IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs. Case No. 76,267

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

Respondents.

ON PETITION TO REVIEW THE DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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The Case and Facts

This case presents the question whether a vendor of alcohol who knowingly serves alcoholic beverages to a habitual alcohol addict may be held civilly liable for injuries caused by the addict's intoxication when the vendor did not have prior written notice of the customer's addiction.

One evening in March 1988 Gilbert Ellis consumed some twenty alcoholic drinks served to him at a Tampa bar owned by respondent N.G.N. of Tampa, Inc. (R.17, 20) The other respondent, Norbert G. Nissen, is the director, owner, and manager of N.G.N. of Tampa, Inc. (R.16, 18) After consuming the drinks, an intoxicated Ellis drove his car in a manner causing it to overturn and crash. He sustained severe injuries, including permanent brain damage. (R.17) He has since been declared incompetent, and his mother, Mary Evelyn Ellis, is his legal guardian. (R.16, 24)

Mrs. Ellis filed a circuit court action against N.G.N. and Nissen seeking compensatory and punitive damages. Tracking the language of section 768.125, Florida Statutes (1987), her complaint alleged that the respondents served her son "knowing that [he] was a person addicted to the use of any or all alcoholic beverages." (R.1-7, 16-23)

The respondents moved to have the complaint dismissed, claiming (1) that section 768.125 does not provide a first-party cause of action for a one-car accident involving an injured adult drinker/driver, and (2) that the complaint failed to allege an essential predicate to their liability, i.e., that the bar had received written notice of Ellis's addiction from his family as

contemplated by section 562.50, Florida Statutes (1987). (R.8)

The complaint was dismissed and then amended to allege basically the same general knowledge, since Mrs. Ellis could not allege that the bar had in fact received written notice. (R.15, 16) The respondents again moved to dismiss on the same grounds. (R.25) The trial court granted the motion and dismissed the action on the ground that there is no cause of action under section 768.125 for injuries received by an intoxicated adult driver in a one-car accident. (R.45) Mrs. Ellis appealed. (R.69)

In its decision the Second District Court of Appeal affirmed the dismissal, but not for the reason given by the trial court. In that regard the district court agreed with Mrs. Ellis that the habitual drunkard is among the class of persons protected by the statutory scheme; thus, "the fact that [Mrs. Ellis's] complaint described a first party cause of action was no reason to dismiss it." Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209, 1211 (Fla. 2d DCA 1990).

Nevertheless, the court held, the complaint was properly dismissed because the respondents had not received prior written notice of Ellis's alcohol addiction. In the court's view, such notice is a necessary predicate to a liquor vendor's civil liability for serving a habitual alcohol addict.

> In sum, we hold 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.

Ellis, 561 So.2d at 1215.

The district court's opinion was filed April 18, 1990. On April 25 Mrs. Ellis filed a motion under Fla.R.App.P. 9.330 requesting the court to certify that its decision was in conflict with the decision of another district court of appeal and/or that it passed on a question of great public importance. The court denied the motion on June 5, 1990. Mrs. Ellis commenced this discretionary review proceeding on July 3. This Court accepted jurisdiction of the case by order dated December 11.

Summary of Argument

The court below was in error. As set forth in section 768.125, the habitual addict exception to the rule of nonliability does not require that the vendor first receive written notice of the customer's addiction.

This is apparent in several ways. First, of course, is the language of the statute itself, which requires simply that the vendor "knowingly" serve an alcohol addict. This language is plain and unambiguous, and therefore does not permit the courts to deviate from it by use of the in pari materia rule or any other statutory construction device.

Moreover, the language contrasts sharply with the clause of the statute regarding service to minors. That clause provides that a vendor may be held liable if he "willfully and unlawfully" serves a minor. The latter qualification constitutes an affirmative legislative direction that that portion of the statute be read in pari materia with other statutes on the general subject. The legislature could easily have made the same direction in

regard to habitual addicts. Its failure to do so must be regarded as intentional. This is confirmed by the legislature's apparent acquiescence to the First District's holding that the statute is not to be read in pari materia with section 562.50.

The legislature's different treatment of the two realms of liability excepted in section 768.125 was intentional, owing in large part to their differing histories. Liability for service to minors had undergone expansion in the courts. In contrast, when the legislature enacted section 768.125 there had not been a single decision addressing liability for serving an addict.

Even assuming that violation of section 562.50 might have been a predicate for civil liability, the scope of that liability would have been very different than that which arose from serving minors in violation of section 562.11. The latter statute employs very broad language to prohibit sales to minors, and therefore includes minors and injured third persons in its protected class. Section 562.50, however, appears to protect only the drunkard and his family.

Nevertheless, that portion of section 768.125 which defines the scope of a vendor's liability employs the same language, indeed, the same sentence, with respect to both realms of liability.

Clearly, then, though section 768.125 was a limitation on judicial expansion of liquor vendor liability, in respect to addicts the legislature actually expanded liability.

This result may be characterized as "anomalous", but that

does not mean the legislature did not intend it. To the contrary, when defining the limits of liability under the statutory exceptions, the legislature was free to expand or contract them as it saw fit. This was accomplished by the normal legislative process of negotiation and compromise among differing viewpoints. With respect to minors, the legislature clearly believed that liability was too easily established under existing law; therefore, it narrowed the circumstances under which liability would arise by specifying that the vendor must act "willfully".

On the other hand, as evidenced by the complete lack of judicial precedent in the area, the lawmakers concluded that the elements of liability for serving addicts were too strict under existing law; therefore, they expanded the circumstances in which liability could arise by amending the legislation to eliminate the requirement of written notice.

That this was the legislators' intent is confirmed by the record of the discussion on the floor of the House when the amendment was under consideration.

Under the circumstances, the lower court's application of the in pari materia aid to statutory construction was erroneous; the result conflicts with every other indication of legislative intent, and it defeats the legislative purpose of the statute.

Argument

WRITTEN NOTICE OF THE CUSTOMER'S ADDICTION IS NOT A STATUTORY PREREQUISITE TO A VENDOR'S CIVIL LIABILITY FOR SERVING AN ALCOHOL ADDICT.

The court below held that a vendor who has not received written notice of his customer's alcohol addiction cannot be held liable for serving him intoxicants. The court came to this conclusion by construing section 768.125, Florida Statutes, in pari materia with section 562.50, Florida Statutes, so as to engraft the notice provisions of the latter onto the former. Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209, 1212 (Fla. 2d DCA 1990).

In an earlier case the First District Court of Appeal reached the opposite conclusion. Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986). The Fifth District, in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990), ruled that a vendor may be held liable where proof that he knew of the customer's addiction is made by circumstantial evidence, a view that necessarily conflicts with that of the lower court herein.1/

For the reasons that follow, Mrs. Ellis submits that the Second District's interpretation of section 768.125 is incorrect.

A. Statutory language.

As in any case involving statutory interpretation, inquiry

1/ The Sabo court certified that its decision conflicts with Ellis. Sabo is under review by this Court in Case No. 76,811.

into the meaning or effect of section 768.125 must begin with its language. The statute reads as follows:

> 768.125 **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.

It can be seen that the statute has three main components:

1. The rule of nonliability.

The first clause of the statute embodies a "reverse dram shop" act. It codifies the common law rule of nonliability for serving alcohol.

2. The two exceptions to nonliability.

The statute's second and third clauses make exceptions to the nonliability rule in cases involving service to underage drinkers and service to addicts, respectively. Both exceptions are qualified. Thus, vis-a-vis the instant dispute, a vendor who "knowingly" serves a person who is habitually addicted to alcohol may be held liable.

This language is significant, not only because its plain meaning is not so restrictive as to require that the vendor's knowledge be gained by written notice--an important point, since reading statutes in pari materia is a form of statutory construction which, like others, is not called for when the statute is unambiguous. 73 Am.Jur.2d Statutes s.188; Coon v. Continental

Insurance Co., 511 So.2d 971 (Fla. 1987); State v. Egan, 287 So.2d 1 (Fla. 1973), and cases cited therein.

But beyond that, the qualifying language associated with liability for serving addicts is significant insofar as it differs from its counterpart in the clause involving service to underage drinkers. Whereas a vendor may be liable for "knowingly" serving an addict, he may be liable for serving an underage drinker only if he does so "willfully and unlawfully."

By the last mentioned phrase the legislature accomplished two things. First, it narrowed the circumstances which can result in liability for serving minors by specifying that it must be done "willfully". Armstrong v. Munford, Inc., 481 So.2d 480 (Fla. 1984).

More important, by requiring that the sale also be done "unlawfully", the legislature created a "reference statute", i.e., a statute which refers to and by the reference wholly or partially adopts pre-existing statutes. State v. J.R.M., 388 So.2d 1227, 1229 (Fla. 1980), citing Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (Fla. 1918).2/ By its use of the word

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2/ A reference statute may be "specific" or "general", that is, it may adopt the provisions of a specific statutory section or it may incorporate the general law regulating the subject. Reino v. State, 352 So.2d 853 (Fla. 1977); Palm Beach County National Utility Co., Inc. v. Palm Beach County Health Dept., 390 So.2d 115 (Fla. 4th DCA 1980). The distinction becomes important when the statutes referred to are amended. A specific reference statute is deemed to incorporate the mentioned law as of the time of the reference, and is unaffected by any subsequent amendment to the referenced provision. A general reference statute is intended to incorporate the general law regulating a subject as it may exist from time to time or at the time of the event to

(continued...)

"unlawfully" the legislature engrafted onto the statute's provision for civil liability premised on service to minors the terms of the general statutory law proscribing such service. In other words, the legislature mandated that the second clause of section 768.125 be read in pari materia with other penal or regulatory statutes on the subject.

To be sure, application of the in pari materia statutory construction device is not limited to statutes which refer to others. But, vis-a-vis the legislative intent behind the second clause of section 768.125, it is telling that the legislature did not assume that the clause would be read in pari materia with other statutes absent an explicit mandate that such be done.

And in light of that, it is also telling that the legislature did not include a similar mandate in the third clause of the statute, at issue here.

Certainly, if the legislature had intended that liability under the third clause be predicated on violation of another statute, it easily could have employed the word "unlawfully" therein, as it did in the second clause. Its failure to do so is rather conspicuous, and must be presumed to have been intentional. Compare, Dept. of H.R.S. v. McTigue, 387 So.2d 454, 456 (Fla. 1st DCA 1980); Johns v. Liberty Mutual Fire Insurance Co., 337 So.2d 830, 831 (Fla. 2d DCA 1976).

2/(...continued)
which the law is to be applied. Reino, 352 So.2d at 858. Since section 768.125 employs the term "unlawfully" instead of making reference to a particular statute, it is a general reference statute.

This presumption is buttressed by the fact that several legislative sessions have passed since Pritchard was announced, but no amendments to section 768.125 have been forthcoming. Therefore, it must be assumed that the legislature is content with the First District's interpretation of the statute. Compare, Dowell v. Gracewood Fruit Co., 559 So.2d 217, 218 (Fla. 1990).

As will be discussed below, the legislature's differing treatment of the two exceptions to nonliability was indeed intentional, with good reason.

3. The scope of liability under the exceptions.

The fourth and final clause of section 768.125 defines the scope of a vendor's liability if either of the above-mentioned exceptions is established. Thus, if a vendor willfully and unlawfully serves a minor, or if he knowingly serves a person who is habitually addicted to alcohol, he may be held liable "for injury or damage caused by or resulting from the intoxication of such minor or person."

Note that, though the elements of the two exceptions to nonliability are different, the statute employs the same language--the same sentence, in fact--when defining the scope of a vendor's liability under both. The significance of this will become apparent after further discussion.

B. Historical background.

The exceptions to nonliability described in the second and third clauses of section 768.125 address two theretofore distinct realms of liquor vendors' liability.

1. Underage drinkers.

The most well-known of the two exceptions derived from the criminal prohibition against serving alcoholic beverages to persons under the lawful drinking age. First enacted in 1935, the proscription is now codified at section 562.11, Florida Statutes:

> It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises. Anyone convicted of violation of the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s.775.082 or s.775.083.

Section 562.11(1)(a) (1989).

As mentioned, the statute is penal in nature; on its face it does not purport to create a private cause of action for damages. However, in 1963 this Court held that violation of section 562.11 was negligence per se, so as to support an action for damages in favor of an underage drinker or his survivors. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963).

Four years later, in Prevatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967), the Second District held that violation of the statute would support an action in favor of third persons who were injured as a result of the youth's intoxication. This view would later be confirmed by this Court in Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978, 979-980 (Fla. 1984).

The Migliore Court observed in passing that the enactment of section 768.125 in 1980 did not create a cause of action against vendors who serve alcohol to minors. Rather, the Court said, in

light of the legislature's presumed familiarity with Davis and Prevatt, supra, the statute must be viewed as a limitation on existing liability. Migliore 448 So.2d at 980-981. This notion was amplified in Armstrong, supra, when in response to the Second District's certified question this Court stated:

> In our recent decisions of Migliore and Barber[v. Jenson, 450 So.2d 830 (Fla. 1984)], we held that prior to the effective date of section 768.125, a third party who could establish proximate causation for his injuries did have a cause of action against the person who furnished alcoholic beverages to a minor in violation of section 562.11. We also stated, however, that although section 768.125 did not create a cause of action for third persons against dispenser of intoxicants for injuries caused by intoxicated minors, it does constitute a limitation on the already existing liability of vendors of intoxicating beverages. The district court correctly held that section 768.125 requires that the selling or furnishing of alcoholic beverage must be done willfully. Section 768.125 controls in those cases arising after its effective date.

Armstrong, 451 So.2d at 481.

Migliore and Armstrong involved that portion of section 768.125 dealing with dispensing alcohol to minors. In that context, the proposition that section 768.125 is a limitation on existing liability, and does not create any liability, is easily sustained. After all, as this Court noted, the legislature was familiar with Davis and Prevatt, and when enacting section 768.125 it narrowed the cause of action by specifying that the vendor must act willfully. As will be seen, however, with respect to the other exception to nonliability the proposition is not as firm.

2. Habitual alcohol addicts.

Ten years after the advent of the statutory prohibition

against dispensing alcohol to minors, the legislature enacted section 562.50. It imposes criminal penalties for serving intoxicants to a habitual drunkard after receiving written notice from his family that he is addicted to alcohol:

> **562.50 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.

When the legislature enacted section 768.125 in 1980, liability for serving alcohol to minors had been expanding under a series of court decisions, as described above. In contrast, in the thirty five years since the enactment of section 562.50 there had not been a single reported decision involving liability--civil or criminal--for dispensing alcohol to an addict. Therefore, when the legislature acted there was not, strictly speaking, any "existing liability" for serving addicts.

On the other hand, it is not unreasonable to believe that the legislature assumed that a violation of section 562.50 could be a predicate to civil liability, just as the courts had found with respect to violations of section 562.11. But this does not mean that the scope of the liability would be the same in both cases.

To the contrary, assuming that civil liability could have been predicated on a violation of section 562.50 prior to 1980, it is likely that the class of possible plaintiffs would have been narrower than that which could bring an action involving section 562.11. As Migliore made clear, minors and third persons injured by intoxicated minors could bring suit for violation of section 562.11 because that statute was intended to protect both classes from injury. Migliore, 448 So.2d at 979-980.

But in contrast to the rather broad language of section 562.11, which simply prohibits the sale of alcoholic beverages to persons under the specified age, section 562.50 is much more restrictive. It proscribes serving alcohol to a habitual drunkard after receiving written notice that he is addicted to alcohol and "that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the [family member] giving said written notice[.]" (Emphasis added.) As the Pritchard Court observed, the obvious purpose of section 562.50 is the protection of the habitual drunkard and his family. Pritchard, 499 So.2d at 929.

Yet, section 768.125 contemplates actions by injured third persons, as well. Id. That this is so is apparent in several ways. First, of course, is the previously mentioned legislative acquiescence to the Pritchard Court's interpretation of the statute.

Of greater force is the language of the statute itself. Again, as Migliore pointed out, the legislature was aware of

prior case law which held that the sale of alcohol to a minor would subject the vendor to liability for injuries suffered by the minor or third persons. When enacting the statute the lawmakers limited the circumstances giving rise to liability to those in which the vendor "willfully and unlawfully" serves an underage person. But they did not narrow the scope of the liability as set forth in the case law.

It is significant, then, that when setting forth the scope of a vendor's liability under section 768.125, the legislature made no differentiation between sales to minors and sales to habitual drunkards. Rather, it employed the same language as to each; indeed, it employed the same sentence.

The use of the same language in regard to the two realms of liability confirms that the legislature intended to impart the same meaning as to both. Clearly, under the statute the scope of a vendor's liability for serving the habitually addicted is co-extensive with his liability for serving a minor. Just as clearly, that liability is not limited to the drinker or his family.

Finally, this is confirmed by reference to a portion of the legislative materials quoted by the court below. The district court pointed out that section 768.125 derived from 1980 House Bill 1561. As originally introduced, the bill predicated civil liability for serving an addict on the defendant first being convicted of violating section 562.50. Representative Tom Gustafson offered an amendment which proposed language substan-

tially identical to what is now contained in the statute. When describing the drawbacks of the original bill, he stated:

> What that means is if you unlawfully serve a minor or you are convicted of a crime of serving a habitual drunkard then you will be responsible. The problem is that it is very unlikely that you will be convicted of that crime in the State of Florida. It requires the written notice from a relative to the bar owner notifying him of the habitual condition and for the bar owner to refuse to acknowledge that and to serve the habitual drunkard anyway, and then that drunkard has to go out and hurt somebody, and then if you get that conviction then you may be able to get the civil liability.

Ellis, 561 So.2d at 1214, quoting Transcript, Excerpt of April 22, 1980 proceedings on the floor of the House of Representatives relative to HB 1561 (Florida State Archives, Series 38, Box 61, Tape 1, Side 2).

Clearly, notwithstanding that section 562.50 would seem to protect only habitual drunkards and their families, in the legislators' discussion of the bill giving rise to section 768.125 they contemplated that liability for serving alcohol to a habitual drunkard would extend to third persons injured as a result of the drunkard's intoxication, just as in the case of underage drinkers.3/

3/ It may also be that the two statutes contemplate injuries of different natures. Section 562.50's requirement that the notice advise that the addict's drinking "is working an injury to" the addict or family member giving the notice seems to embrace the gradual, ongoing harm (e.g., loss of earning ability, depletion of financial resources, physical deterioration, destruction of family relationships, and the like) which may be suffered by the drinker or his family as a direct result of the alcohol abuse. On the other hand, and especially as characterized in the above-quoted remarks by Rep. Gustafson, section 768.125 seems to contemplate injuries or damages, whether suffered by the drinker or unrelated third persons, that are caused by the actions of the (continued...)

It is apparent, then, that though section 768.125 is indeed a limitation on liquor liability, nevertheless it expanded the class of plaintiffs who could bring an action predicated on the sale of alcohol to addicts beyond that contemplated by section 562.50. And, Mrs. Ellis submits, at the same time the legislature eliminated the necessity that the vendor first be given written notice of the addict's condition.

C. The legislative process.

The court below asserted that such a result would be "anomalous". And in the sense that an anomaly is a deviation from the general rule, it is. But this is not to say that the legislature could not, or did not, enact an "anomaly". To the contrary, the legislative process, which often involves negotiation and compromise between forces with opposing points of view, often produces mixed results.

Here the legislature could and did limit the judicial expansion of liquor vendor liability simply by legislating in the field. See Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987)(Court would not create cause of action against social hosts where legislature has evidenced its desire to make decisions concerning the scope of civil liability in this area). This does not mean that in so doing the lawmakers were constrained by the limits already established by the courts. Rather, they were free

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3/(...continued)
addict while intoxicated. This, again, is consistent with the scope of liability established by case law for serving minors in violation of section 562.11.

to expand or contract those limits as they deemed best.

Whether and how much to do so involved policy choices on which the lawmakers differed, and so they were forced to compromise. This process was amply demonstrated by the legislative history recited in the opinion below:

When introduced in 1980, HB 1561 was substantially identical to a bill which had been passed by the legislature the previous year, but then vetoed by the Governor. As previously mentioned, the bill predicated liability for serving an addict on the vendor first being convicted of violating section 562.50. In 1980 the bill was approved in committee in its original form, then amended by the full House to delete the requirement of a conviction of section 562.50 in favor of language specifying simply that the vendor must "knowingly" serve an addict. Florida House Journal 216, 224-225 (Reg.Sess.1980).

After the House had amended and approved HB 1561 the Senate passed the bill--with an amendment expanding liability to social hosts. Florida Senate Journal 271 (Reg.Sess.1980). When the bill returned to the House, the latter body amended it to remove the social host liability provision, and the Senate then concurred in the bill. House Journal 451-452; Senate Journal 323.4/

4/ This confirms that the Court's decisions in Bankston, supra, and Dowell v. Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990), were correct--section 768.125 does not expand liability to social hosts--but only because the proponents of social host liability were unable to muster sufficient votes in the House to include such a provision in the ultimate compromise.

Ultimately, then, this give-and-take produced legislation declaring that as a general rule a vendor can not be held liable for the consequences of selling alcohol, subject to the two exceptions for serving minors and habitual addicts, respectively. In regard to the first, the legislators obviously felt that liability was too easily established under existing law, and for that reason imposed a new requirement that the vendor act willfully.

But with respect to the exception involving addicts, the legislators reasonably could have concluded that under existing law the class of protected persons was not broad enough, and that the elements of the cause of action were too stringent, as evidenced by the absence of any reported decisions in the area. For these reasons the legislators (1) broadened the protected class to include injured third persons, as in the case of minors; and (2) eliminated the onerous requirement of written notice, substituting in its place the more easily met burden of proving simply that the vendor knew that his customer was addicted.

The court below rejected this view, in large part because of its interpretation of the House proceedings in which HB 1561 was amended to substitute the current language in place of the original requirement of a conviction under section 562.50. The court posited that the amendment's purpose was merely to delete the necessity of a conviction, and that a violation of the statute, notice provision and all, was still required. "[W]hat was troubling the legislature was the requirement of a previous

conviction, not the requirement of notice per se." Ellis, 561 So.2d at 1215 (emphasis by the court).

The court's position is not sustainable for two reasons. First, had the legislature intended what the court surmised, it could have simply changed the phrase "person convicted of a violation of s.562.50" to "person violating s.562.50" (a specific reference) or, as in the case of minors, it could have simply premised liability on the "unlawful" sale of alcohol to an addict (a general reference). Instead, the lawmakers deleted the reference to section 562.50 altogether, and inserted a new and different scienter requirement: knowledge that the customer is addicted.

The other reason for rejecting the lower court's view is that it was based on a misunderstanding of the discussion on the floor of the House relating to the amendment. In this regard the court chose to focus on the remarks of Rep. Gustafson quoted above (p.15), wherein he complained that HB 1561 as introduced made it too difficult to impose civil liability for serving an addict.

> Representative Gustafson's specific comment that the "problem" was that it was very unlikely that the necessary conviction could be obtained is further evidence that we reach the correct conclusion in interpreting this legislative concern.

Ellis, 561 So.2d at 1215.

But the court's quotation of the proceedings was incomplete. The transcript in its entirety, appended hereto, reflects that Rep. Gustafson's remarks were preceded by the comments of Rep.

Ronald Richmond.5/ His statement revealed that the legislators understood why a conviction under section 562.50 was unlikely.

> Speaker: Read House Bill 1561.
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> Clerk: House Bill 1561 by the Committee on Regulated Industries and Licensing.
>
> Speaker: Mr. Richmond?
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> Rep. Richmond: Ladies and gentlemen of the House, last year we passed a reverse dram shop act bill which limited the liability of tavern owners to those instances of willful sale to minors and a certain notice that is delivered under statutes concerning habitual drunkards. We have -- the bill was vetoed by the Governor. We have satisfactory language I believe to those who were concerned about the bill and the Governor, and I believe if we put Mr. Gustafson's amendment on then we can send it on to the Senate.
>
> Speaker: Mr. Gustafson for what purpose do you rise?
>
> * * * * * *

(Emphasis added.)

Rep. Richmond's remarks leave no doubt: the legislators recognized that a criminal conviction under section 562.50 was unlikely because of its written notice requirement, and the purpose of the amendment to HB 1561 was to eliminate the notice as a prerequisite to civil liability. As Rep. Gustafson summed it up:

> With the amendment [the bill] simply provides that if you knowingly serve a person who is habitually addicted to alcoholic beverages then you will be responsible.

5/ HB 1561 was a committee bill by the Committee on Regulated Industries & Licensing. House Journal 216. Rep. Richmond chaired the committee's Subcommittee on Alcoholic Beverages and Tobacco, which initially approved the bill.

D. The in pari materia rule of statutory construction.

The court below asserted that section 768.125 must be read in pari materia with section 562.50 because (1) both sections "deal with the same subject matter--unlawful dispensing of alcohol and the consequences thereof, whether civil or criminal" (emphasis added); and (2) as initially approved by the legislature HB 1561 would have placed the statute in the Beverage Law Enforcement chapter, numbered as 562.51. Ellis, 561 So.2d at 1213.

In regard to the first, Mrs. Ellis has already pointed out that section 768.125 addresses the unlawful sale of alcohol to minors, but contains no such qualification in the clause regarding addicts. Therefore, this justification for reading the statutes together merely begs the question.

As the Pritchard Court observed, sections 562.50 and 768.125 were enacted at different times, and have different goals. Section 562.50 is a penal statute, enacted for the protection of a narrow class of persons, the drunkard and his family, from the ongoing, progressive ravages of persistent alcohol abuse. Section 768.125, on the other hand, addressed civil liability, and broadens the protected class to include the drunkard and members of the general public who are injured by the drunkard's actions while intoxicated. Pritchard, 499 So.2d at 928-929.

The differing aims of penal and remedial statutes are well-established. 1 Fla.Jur.2d, Actions ss.10, 11; 49 Fla.Jur.2d, Statutes s.14. And it is not unusual for the law to recognize a

civil cause of action for conduct that does not subject the actor to criminal sanction for lack of a particular level of intent or notice.6/

The lower court's reliance on the legislature's original placement of the statute in the chapter regulating the sale of alcoholic beverages was also misplaced. The initial numbering of the statute no doubt derived from the fact that HB 1561, as introduced, provided for the imposition of civil liability only upon those who violated provisions contained in the beverage law chapter. As amended, however, the bill omitted any reference to violation of the beverage laws as a prerequisite to liability for serving addicts. For this reason, it was reasonable of the Joint Legislative Management Committee to transfer the statute to the Negligence chapter pursuant to its authority under section 11.242(5)(e), Florida Statutes.

In Bankston, supra, the Court declined to find significance in the transfer.

> [T]o attach legal significance to the placement of 80-37 in the Negligence chapter, instead of its placement in the chapter on Beverage Law Enforcement as directed by the legislature which enacted 80-37, would in effect allow the Joint Legislative Management Committee, authorized by section 11.242(5)(e) to transfer acts, to alter the substance of a statute. This we refuse to do.

Bankston, 507 So.2d at 1387.

It is certainly the case that the Joint Legislative Management Committee may not alter the substance of a statute. But an

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6/ Trespass on land is one example. Compare Harris v. Baden, 17 So.2d 608 (Fla. 1944), to the willfulness and notice requirements of ss. 810.08 and 810.09, Florida Statutes.

argument can be made that its actions should be taken into account when interpreting a statute, for among the committee's prescribed duties is that of "facilitating [the] correct and proper interpretation" of statutes. Section 11.242(1), Florida Statutes. Given this charge, and given that the committee is composed of legislators, its view of a statute should be given at least as much weight as, if not more than, that accorded to "contemporaneous constructions" by administrative agencies. See e.g., Dept. of Insurance v. Southeast Volusia Hospital District, 438 So.2d 813 (Fla. 1983); U.S. Gypsum Co. v. Green, 110 So.2d 409 (Fla. 1959).

Moreover, the committee does not have the final word. Its work product must be submitted to the full legislature in the form of a reviser's bill, accompanied by notes "showing the changes made therein and the reason for such recommended change." Section 11.242(1), Florida Statutes.

Revisions to the Florida Statutes are adopted by the legislature biennially, in odd-numbered years, by the enactment of a law amending section 11.2421, Florida Statutes. That section adopts and enacts as the "official statute law of the state" the statutes as published in the last prior odd-numbered year, as revised. Thus, revisions to statutes first published in the even-numbered-year supplements, as was the case with section 768.125, are officially adopted three years later.

> For the purpose of the continuous revision program, the supplement volume is not considered an integral part of the Florida Statutes. Consequently, assuming a section appearing in the supplement is not subsequently amended, it will

> be carried forward into the next regular edition of the Florida Statutes as prima facie evidence of the law and will not be adopted as official law until the next succeeding regular session occurring 3 years after the session in which the section was enacted or amended.

Preface, 1980 Supplement to Florida Statutes 1979.

Though the legislature initially placed the subject statute in the Beverage Law Enforcement chapter, in 1983 it affirmatively concurred in the Joint Legislative Management Committee's recommendation that it be placed instead in the Negligence chapter, Ch. 83-61, Laws of Florida, and that placement has been readopted in every odd-numbered year since. We must therefore assume that the legislature is satisfied with the committee's interpretation of the statute, just as it is satisfied with the interpretation announced in Pritchard.

Even if, as Bankston suggested, the statute's eventual placement in the Negligence chapter is of no significance to its interpretation, the foregoing considerations must at least countervail the lower court's effort to find significance in the statute's original location.

It thus appears that the lower court's justifications for reading sections 768.125 and 562.50 in pari materia are illusory. And even to the extent that those justifications might have superficial appeal, they would still be insufficient to overcome the factors that weigh heavily against reading the statutes together.

Not the least of these is the fact that the in pari materia rule is not an inflexible doctrine of substantive law, to be

applied in every case where two statutes touch on the same general subject. Rather, it is an aid to construction, and as such is to be applied only when the legislative intent underlying a statute is not apparent on its face. Coon, supra; Egan, supra. Where, as here, that intent is plainly communicated by the statute's unambiguous language, the courts may not alter the statute by resort to statutory construction devices. "Prior acts may be resorted to to solve, but not to create, ambiguity in [a] statute." Adams v. Fielding, 4 So.2d 678, 683 (Fla. 1941), quoting McCamy v. Payne, 94 Fla. 210, 116 So. 267, 268.

Indeed, the plain language of a statute is the most direct and persuasive evidence of legislative intent. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978). Moreover,

> [e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.

St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1 071, 1073 (Fla. 1982), quoting Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

In sum, when interpreting a statute, a court cannot invoke a limitation or add words not put there by the legislature. Chafee v. Miami Transfer Co., Inc., 288 So.2d 209, 215 (Fla. 1974). The court below did just that when it, in essence, inserted into the provision for liability premised on sale to addicts the requirement that the vendor act unlawfully.

Even in circumstances which would otherwise justify applica-

tion of the in pari materia rule, the courts are admonished not to apply it "when to do so leads to absurd results which are at variance with other indicia of legislative intent." Moore v. State, 343 So.2d 601, 604 (Fla. 1977).

As has been discussed in this brief, every other indicator of the legislative intent behind section 768.125 is at odds with the result reached by the court below. Moreover, while that result is arguably not absurd, it does deprive the habitual addict provision of its purpose. In Sabo, wherein the vendor asserted that its knowledge of the customer's addiction must be proved by direct evidence, the court observed that

> such an interpretation would lead to so restricted an application as to make that portion of section 768.125 dealing with liability for adult customers virtually meaningless.

Sabo, 566 So.2d at 268.

Even the court below, which went even further by interpreting the statute to require prior written notice, acknowledged that its construction thwarted the statute's purpose:

> We realize that the delivery of a written notice to the operator of a habitual drunkard's favorite tavern will place little impediment in the destructive path of the drunkard.

Ellis, 561 So.2d at 1215.

Indeed, the legislature recognized the same thing, and that is why it wrote the statute as it did. The lower court should not have changed it.

Conclusion

For the foregoing reasons, it is clear that liability for serving alcohol to an addict under the exception set forth in

section 768.125 does not have to be predicated on a prior written notice to the vendor. Therefore, the lower court's decision affirming the dismissal of Mrs. Ellis's action must be reversed with directions that her action be reinstated.

Respectfully submitted,

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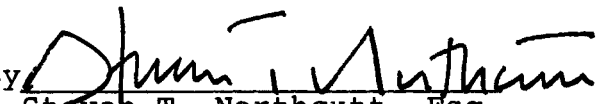
By 

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Certificate of Service

I certify that a true copy of the foregoing was furnished by U.S. Mail to Scott W. Dutton, Esquire, and Frank B. Lieppe, Esquire, 1509 W. Swann Avenue, Suite 210, Tampa, Florida 33606 on December 31, 1990.

Stevan T. Northcutt, Esq.