstances, or if he fails to do that which a reasonable and prudent person would have done under the same or similar circumstances. Jacksonville Journal Company v. Gilbreach, 104 So.2d 865 (Fla. 1st DCA 1958). More recently, the Supreme Court has stated that a person who creates a dangerous situation may be deemed negligent because he violates a duty of care. Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). The commercial sale of alcohol by a liquor vendor to a person unable to make a responsible, volitional decision, whether minor or an adult habitually addicted to alcohol, places in motion a foreseeable dangerous force which, experience has proven, is likely to result in injury or death. The commercial liquor vendor's decision to sell or furnish alcohol to a minor or an adult habitually addicted to alcohol creates a position of peril for the patron and the community. To hold that a commercial liquor vendor is immune from civil liability, that the commercial liquor vendor has no duty to refrain from "adding raw alcohol to the flaming addiction", ignores the basic principles of common law negligence which governs all other members of society. Mothers Against Drunk Driving Florida, as Amicus Curiae, respectfully submits that the common law of Florida should not and does not insulate the commercial vendor of liquor from liability for the foreseeable results of a commercial vendor's negligence.

In sum, there is no contrary pronouncement by the Supreme Court of Florida as to what the common law was before Section 768.125 became effective; thus, this Court may (and should) hold that there exists a common law duty on the part of commercial liquor vendors to exercise reasonable care in the conduct of their business, and that independent of negligence per se for the violation of a statute, such commercial vendors may be held liable for the damages approximately resulting from the sale of liquor to a patron lacking the responsible, volitional decision-making ability to say no, whether a minor or an adult habitually addicted to alcohol. Accordingly, the present complaint states a cause of action, and the judgment below should be reversed.

II. THE FIFTH DISTRICT CORRECTLY HELD THAT WRITTEN NOTICE IS NOT A PREREQUISITE UNDER SECTION 768.125, FLORIDA STATUTES, FOR IMPOSING LIABILITY UPON A VENDOR WHO KNOWINGLY FURNISHES ALCOHOL TO A PERSON HABITUALLY ADDICTED THERETO.

Mothers Against Drunk Driving Florida, as Amicus Curiae, supports the argument of Petitioner in its entirety. The following discussion is intended to provide this Honorable Court with additional input on this important issue from a standpoint other than that of the immediate litigants. It is Mothers Against Drunk Driving Florida's position that the Legislature, in enacting Section 768.125, intended that commercial liquor vendors be held responsible for the damages caused in two separate and distinct occasions. First, the commercial liquor vendor 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

damage caused by or resulting from the intoxication of such minor. Secondly, the commercial liquor vendor 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 person. Each cause of action has a different historical origin and each occasion requires different elements of proof.

This case presents to this Court its first opportunity to interpret the second segment of Section 768.125, the commercial liquor vendor who knowingly serves a person habitually addicted to alcohol. Previous decisions by this Court involving this statute have been decided in the context of the first portion of Section 768.125, the commercial liquor vendor who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age. The distinction is crucial and, once clearly understood, reveals that the basis for much of the Respondent's argument is illogical and unsupported by case law.

This Court's decisions in Migliore v. Crown Liquors of Broward, 448 So.2d 978 (Fla. 1984), and the more recent decisions dealing with the non-liability of social hosts, Dowell v. Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990) and Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987) have conclusively eradicated any viable contention the Legislature intended to create social host liability by enacting Section 768.125. However, Mothers Against Drunk Driving Florida stands firm against the extension of no liability to the commercial liquor vendor who serves those incapable of

making a responsible, volitional decision to say no. The Second District in Ellis has extended this Court's holdings of no social host liability to cases involving a commercial liquor vendor who serves a known alcoholic. That rationale cannot, however, be used to support the claim that the Legislature intended to similarly limit a vendor's liability for serving a known alcoholic. This is so for two reasons: first, at the time the legislation was passed, there were no reported decisions establishing liability in such situations; and, second, the legislative history reveals a deliberate intent by the Legislature to provide a more effective deterrent to taverns serving alcoholics by eliminating the requirement of written notice. The Legislature enacted Section 768.125 in 1980 in the midst of a period of growing awareness and concern with the harm inflicted by intoxicated persons, particularly when they operate an automobile on the highway. Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), rev. den. 511 So.2d 298 (Fla. 1987). It was recognized that criminal sanctions alone were not providing an effective deterrent to the death and destruction left behind in the path of the drunk driver whose place of last drink was a commercial liquor vendor's establishment. A growing number of "place of last drink" studies have determined that 40% to 60% of persons being arrested for driving under the influence consumed their last alcoholic beverage at a commercial liquor vendor. With findings reaching as high as 60%, it is clear that the commercial liquor vendor has a significant potential in reducing DUI and alcohol related fatal

crashes. Journal on Public Health Policy, 6: 510-525 (1985). The potential is limitless considering only 1 out of 500 DUI offenders is actually apprehended. This is underscored by the National Highway Transportation Safety Administration's estimation that for the year 1987, 23,632 persons died in alcohol-related traffic crashes. These deaths constituted over 51% of the total traffic fatalities. National Highway Traffic Safety Administration Preliminary Estimates of 1987 Highway Safety Statistics, (1988).

As the Second District pointed out in Ellis, the original version of this bill presented to the House provided that liability would be imposed only if the liquor vendor were convicted of a violation of Section 562.50, Fla.Stats. Ellis, supra at 1213. An amendment thereto was offered by Representative Gustafson to relax the requirements for imposing liability by eliminating the prerequisite of a criminal conviction. As Representative Gustafson pointed out, the statute with the amendment ". . . simply provides that if you knowingly serve a person who is habitually addicted to alcoholic beverages, then you will be responsible." The amendment was passed and incorporated into the statute. During the floor debate, Representative Gustafson argued that the conviction requirement was too onerous because the criminal statute's requirement of a written notice made it very unlikely that a conviction could be obtained. This Court has not yet spoken on this portion of Section 768.125, dealing with the commercial liquor vendor who knowingly serves a person habitually addicted to alcohol.

Mothers Against Drunk Driving Florida believes that a proper view of the statute's legislative history, purpose, and dissection into its two distinctive components will compel the conclusion that the Legislature intentionally omitted any written notice requirement for imposing civil liability on a commercial liquor vendor who knowingly serves a person habitually addicted to alcohol.

SALE TO PERSON OF UNLAWFUL DRINKING AGE

By excising the habitual addicted portion for subsequent analysis the statute would read:

> **768.125 Liability for injury or damage resulting from intoxication.**-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 damage caused by or resulting from the intoxication of such minor.

Prior to the enactment of Section 768.125, the Supreme Court of Florida in Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963) held the UNLAWFUL sale of alcoholic beverages to minors was negligence per se. The Supreme Court in Davis recognized that the act of selling alcoholic beverages to minors was in derogation of criminal statute 562.11 and was negligence per se. Thus, the case law created a civil cause of action for the violation the criminal statute Section 562.11.

The Florida Legislature in 1980 responded by seeking to limit the negligence per se civil liability created in Davis for the UNLAWFUL sale of alcoholic beverages to minors.

It is important to the analysis to note that the negligence

per se civil liability for the UNLAWFUL sale of alcoholic beverages to minors was not created by either Florida Statute Section 562.11 or the pertinent portion of Section 768.125. It was created by the Supreme Court's decision in Davis. Furthermore, the civil liability for the UNLAWFUL sale of alcoholic beverages to minors was legislatively deterred by both the portion dealing with sales to minors of Section 768.125 and Section 562.11.

This portion of Section 768.125 limits the negligence per se civil liability to instances in which the server "willfully and unlawfully" sells or furnishes alcoholic beverages to a minor. Section 562.11, the statute deeming the sale unlawful, must be read to define those acts legislated as a violation of the law. Since Section 768.125 refers to the "unlawful" sale of alcoholic beverages to minors, it follows that the criminal statute shall be consulted for the definition of "unlawful".

The historic line of cases, cited by the Second District in Ellis, holds that Section 768.125 is a limiting statute upon civil liability for injuries resulting from illegal sales to minors established in Davis. Each and every case cited by the Second District in Ellis for the proposition that Section 768.125 is a limiting statute for both its distinct purposes, involve an illegal sale to minors, NOT for the sale to persons of a **LAWFUL** drinking age known to be habitually addicted to the use of any or all alcoholic beverages.

Furthermore, the Second District uses this same line of cases

and reasoning for its holding that Section 768.125 does not create a new cause of action imposing civil liability for all circumstances. However, again, each and every case cited by the Second District in Ellis for the proposition that Section 768.125 does not create a new cause of action is a case of liability resulting from illegal sales to minors NOT for the sale to persons of a LAWFUL drinking age known to be habitually addicted to the use of any or all alcoholic beverages.

Mothers Against Drunk Driving Florida agrees that this is a proper analysis in the circumstance of an unlawful sale of alcoholic beverages to a minor. Civil liability grounded in negligence per se for the violation of criminal statute 562.11 resulting in injury emanated from case law. The Davis court established this form of civil liability for the sale of alcoholic beverages to a minor. For a complete analysis of civil liability for the unlawful sale of alcoholic beverages to a minor, the Court must look to the case, Davis, creating the cause of action, Section 768.125's pertinent part concerning the sale section for the legislative reaction to the case law created in Davis and, finally, Section 562.11 to define unlawful. Thus, the Second District in Ellis was partially correct when it reasons liability for injuries resulting from illegal sales to minors requires that Section 768.125 must be in pari materia with Section 562.11 to establish civil liability for the unlawful sale of alcoholic beverages to a minor.

Each case cited by the Second District in Ellis for the

proposition that Section 768.125 and Section 562.11 must be read in pari materia is factually an illegal sale to a minor, NOT for the sale to persons of a LAWFUL drinking age known to be habitually addicted to the use of any or all alcoholic beverages.

The Second District fails to cite one single case in which Section 768.125 is read in pari materia for the purpose of establishing liability for the sale of alcohol to a person habitually addicted to alcoholic beverages.

SALE TO A PERSON OF LAWFUL DRINKING AGE
HABITUALLY ADDICTED TO ALCOHOLIC BEVERAGES

By excising the sale to a minor portion for subsequent analysis the statute would read:

> **768.125 Liability for injury or damage resulting from intoxication.**-A person 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 person.

Florida case law has distinguished the criminal statute Section 562.50 requiring written notice before criminal sanctions are imposed from the negligence statute Section 768.125 creating civil liability for one who knowingly serves a habitual drunkard. Liability under Section 768.125 for knowingly serving a person habitually addicted to alcoholic beverages has been judicially recognized as creating a new cause of action. The Fourth District held that prior to Florida Statute Section 768.125, there was no cause of action for dispensing alcoholic beverages to a drunkard who later drunkenly and negligently injures another. Thus, violation of the criminal statute had not created a civil cause of

action. The court went on to explain that 768.125 is declarative of the existing law on the subject of civil liability for knowingly serving a habitual drunkard. The Court concluded that Section 768.125 would impose civil liability on one who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages. Although Section 768.125 imposed civil liability without written notice that the patron was addicted, it was passed in 1980 and was not in effect at the time of the accident in question.

Therefore, Section 768.125 was not an applicable change in the law when the accident occurred. Lonestar Florida Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982).

The Second District Court of Appeal has differentiated the "knowingly serves" requirement under the negligence statute, 768.125 and the "written notice" requirement under the criminal statute 562.50. The Second District, in Roberts v. Roman, 457 So.2d 578 (Fla. 2nd DCA 1984), explained that by virtue of the fact that Section 768.125, Florida Statutes (1980) imposed liability without a requisite written notice requirement on one who knowingly sells intoxicating beverages to a person who is habitually addicted was not in effect at the time of the sale alleged, there was no liability.

Furthermore, the Court reasoned it was precluded from imposing civil liability for the violation of a criminal statute because factually the statute was not violated. The Court refused to impose civil liability for violation of the criminal statute, Section 562.50, because the necessary element of the crime, written notice,

had not been alleged. The court differentiated the requirements for civil liability under the negligence Section 768.125 from the stricter requirements for imposing negligence per se predicated from the violation of the criminal statute, Section 562.50, mandating written notice.

While the Legislature has provided criminal penalties for serving habitual drunkards in violation of Section 562.50, it has not provided civil remedies. Ochab v. Morrison, Inc., 517 So.2d 763 (Fla. 2nd DCA 1987). There, the court declined to create a civil cause of action by implication of legislative intent from the provisions of Section 562.50.

Finally, in Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), rev. den. 511 So.2d 298 (Fla. 1987), the First District held that Florida Statute Section 768.125 imposed civil liability for knowingly serving a person habitually addicted to alcoholic beverages. Furthermore, to prove that the commercial liquor vendor knowingly served a person habitually addicted to alcoholic beverages did not require written notice. Instead, 768.125 merely requires that service to such a person be provided knowingly without any specification of how such knowledge must be obtained. Florida Statute Section 768.125 is a negligence statute which provides for a cause of action against a person who serves alcoholic beverages to a minor or to person who is known to the server to be habitually addicted to the use of alcohol.

STATUTORY CONSTRUCTION

The meaning of Section 768.125, Fla.Stats. is clear and

unambiguous on its face. Its clairvoyant intention can be unequivocally interpreted from within its four corners. The Fifth District's decision in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990), should be affirmed. The Sabo court correctly held that its plain meaning dictates that circumstantial evidence may establish that the commercial vendor knowingly served a person habitually addicted to the use of any or all alcoholic beverages as required by Section 768.125, Fla.Stats. That sufficient circumstantial evidence can establish an issue of fact of whether or not a commercial vendor knew of a patron's addiction. Furthermore, the court's well reasoned opinion in Pritchard, relies on established principles of statutory construction and the plain reading of the statute which merely requires that the service to such a person be provided "knowingly" without any specification of how such knowledge must be obtained. We suggest that the Second District in Ellis, has violated that provision of statutory construction by assuming that the Legislature intended to include a written notice requirement. The fallacy of such an assumption is underscored by the fact that the Legislature expressly refused to require a criminal conviction as a prerequisite to the imposition of liability, precisely because the underlying requirement of written notice was practically impossible to obtain.

The Ellis court justified its interpretation of the statute by relying upon the rule that statutes which relate to the same or a closely related subject should be regarded as in pari materia and

should be construed together, citing Ferguson v. State, 377 So.2d 709 (Fla. 1979). That rule of statutory construction, however, does not require or permit the wholesale importation of the language of one statute into that of another, as the Second District did here; rather, it is the purpose of that rule to eliminate the meaning of a statute by viewing the legislative treatment of the problem as a whole, so that all statutes relating to the same subject matter may be given effect, if this can be done by any fair and reasonable construction. Ferguson, at 711. Here, there is no contradiction or anomaly between the Legislature's decision in 1945 to require written notice as a prerequisite to conviction under Section 562.50, Fla.Stats., and its decision in 1980 to impose civil liability where the vendor's knowledge is established by some other form of evidence. The plain language of the statute should be given its ordinary meaning, namely that a vendor who knows that the person he is serving is an alcoholic may become liable as a result.

Both the Fifth District in the present case and the First District in Pritchard, have interpreted Section 768.125 as permitting the "knowledge" requirement of the statute to be proved in some manner other than by the written notice required for conviction under the criminal statute. Although Pritchard, was decided after Migliore, this Court apparently recognized that Pritchard did not conflict with Migliore (which dealt with only serving alcohol to minors), since it declined to review Pritchard.

Mothers Against Drunk Driving Florida submits that the result reached by the Fifth District in the present case and the First District in Pritchard was the correct one, that the Fifth District's decision should be approved, and that the Ellis court's interpretation of the statute be specifically disapproved.

Even the Ellis court recognized that the written notice requirement "will place little impediment in the destructive path of the drunkard," Id. at 1215, but concluded nonetheless that the liquor server could not be civilly or criminally liable unless it had received that notice. It is Mothers Against Drunk Driving Florida's view, however, that the Legislature was fully aware of the problem and acted intentionally to ease the requirement for imposition of negligence per se liability upon a commercial vendor who serves liquor to a known alcoholic. Both the language of the statute itself and the legislative history support this conclusion, and we urge this Court to so hold.

KNOWINGLY

"Knowingly" has been judicially defined against a background of alcohol beverage service and Gorman v. Albertson's Inc., 519 So.2d 1119 (Fla. 2nd DCA 1988). There, it was alleged that the commercial vendor of alcohol knowingly sold alcoholic beverages to a purchaser who was not of lawful drinking age and that such knowledge may be established by circumstantial evidence. Inculpatory knowledge of the age of a particular person may be

proven by direct evidence of actual knowledge or such knowledge that may be established by circumstantial evidence. Circumstantial evidence of such knowledge may consist of facts relating to the apparent age of a person. Willis v. Strickland, 436 So.2d 1011 (Fla. 5th DCA 1983). By analogy, the knowledge of serving a person habitually addicted to alcohol can also be shown by circumstantial evidence as well as actual knowledge. Thus, notice is not required to show that a person knowingly served a person habitually addicted to the use of any or all alcoholic beverages under Section 768.125. Pritchard, Ellis, Ochab, Roberts and Lonestar are all the known cases interpreting the portion of Florida Statute 768.125 providing 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 knowingly serves a person habitually addicted to the use of any and all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such person.

CONCLUSION

Mothers Against Drunk Driving Florida applauds the Fifth District's decision recognizing the liquor vendor's duty to act reasonably and urges the Court to reverse the Second District Court of Appeal's Summary Judgment in recognition that the complaint states a cause of action cognizable under existing principles of common law negligence.

Moreover, Mothers Against Drunk Driving Florida urges the Court to approve the Fifth District's opinion and specifically disapprove the Second District's decision in this case to the extent that it requires written notice as a prerequisite to imposition of negligence per se liability under Section 768.125, Florida Statutes.

Respectfully submitted,

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