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 REPLY BRIEF ON THE MERITS

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

Most of the assertions by respondents and amicus curiae Florida Defense Lawyers Association were anticipated and disproved by the arguments set forth in petitioner's initial brief and in the very cogent submission of *amicus curiae* Academy of Florida Trial Lawyers. Petitioner will not burden the Court with a repetition of those arguments, but a few rebuttal observations are in order.

The first has to do with respondents' attempt to overcome the very different histories of the law relating to responsibility for serving alcohol to minors on the one hand, and that addressed to habitual drunkards on the other. Petitioner and the Academy have pointed out that, whereas the legislature enacted section 768.125 against a backdrop of court decisions broadening liability for dispensing alcohol to minors, at that time there had been no such judicial activity regarding service to habitual drunkards.

Respondents counter with the surprising claim that when section 768.125 was passed there had in fact been ***no expansion of liability for serving minors***. If true, this would certainly come as a surprise to the authors of Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984), and Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). "As [the Court] explicitly recognized in Migliore, vendor liability had been ***broadened*** by judicial decisions and that the legislative response that trend was to ***limit***

that liability." Bankston, 507 So.2d at 1386-87 (emphases by the Court).

Migliore's specific references were to Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963), and Prevatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967). Migliore, 448 So.2d 978, 981. Respondents dispute the importance of those cases in this context because "neither of these two decisions expanded liquor liability beyond the purview of Section 562.11." (*Respondents' brief, p. 11*) Of course, respondents' circular reasoning ignores that both cases enlarged the responsibility of a liquor vendor beyond the facially criminal purview of that statute.

Be that as it may, respondents cannot dispute that both of those cases involved service of alcohol to minors. Notwithstanding the 35-year existence of section 562.50, there had not been a single reported decision--civil ***or*** criminal--involving service to a habitual drunkard.

Why? Respondents offer no explanation, perhaps because the reason is apparent on the face of section 562.50. Unlike section 562.11, which protects a wide class of persons with its broad prohibition against serving alcohol to minors, the habitual drunkard statute purports to protect only a narrowly-defined class: the drunkards and their families.

But that alone could not account for the complete absence of any decision applying the statute. Certainly, habitual drunkards are not scarce. To the contrary, they have been fixtures of western civilization from its earliest beginnings. The habitual

drunkard appears in history: "[The Persians] are accustomed to deliberate about the most important matters when they are drunk." (*The Histories of Herodotus*) His condition is bemoaned in the Bible: "The drunkard and the glutton come to poverty: and drowsiness shall clothe a man with rags." (*Proverbs 23:21*) He is mourned in literature: "That shabby corner of God's allotment where He lets the nettles grow, and where all unbaptized infants, notorious drunkards, suicides, and others of the conjecturally damned are laid." (Thomas Hardy, *Tess of the D'Urbervilles*) And he is caricatured in popular culture, *e.g.* Andy Capp of the comic strips, and *The Andy Griffith Show's* Otis Campbell.[1]

Notwithstanding that section 562.50's protected class is quite narrow, one would expect that in the course of three and one-half decades at least one of its members would have staggered into a courthouse.

No, the reason the statute went unused--indeed, virtually unnoticed--in both the civil and criminal arenas was not merely that its protected class was limited. Rather, that section 562.50 remained obscure while the courts expanded liability under section 562.11 must for the most part be attributed to the only other significant difference between the two statutes: the former's onerous written notice requirement.

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[1]Consider also Finley Peter Dunne's *Dissertations by Mr. Dooley* ("The Bar") [1906]: "Ye ra-aly do think dhrink is a nicissry evil?" said Mr. Hennessy. "Well," said Mr. Dooley, "if it's an evil to a man, it's not nicissry, an' if it's nicissry it's an evil."

As this Court pointed out in Migliore and Bankston, when enacting section 768.125 the legislature was presumed to be acquainted with the judicial expansion of liability for serving alcohol to minors. At the same time, it would be unreasonable to presume that the dearth of reported decisions involving service to habitual drunkards escaped the lawmakers' notice.

And if, as this Court has appropriately assumed, the legislators found significance in, and were motivated by, the judicial expansion of civil liability for serving alcohol to minors, it must also be assumed they were impressed by the fact that civil liability for serving addicts had never been judicially ***acknowledged***, let alone expanded. Unlike section 562.11, section 562.50 clearly did not serve the purpose for which it was enacted, *i.e.*, protection of drunkards and their families, nor would its elements serve the broader purpose of the habitual drunkard exception to nonliability written into section 768.125, *i.e.*, protection of the public at large. Just as clearly, the legislature recognized that.

Therefore, when writing exceptions to the rule of nonliability set forth in section 768.125, the legislature deleted any reference to section 562.50. In its place, the lawmakers employed language which (1) expanded the class of persons who could sue for injuries resulting from the sale of alcohol to habitual addicts, to match the class which could bring claims based on service to minors: the drinker and injured third persons; and (2) substituted mere knowledge of the drinker's addiction in the place of written notice as

a precondition to liability.[2]

In Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), the First District recognized that the first change mentioned above manifested a scope and a purpose that were sufficiently different from those of section 562.50 as to preclude nullification of the second change by a reading of the two statutes *in pari materia*.

And, indeed, in her initial brief petitioner pointed out that the *in pari materia* aid to statutory construction is not controlling when its application would lead to a result at odds with the legislative purpose. Moore v. State, 343 So.2d 601, 604 (Fla. 1977). That principle is especially appropriate here; if section 562.50, with its written notice requirement, is ineffective to protect those who are authorized to send the notice because of their familial connection to the drunkard, it would furnish even less protection to third persons who are strangers to the drunkard and have no control over whether notice of his addiction is sent.

Nonetheless, respondents and the Defense Lawyers urge that Pritchard is at odds with Migliore and Armstrong v. Munford, Inc., 451 So.2d 480 (Fla. 1984), which preceded it, and with Bankston and Dowell v. Gracewood Fruit Co., 559 So.2d 217 (Fla. 1990), which came after. But their contention teeters atop some rather disin-

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[2]Since respondents and the Defense Lawyers both urge that the habitual drunkard himself has no cause of action (a contention that will be disproved later in this brief), they certainly must concede that under section 768.125 suit may be brought by injured third persons; otherwise, the statute's habitual drunkard exception to nonliability would have no sphere of operation.

genuous descriptions of those decisions.

For instance, the Defense Lawyers assert that:

> This Court in [Migliore] held that creation of any new cause of action, which did not exist at common law, occurred with the enactment of sections 562.11 ***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 768.125 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 562.11 ***and 562.50.*** Id. at 980.

(*Defense Lawyers' brief at 7*; emphases added)

But Migliore did not ***expressly*** hold any such thing with respect to section ***562.50***; indeed, in that opinion the Court had no occasion to, and did not, mention that statute ***at all***. Rather, the Defense Lawyers ***infer*** that this Court's observations with respect to liability for serving liquor to minors are equally applicable in cases involving service to known drunkards. In their initial briefs, petitioner and the Academy demonstrated why such an inference is not valid: the Migliore decision was in very large part premised on prior judicial expansion of liability, of which there had been much with respect to minors, and none with respect to drunkards.

For their part, respondents contend that in all four of the Supreme Court decisions mentioned above the Court "stated and reiterated over and over again the following theme:

> Section 768.125 does not create a cause of action against ***dispensers of intoxicants***, but rather it constitutes a limita-

tion of commercial vendors of intoxicating beverages." (*Respondents' brief at 10*; emphasis added)

Again, respondents dissemble. In Migliore this Court took issue with the Fourth District's holding that section 768.125 "creates a cause of action for third persons against dispensers of intoxicants for injuries by ***intoxicated minors***[.]" Migliore 448 So.2d at 980 (emphasis added).

In Armstrong the Court reiterated the Migliore holding:

> In our recent decisions of *Migliore* and *Barber*, 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 dispensers of intoxicants for injuries caused by ***intoxicated minors***, it does constitute a limitation on the already existing liability of vendors of intoxicating beverages.

Armstrong, 451 So.2d at 481 (emphases added).

In Bankston, which involved the service of alcohol to a minor, the Court held that section 768.125 did not create "an entirely new and distinct cause of action against a ***social host***, a cause of action previously unrecognized by common law [citation omitted], and which has heretofore been unrecognized by statute or judicial decree." Bankston, 507 So.2d at 1387 (emphasis added).

Dowell reiterated the Bankston holding in the context of habitual drunkards:

> [I]n Bankston, this Court reviewed the circumstances under which section 768.125 had been enacted and held that the statute did not create a cause of action ***against a social host for serving alcoholic beverages to a minor***. In reaffirming our earlier decisions which had held that the statute constituted a limitation on the already existing liability of

vendors for serving alcoholic beverages ***to minors*** we noted that

> [i]t would therefore be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously crate an entirely new and distinct cause of action against ***a social host***, a cause of action previously unrecognized by common law, and which has heretofore been unrecognized by statute or judicial decree.
>
> The polestar of statutory construction is, of course, legislative intent. Although petitioners' argument that the plain language of the statute creates a cause of action against a social host has superficial appeal, we cannot simply ignore our prior decisions of which the legislature is presumably aware.

Dowell, 559 So.2d at 218, quoting Bankston, 507 So.2d at 1387 (emphases added).

Bankston and Dowell involved the question of social host liability, which is as different from the question of vendor liability as service to minors is from service to habitual drunkards--indeed, perhaps more so. When the legislature enacted section 768.125, it was aware that liability for serving minors had been expanded by judicial pronouncements, but that there had been no judicial ***discussion*** of liability for serving known drunkards. As to the latter, there were no precedents one way or the other. In contrast, with respect to the *vendor/social host* dichotomy, the legislature had the benefit of several decisions holding that social hosts could not be held liable. *E.g.*, Bryant v. Pistulka, 366 So.2d 479 (Fla. 1st DCA 1979); United Services Automobile Association v. Butler, 359 So.2d 498 (Fla. 4th DCA 1978).

Therefore, it indeed would have been anomalous for the legislature when enacting a reverse dram shop act to create a new cause

of action against social hosts without explicitly stating its intent to do so. As pointed out in petitioner's initial brief, when the bill giving rise to section 768.125 was under consideration the Senate made an unsuccessful attempt to do just that.[3]

The bottom line is that none of this Court's prior pronouncements regarding section 768.125 announced a broad holding that the statute does not create ***any*** cause of action. Further, each of those decisions addressed a question on which there had been judicial precedents at the time section 768.125 was enacted, and each appropriately interpreted the statute under the presumption that the legislature was aware of those precedents when enacting it.

Finally, and most importantly, none of those decisions involved service to a habitual drunkard by a vendor. And to the very large extent that their interpretations of section 768.125 rested on legislative awareness of pre-1980 judicial precedents, those

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[3] Bryant and Butler turned in large part on the courts' interpretation of the word "person" in section 562.11. The courts held that the term was qualified by other references to "licensed premises" and "licensee" under chapter 562. It is telling, then, that the Senate proposed to impose liability on social hosts by appending to the legislation the following sentence: "It is the intent of the Legislature that this provision applies to any person including, but not limited to, private party hosts as well as licensees under chapter 562." Journal of the Senate 1980 Reg. Sess. p. 271 (May 8, 1980); Journal of the House of Representatives 1980 Reg.Sess. pp. 451-52 (May 14, 1980).

That this amendment was rejected before the bill was finally passed confirms that the legislature intended that only vendors would be liable for injuries caused by service of alcoholic beverages. Moreover, this is the most likely reason why the statute was initially placed in the chapter regulating licensed vendors.

decisions did not control Pritchard and do not control the case *sub judice*.

LIABILITY FOR SERVING ALCOHOL TO A HABITUAL DRUNKARD IS NOT LIMITED TO INJURIES SUFFERED BY THIRD PERSONS.

Respondents and the Defense Lawyers are mistaken in their beliefs that the habitual drunkard himself has no action for injuries suffered as a result of his own intoxication. As detailed in petitioner's initial brief, the language of section 768.125 that defines the scope of a vendor's liability for serving a known drunkard is the same as that setting forth the scope of his liability for serving a minor. In fact, both are described in the same phrase; a vendor who serves alcohol to a minor ***or*** to a known drunkard is liable "for injury or damage caused by or resulting from the intoxication of such minor or person".

We know, from Davis, *supra*, and Prevatt, *supra*, that a vendor who sells to a minor may be held responsible for injuries to the minor as well as those suffered by a third person. It would have been illogical of the legislature to employ the identical language regarding habitual drunkards if it did not intend for the attendant scope of liability to be the same.

Ignoring this, respondents and the Defense Lawyers assert that the drunkard can have no cause of action because the proximate cause of his injuries is his drinking, not the serving. In this respect, their citations to cases involving alcohol are unavailing, for those cases ***at most*** do nothing more than repeat the common law

rule of nonliability for serving alcohol.[4] ***None*** of their cases involved a sale to a known habitual drunkard.

The rationale behind the common law rule is, indeed, that injuries arising from someone's intoxication are proximately caused by his drinking, not by the participation of his server. Davis v. Shiappacossee, 145 So.2d 758, 760 (Fla. 2d DCA 1962), citing 30 Am.Jur. Intoxicating Liquors s.520.

But the rule is reversed where the legislature has acted to protect a particular class of imbibers. Thus, in a case involving a sale of alcohol to a minor, the Second District said:

> Here, the statute forbidding the sale of liquor to minors was violated, and constitutes negligence per se; the statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibing such liquors. The very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making.
>
> ***The proximate cause of the injury is the sale rather than the consumption.***

Prevatt, 201 So.2d at 781 (emphasis added). This Court expressly approved that reasoning in Migliore, 448 So.2d at 979-980.

In Barnes v. B.K. Credit Service, Inc., 461 So.2d 219 (Fla.

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[4]Though Bennett v. Godfather's Pizza, 570 So.2d 1351 (Fla. 3d DCA 1990), Goodell v. Nemeth, 501 So.2d 36 (Fla. 2d DCA 1986), and Reed v. Black Caesar's Forge Gourmet Restaurant, Inc., 165 So.2d 787 (Fla. 3d DCA 1964), all state the common law rule that the proximate cause of a drinker's injury is the drinking, not the serving, it is only arguable that the other cases cited by respondents and the Defense Lawyers turned on that point. Checker Cab Operators v. Castleberry, 68 So.2d 353 (Fla. 1953), simply applied the principle that a common carrier owes no greater duty to its passenger simply because he is intoxicated. Though the plaintiff in Clyde Bar v. McClamma, 10 So.2d 916 (Fla. 1942), had been drinking, that case appeared to be decided as a simple slip and fall case.

1st DCA 1984), the court considered a challenge to the constitutional validity of section 768.125 on the ground that it unreasonably discriminated between adult and minor drinkers.

> As noted earlier, Florida has traditionally adhered to the common law rule of non-liability. Again, the logic behind the rule is that the proximate cause of the injury was the intoxicated patron's voluntary act of rendering himself or herself incapable of driving a vehicle. The tavern owner's act of furnishing the alcohol was considered only to be a remote cause of the injury. ***However, when the legislature carved out an exception to this rule in favor of minors (and those known to be habitually addicted to alcohol) by enacting section 768.125, it was doubtless furthering the ultimate legitimate interest of safeguarding from harm one of immaturity imbibing intoxicants.*** [*Davis*] The basis of the distinction was recognized by the supreme court in [*Migliore*] when it observed that "[p]roviding alcoholic beverages to minors involves the obvious foreseeable risk of the minor's intoxication and injury to himself or a third person." *Id.*, at 980. Whether it would have been wiser for the legislature to also include under its protection obviously intoxicated adults is not an issue that we may resolve.

Barnes, 461 So.2d at 219-20; (emphasis added).

Indeed, here the legislated exception to the common law rule is rather explicit *vis-a-vis* proximate causation. Section 768.125 provides that one who knowingly serves an addict may be liable "for injury or damage ***caused by or resulting from the intoxication***" of the addict. (Emphasis added.)

The other cases cited by respondents and the Defense Lawyers on this point are inapposite. Since they did not involve alcohol they had no occasion to apply the common law rule of proximate causation, ***nor*** did they have occasion to interpret the statutory exception to the rule.

Respondents do not explain why they cite Landers v. Milton, 370 So.2d 368 (Fla. 1979). The relevance of that decision, which

involved the burden that must be met by a movant for summary judgment, is not apparent.

Likewise, Green v. Evans, 232 So.2d 424 (Fla. 1st DCA 1970), has no application to this case at all. In that case a minor accidently shot another minor. The latter sued, and attempted to hold the former responsible under a statute which made it a crime to sell, give, or lend a firearm to someone under the age of 18. The court held that, though the statute afforded a basis for holding the *person who furnishes the weapon* civilly responsible for the consequences, it did not impose liability on the minor himself.[5]

Finally, even in the context in which Strickland v. Roberts, 382 So.2d 1338 (Fla. 5th DCA 1980), was decided (violation of then-section 371.54 regarding operation of water ski tow boats[6]), it did not announce a rule of law on proximate causation. Rather, it ruled, since in that case the boat operator was observing the skier when he was injured, the failure to have the mandatory separate observer aboard could not have caused the accident. Moreover, at

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[5]In regard to the first proposition the court cited Tamiami Gun Shop v. Klein, 116 So.2d 421 (Fla. 1959). Notably, that is the case this Court relied upon when holding that section 562.11 furnished a basis for holding a vendor liable for injuries suffered by the intoxicated minor, himself. Davis, 155 So.2d at 367.

[6]Subsection (1) of the statute required a boat towing a skier to have aboard an observer other than the boat operator. Subsection (4) forbade operating the boat "in such a way as to cause the water skis . . . or any person thereon to collide or strike against any object . . . [.]" Since Strickland was decided, the statute has been renumbered as section 327.37.

the location where the accident occurred, the boat operator was travelling in a straight direction. The skier, employing a slalom ski which permitted him to control his position and direction independent of the boat, propelled himself into a dock piling. Thus, the court said, there was no evidence that the boat driver operated the craft in a manner that caused the skier to collide with the piling.

Strickland, which found no proximate cause on the basis of the facts present in that case, simply does not support the effort of respondents and the Defense Lawyers to have this Court rule that a habitual drunkard's injuries while intoxicated are, as a matter of law, his own fault. Certainly this Court is not free to second-guess the legislature's determination that the blame should rest with the person who sells to an addict with knowledge of his affliction.

Yet that is precisely what respondents and the Defense Lawyers ask this Court to do. The common law rule of proximate causation would preclude not only an action by the drunkard, but actions by injured third persons, as well. *E.g.*, Bennett v. Godfather's Pizza, 570 So.2d 1351 (Fla. 3d DCA 1991). It can be seen, then, that respondents' argument would render that portion of section 768.125 regarding habitual drunkards to be wholly useless.

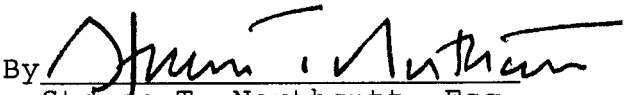
Conclusion

For the reasons set forth above and in the initial briefs of petitioner and the Academy, it is clear that liability for serving

alcohol to a known habitual drunkard does not have to be predicated on a prior written notice to the vendor, nor is that liability limited to injuries suffered by third persons. Therefore, the lower court's decision affirming the dismissal of petitioner's action must be reversed.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

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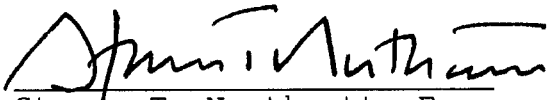

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