IN THE SUPREME COURT OF FLORIDA

CASE NO. 93-00928

TERJE PERSEN and ELIZABETH DRYHURST, as personal representative of the Estate of METTE VALLAND,

Petitioners,

84 368

vs.

THE SOUTHLAND CORPORATION, a Texas corporation; PHIL AND EDDIE'S, INC., a Florida corporation; CAROL BRAY ENTERPRISES, a Florida corporation, and DONALD PRELOH, an individual,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONERS

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-and-
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I
STATEMENT OF THE CASE AND FACTS

This case is before the Court on certification from the District Court of Appeal, Fourth District, of the following question of great public importance:

> Does section 768.125, Florida Statutes, which imposes liability on one who "knowingly serves" a habitual drunkard, apply to a retail seller who sells to an adult closed container alcoholic beverages for consumption off premises?

Section 768.125, Fla. Stat. (1993) provides as follows:

> **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 a 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.

The relevant facts are stated in the district court's opinion. The plaintiffs alleged in their complaint that on September 2, 1990, Donald Preloh, who after consuming eleven beers and two mixed drinks was "noticeably drunk and intoxicated," went to the 7-11 store owned by respondent Southland, and purchased a twelve-pack of beer which he took in closed cans from the store. The plaintiffs alleged that Southland knew Mr. Preloh to be an alcoholic--indeed, Mr. Preloh himself admitted that he is an alcoholic, and that on one prior occasion he had driven his car through the 7-11 store in a drunken condition--and thus that Southland had violated § 768.125 when it served Mr. Preloh by selling him the twelve-pack of beer. However, the trial court granted summary judgment to Southland on the ground that § 768.125, by using the word "serves," proscribes only the sale of alcoholic beverages to alcoholics in open containers for consumption on the premises, but not the sale of such beverages to alcoholics in closed containers, presumably for consumption off the premises.

The district court agreed with that construction of the statute, and affirmed. The district court offered two reasons for its holding. First, in reliance upon several decisions of this Court stating that § 768.125 was promulgated (in 1980) to codify pre-existing common-law causes of action concerning the furnishing of alcoholic beverages to minors and to alcoholics, but not to create any new causes of action which had not previously existed at common law, the district court--on the apparent assumption that the plaintiffs in the instant case would not have had a cause of action in Florida before the enactment of § 768.125--held that the statute could not be construed to create one: "Applying the same logic at bar, we agree with appellee that this statute should not be judicially expanded to ***create*** a cause of action against retail vendors who sell closed containers of alcohol to an adult with the understanding it will not be opened nor consumed on the vendors' premises" (emphasis added). In reliance upon the prior decisions holding that § 768.125 did not create any new causes of action, the district court's primary holding rests upon the (incorrect) assumption that the plaintiffs in the instant case would not have had a cause of action against Southland at common law.

Second, the district court also announced an alternative holding--that even if such a cause of action had existed at common law, it was unambiguously abrogated by § 768.125. As the district court put it:

> Additionally, section 768.125 contains a clear distinction between one who "sells or furnishes" alcoholic beverages to a minor and one who "knowingly serves" a habitual drunkard. From the plain language of the statute, it is apparent that the legislature was specific in its choice of language when it used the term "sells or furnishes" in the minor exception. However, such language is conspicuously absent in the habitual drunkard exception; the legislature instead choosing to use "knowingly serves." The plain language of the statute requires that the habitual drunkard be "served," and we agree with appellee that the only definition of "serve" that is meaningful in this context is "to place food or beverage before."

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Notwithstanding its two alternative holdings, the district court certified to this Court the question of whether § 768.125 applies "to a retail seller who sells to an adult closed container alcoholic beverages for consumption off premises." In an order dated September 19, 1994, this Court postponed its consideration of jurisdiction pending briefing on the merits.

II
ISSUE ON REVIEW

WHETHER § 768.125, FLA. STAT., WHICH IMPOSES LIABILITY ON ONE WHO "KNOWINGLY SERVES" AN HABITUAL DRUNKARD, APPLIES TO A RETAIL SELLER WHO SELLS TO AN ADULT CLOSED CONTAINER ALCOHOLIC BEVERAGES FOR CONSUMPTION OFF PREMISES.

III
SUMMARY OF THE ARGUMENT

The plaintiffs' position is straightforward. Before the enactment of § 768.125, Fla. Stat. in 1980, Florida's common law unquestionably recognized a cause of action predicated upon the unlawful sale of liquor to an alcoholic in a closed container, for consumption off the premises. That conclusion derives from a line of cases, beginning with this Court's 1963 decision in *Davis v. Shippacossee,* 155 So. 2d 365 (Fla. 1963), recognizing a common-law cause of action based upon violation of Florida's criminal statute concerning the provision of alcoholic beverages to minors and to habitual drunkards. At all relevant times, that statute, now § 562.50, Fla. Stat. (1993), has imposed criminal liability on anyone who "shall sell, give away, dispose of, exchange, or barter any alcoholic beverage . . . to any person habitually addicted to the use of any or all such intoxicating liquors . . . ." The criminal statute explicitly and without qualification forbids the sale or provision of an alcoholic beverage to an habitual drunkard, whether the sale is in an open or closed container, and whether the sale is for consumption on or off the premises. Before the enactment of § 768.125, Florida's common law recognized a civil cause of action for negligence, predicated upon a violation of that criminal statute. Without

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question, therefore, before the enactment of § 768.125, the plaintiffs in the instant case would have had a common-law cause of action against Southland, for knowingly selling liquor to a known habitual drunkard.

The dispositive question, then, is whether § 768.125 explicitly and unambiguously abrogated that pre-existing common-law cause of action. Only such explicit and unambiguous abrogation would suffice to abolish such a pre-existing cause of action, in light of the well-settled principle in Florida that any statute which purports to limit a pre-existing common-law rule must be narrowly construed, and any ambiguity in such a statute must be resolved in favor of the broadest possible retention of the pre-existing common-law rule. Section 768.125 retains a civil cause of action against one who "knowingly serves a person habitually addicted to the use of any or all alcoholic beverages . . . ." The plaintiffs' right of action can fail in this case only if the word "serves" plainly and unambiguously abolishes their pre-existing rights at common law.

As we will demonstrate, the word "serve" is easily broad enough to encompass the plaintiffs' cause of action. One dictionary offers a number of definitions which would cover sale in a closed container; one of them defines "serve" as "to wait on (a customer) in a store." *See infra* p. 10. Another dictionary also contains several applicable definitions, including "[t]o provide goods and services for." *See infra* p. 10. Indeed, even a Florida Statute has used the word "serve" in connection with the provision of alcoholic beverages by a retail establishment. *See infra* p. 10. Without question, the word "serve" is sufficiently ambiguous to encompass the facts of the instant case, and thus the statute must be construed to preserve the plaintiffs' pre-existing common-law cause of action.

In this context, the district court unquestionably erred in upholding Southland's summary judgment. The district court's primary holding--that the plaintiffs' cause of action did not exist at common law--is simply and flatly wrong. And the district court's secondary holding--that

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even if such a cause of action existed at common law, § 768.125 unambiguously abolished it--is likewise wrong. The plaintiffs' cause of action existed at common law, and that cause of action was not unambiguously abrogated by the statute. Therefore, the trial court erred in entering judgment for Southland, and that judgment must be reversed.

IV
ARGUMENT

SECTION 768.125, FLA. STAT., IMPOSING LIABILITY ON ONE WHO "KNOWINGLY SERVES" A HABITUAL DRUNKARD, DOES APPLY TO A RETAIL SELLER WHO SELLS TO AN ADULT CLOSED CONTAINER ALCOHOLIC BEVERAGES FOR CONSUMPTION OFF PREMISES.

A. Before the Enactment of § 768.125, Fla. Stat., Florida's Common Law Did Recognize a Cause of Action for the Knowing Sale of Alcohol in Closed Containers to an Habitual Drunkard for Consumption off Premises. Therefore, the District Court's First Rationale for Decision was Incorrect.

The district court's primary rationale was that § 768.125 was promulgated to limit the pre-existing common-law rule regarding civil liquor liability, but not to create a cause of action which had not existed at common law. The district court concluded that before the enactment of § 768.125, Florida's common law did not recognize a cause of action for the knowing sale of alcoholic beverages, in a closed container, to an habitual drunkard for consumption off the premises. Therefore, the district court concluded, § 768.125 should not be construed to have created such a cause of action. As the district court put it: "[T]his statute should not be judicially expanded to ***create*** a cause of action against retail vendors who sell closed containers of alcohol to an adult with the understanding it will not be opened nor consumed on the vendors' premises" (emphasis added).

The rule of law enforced in the district court's primary holding is correct. This Court and the district courts have declared repeatedly that § 768.125 was promulgated to preserve in

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limited form the pre-existing common-law causes of action which had been recognized in this area, but not to create any new causes of action which did not exist at common law. The primary decision to that effect is *Bankston v. Brennan,* 507 So. 2d 1385 (Fla. 1987), holding that because no common-law cause of action existed for the service of liquor by a social host, § 768.125 cannot be construed to have created such a cause of action. As the Court put it, 507 So. 2d at 1386-87 (emphasis in original):

> As we explicitly recognized in *Migliore* [*v. Crown Liquors of Broward, Inc.,* 448 So. 2d 978 (Fla. 1984)], vendor liability has been *broadened* by judicial decisions and that the legislative response to that trend was to *limit* that liability. It would therefore be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law, *see Davis v. Shiappacossee,* 155 So. 2d 365 (Fla. 1963), and which has theretofore been unrecognized by statute or judicial decree.

Similar pronouncements are found in the Florida decisions both before and after *Bankston. See, e.g., Ellis v. N.G.N. of Tampa,* 586 So. 2d 1042, 1046-47 (Fla. 1991); *Dowell v. Gracewood Fruit Co.,* 559 So. 2d 217 (Fla. 1990); *Armstrong v. Munford, Inc.,* 451 So. 2d 480, 481 (Fla. 1984); *Migliore v. Crown Liquors of Broward County,* 448 So. 2d 978, 980 (Fla. 1984); *Lonestar Florida, Inc. v. Cooper,* 408 So. 2d 758, 759 (Fla. 4th DCA 1982); *Reed v. Black Caesar's Forge Gourmet Restaurant,* 165 So. 2d 787, 788 (Fla. 3d DCA 1964), *cert. denied,,* 172 So. 2d 597 (Fla. 1965).

In light of these holdings, the key to the district court's primary rationale for decision is its conclusion that Florida's common law did not recognize a cause of action for the knowing sale of alcohol in a closed container to an habitual drunkard for consumption off the premises. As we will demonstrate, that holding is simply and flatly incorrect.

The best summary of the evolution of Florida's common-law cause of action, before the enactment of § 768.125, is found in *Ellis v. N.G.N. of Tampa,* 586 So. 2d 1042, 1044-45 (Fla.

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1991). Florida has never had a Dram Shop Act, creating general civil liability for the sale of alcoholic beverages,[1/] and prior to 1963, Florida's common law did not initially recognize such a cause of action in any context. *See Ellis v. N.G.N. of Tampa,* 586 So. 2d at 1044; *Lonestar of Florida, Inc. v. Cooper,* 408 So. 2d at 759. However, since 1913 Florida's criminal law has forbidden the sale or provision of alcoholic beverages to a minor or an habitual drunkard[2/]; and in 1963, the Florida Supreme Court followed New Jersey[3/] in holding that a violation of Florida's criminal statute constituted negligence per se at common law. *Davis v. Shippacossee,* 155 So. 2d 365, 367-68 (Fla. 1963). *Accord, Burson v. Gate Petroleum Co.,* 401 So. 2d 922 (Fla. 2d DCA 1981); *Prevatt v. McClennan,* 201 So. 2d 780, 781 (Fla. 2d DCA 1967). These decisions rejected the prior notion that the drunk alone was the proximate cause of a third party's injury in such cases, holding that the provider of alcohol was also a cause to the extent that injury by the drunk to a third party was foreseeable. *See Ellis v. N.G.N. of Tampa,* 586 So. 2d at 1044-45; *Bankston v. Brennan,* 507 So. 2d at 1386; *Forlaw v. Fitzer,* 456 So. 2d 432, 433 (Fla. 1984); *Armstrong v. Munford, Inc.,* 451 So. 2d 480 (Fla. 1984); *Migliore v. Crown Liquors of Broward County,* 448 So. 2d at 979-80.

The criminal statute in effect at the time of *Davis* provided in relevant part as follows:

> 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

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[1/] *See Davis v. Shiappacossee,* 155 So. 2d 365, 367 (Fla. 1963); *Lonestar of Florida, Inc. v. Cooper,* 408 So. 2d 758, 759 (Fla. 4th DCA 1982); *Reed v. Black Caeser's Forge Gourmet Restaurant,* 165 So. 2d 787, 788 (Fla. 3d DCA 1964).

[2/] *See ex parte Lewinsky,* 66 Fla. 324, 63 So. 577 (1913) (upholding the 1913 criminal statute).

[3/] *See Rappaport v. Nichols,* 31 N.J. 188, 156 A. 2d 1, 8-9 (1959). *See also Waynick v. Chicago's Last Department Store,* 269 F. 2d 322, 325-26 (7th Cir. 1959) (Mich. law), *cert. denied,* 362 U.S. 903, 80 S. Ct. 611, 4 L. Ed. 2d 554 (1960); *Elder v. Fisher,* 247 Ind. 598, 217 N.E. 2d 847 (1966); *Adamian v. Three Sons, Inc.,* 233 N.E. 2d 18, 19-20 (Mass. 1968); *Walz v. City of Hudson,* 327 N.W. 2d 120, 122 (S. Dak. 1982).

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> 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 . . . .

Section 562.50, Fla. Stat. (1963). The criminal statute has contained virtually identical language ever since. *See, e.g., Lonestar of Florida, Inc. v. Cooper,* 408 So. 2d 758, 759 (Fla. 4th DCA 1982) (the 1979 statute "prohibited the sale of alcohol or other intoxicants to minors or habitual drunkards after notice"); § 562.50, Fla. Stat. (1993) ("sell, give away, dispose of, exchange, or barter . . . to any person habitually addicted . . ."). [4/]

Notwithstanding the absence of any Florida decisions on point, there can be no question that before the enactment of § 768.125, Fla. Stat., Florida's common law recognized a cause of action, in proper cases, predicated upon the unlawful sale of an alcoholic beverage to an habitual drunkard, even if the sale was in a closed container, and consumption was intended to be off the premises. This point is simply not debatable. The criminal statute proscribes, and has always proscribed, not just selling, but giving away, disposing, exchanging, or bartering "any" alcoholic beverage to an habitual drunkard. The statute says nothing about open containers or closed containers--nothing about consumption on the premises or off the premises. Unquestionably, the statute makes it a criminal offense, upon proof of proper scienter, to sell alcohol in a closed container to an habitual drunkard, for consumption off the premises. Under the common-law decisions, before the adoption of § 768.125, *any* violation of the criminal

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[4/] The provision of written notice to the nearest relative, which is a condition of the criminal statute, is not a condition of civil liability. *Ellis v. N.G.N. of Tampa,* 586 So. 2d 1042, 1048 (Fla. 1991).

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statute constituted negligence per se. Thus, before the adoption of § 768.125, Florida recognized a cause of action for the sale of liquor in a closed container to an alcoholic.[5/]

The district court's first rationale for decision, therefore, is simply and flatly incorrect. The district court's holding cannot be defended on the ground that the instant plaintiffs did not have a cause of action at common law.

B. Section 768.125 Does Not Unambiguously Abolish the Pre-Existing Common-Law Cause of Action for the Sale of a Closed Container of Alcohol to an Habitual Drunkard for Consumption off the Premises; the Statute Therefore Must be Construed to Preserve that Pre-Existing Cause of Action.

The district court's second, alternative rationale for its decision was that even if the plaintiffs' cause of action existed at common law, the action was unambiguously abolished by § 768.125. The district court noted that the statute retains liability against one who "sells or furnishes" alcoholic beverages to a minor, but preserves liability regarding alcoholics only in one who "knowingly serves" such an alcoholic. Based upon that "clear distinction"--that is, that the "sells or furnishes" language applies only to minors, but "is conspicuously absent in the habitual drunkard exception"--the district court found no ambiguity: "The plain language of the statute requires that the habitual drunkard be 'served,' and we agree with appellee that the only definition of 'serve' that is meaningful in this context is 'to place food or beverage before.'" The district court offered no suggestion as to why the legislature would have made such a distinction--why it should remain actionable when a bar sells a drink to an apparent habitual

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[5/] We have discovered three non-Florida common-law decisions on the specific point in question. All have recognized such a cause of action. *See Picadilly, Inc. v. Colvin,* 519 N.E. 2d 1217, 1219-20 (Ind. 1988) (sale of closed containers in a supermarket-style check-out adjacent to a bar; violation of criminal statute evidence of negligence); *Walz v. City of Hudson,* 327 N.W. 2d 120, 122 (S. Dakota 1982) (sale by retail store violated criminal statute; common-law liability); *Mitchell v. Ketner,* 393 S.W. 2d 755, 756-59 (Tenn. 1964) (sale by tavern of two closed-container cases for consumption off the premises, and later another unspecified amount in closed containers; common-law cause of action recognized, but defendant was entitled to judgment because the purchaser was not visibly drunk).

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drunkard, but not when a liquor store sells the same obvious habitual drunkard a closed container of alcohol.

1. At the Least, the Statute is Ambiguous. The district court erred, as a matter of law, in holding that § 768.125 unambiguously abolishes the pre-existing common-law cause of action against a package store for serving its patrons by selling them closed containers of alcohol for consumption off the premises. The statute does use the word "serve," but that word has a variety of definitions, many of which cover the instant case. For example, the definitions provided in *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster 1985) include the following: "to be a servant"; "to be of use"; "to be favorable, opportune, or convenient"; to "discharge a duty or function"; "to prove adequate or satisfactory"; "to help persons to food"; "to wait on customers"; "to be a servant to"; "to comply with the commands or demands of"; "to furnish or supply with something needed or desired"; "to wait on (a customer) in a store"; "to furnish professional service to"; and "to provide services that benefit or help." Obviously, one of these dictionary definitions explicitly covers the instant case--"to wait on (a customer) in a store." And a number of the others are easily sufficient to cover the service provided by a package store when it sells packages to its customers.

Similar definitions are found in the *American Heritage Dictionary* (Sixth Ed. 1983), including "[t]o work for; be a servant to"; "[t]o act in a particular capacity"; "[t]o place food before"; "[t]o provide goods and services for"; "[t]o be of assistance to"; and "[t]o meet a need." Obviously the fourth definition--"[t]o provide goods and services for"--explicitly fits the instant case, and several of the others do as well.

Moreover, the Florida Legislature itself has used the word "serve" in this context. Section 562.51, Fla. Stat. (1993), deals with the rights of retail alcoholic beverage establishments to refuse service to certain patrons; and of course such retail establishments include both sellers of liquor in open containers (bars) and sellers in closed containers (liquor

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stores).[6] Section 562.51 provides: "A licensed retail alcoholic beverage establishment open to the public is a private enterprise and may refuse service to any person who is objectionable or undesirable to the licensee, but such refusal of service shall not be on the basis of race, creed, color, religion, sex, national origin, marital status, or physical handicap." With respect to ***all*** retail alcoholic beverage establishments, the Florida Statute twice utilizes the word "service." The legislature itself has recognized that a liquor store, providing a closed container of alcohol to its patrons, is "serving" those patrons no less than a bar.

Finally, although the district court is correct that no Florida court has ever ruled on the specific point at issue, we should note that at least three appellate decisions, at least in *dicta,* have characterized the statute consistent with the plaintiffs' position. For example, in *Ellis v. N.G.N. of Tampa, Inc.,* 586 So. 2d 1042, 1043 (Fla. 1991), this Court held that circumstantial evidence may be utilized to show the defendant bar's knowledge that it was serving an habitual drunkard, and therefore that "a cause of action exists under the circumstances for a vendor's sale of alcoholic beverages to a person habitually addicted to alcohol."[7] Admittedly, as the district court noted, *Ellis* concerned a bar and not a package store. The point, however, is that the Court characterized the statute to govern "a vendor's sale of alcoholic beverages" to an habitual drunkard. Similarly, in *Decker v. National Financial Realty Trust,* 589 So. 2d 1045 (Fla. 4th DCA 1991), the plaintiff was held to have stated a cause of action in asserting that the defendant had "sold or furnished" alcohol to an habitual drunkard. And in *Roberts v. Roman,* 457 So. 2d 578, 579 (Fla. 2d DCA 1984), the court noted in *dictum* that the statute imposes liability upon

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[6] The Florida Statutes define a retail seller as one who sells primarily to retail buyers; and a retail buyer as one who purchases for his own use, and "not principally for the purpose of resale." § 520.31(9), (12), Fla. Stat. (1993). The dictionary definition of "retail" is "the sale of commodities or goods in small quantities to ultimate consumers." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster 1985).

[7] *See also id.* at 1048 (the statute requires proof that "the vendor had knowledge that the individual the vendor served was a habitual drunkard").

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one who "knowingly sells" to an habitual drunkard. These cases, of course, are not controlling of the instant question; but they certainly offer guidance on the issue of ambiguity. At least three Florida courts, including this one, have read the word "serves" in the statute to encompass a vendor's sale of alcohol. That strongly indicates that the word is not clear and unambiguous, as the district court held, but at the least is ambiguous.

In light of the foregoing, it is inconceivable that the district court could have properly found the word "serves" to be unambiguous--that is, to clearly and unquestionably refer only to the provision of alcoholic beverages in open containers for consumption on the premises. In light of the foregoing, the word "serve" at the least is ambiguous, embracing numerous definitions which easily encompass the sale of liquor by retail establishments.

2. *The Ambiguity Must be Resolved in Favor of the Plaintiffs.* As the district court implicitly recognized, its secondary holding in Southland's favor depended upon its conclusion that § 768.125 is not ambiguous. It is axiomatic that any statute which purports to limit a pre-existing common-law rule must be narrowly construed, and any ambiguity in such a statute must be resolved in favor of the broadest possible retention of the pre-existing common-law rule.[8/] Indeed, the Florida courts have applied that rule in interpreting § 768.125 in other contexts, holding, for example, that the word "knowingly" in the statute is sufficiently ambiguous to encompass both constructive knowledge and actual knowledge, thus permitting the plaintiff to prove such knowledge by circumstantial evidence.[9/]

[8/] *See generally Nell v. State,* 277 So. 2d 1 (Fla. 1973); *Southern Attractions, Inc. v. Grau,* 93 So. 2d 120 (Fla. 1957); *Collingsworth v. O'Connell,* 508 So. 2d 744 (Fla. 1st DCA 1987); *Graham v. Edwards,* 472 So. 2d 803 (Fla. 3d DCA 1985), *review denied,* 482 So. 2d 348 (Fla. 1986).

[9/] *See Peoples Restaurant v. Sabo,* 591 So. 2d 907 (Fla. 1991); *Ellis v. N.G.N. of Tampa,* 586 So. 2d at 1048-49; *Roster v. Moulton,* 602 So. 2d 975 (Fla. 4th DCA), *review denied,* 613 So. 2d 5 (Fla. 1992). *See also O'Neale v. Hershoff,* 634 So. 2d 644, 646 (Fla. 3d DCA 1993) (§ 768.125 creates a cause of action in a minor who is given liquor by the purchaser, if the seller had reason to know the purchaser would furnish to a minor); *Dixon v. Saunders,* 565 So.

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As we have established, before the enactment of § 768.125, Florida law unquestionably recognized a common-law action, based upon a violation of the criminal statute, for the negligent sale of liquor in closed containers to an habitual drunkard, for consumption off the premises. Given the language of the criminal statute, that point simply is not debatable. Therefore, defendant Southland's position here, and the district court's secondary holding, necessarily rebuff the plaintiffs notwithstanding that § 768.125 abrogated a pre-existing common-law right of action. The argument must fail in the recognition that at the least, § 768.125 is ambiguous, and that any ambiguity must be construed in favor of the broadest possible retention of the plaintiffs' pre-existing common-law rights. As we have demonstrated, a reasonable construction of the statute readily encompasses the plaintiffs' position. Given the statute's ambiguity, that construction must be adopted, as a matter of law.[10/]

2d 802, 803 (Fla. 2d DCA 1990) (same). The courts outside of Florida similarly have adopted expansive definitions of such statutes. *See, e.g., Amusement Club, Inc. v. Government of Guam,* 156 F. Supp. 443, 445 (D. Guam 1957) ("Courts will refuse to countenance any trick of subterfuge intended to evade the law against the illegal sale of intoxicating liquor"; licensing requirement applicable even if the patron brings the liquor into the establishment); *Boggs v. Commonwealth,* 189 S.W. 21 (Ky. 1916) ("lending" of liquor constitutes a sale); *State ex rel. Harvey v. Missouri Athletic Club,* 170 S.W. 904 (Mo. 1914) (barter of liquor reasonably encompassed by statute); *Kinnane v. State,* 178 S.W. 439 (Tenn. 1915) (vessel could not escape legal requirement by selling liquor after the boat had docked).

[10/] Moreover, even if we resorted to other rules of statutory construction, the plaintiffs' position undoubtedly should prevail. As we have noted, the district court offered no reason why the legislature would distinguish in this context between the sale of liquor in open containers for consumption on the premises, and the sale of liquor in closed containers for consumption off the premises. Either way, the knowing sale of liquor to an habitual drunkard embraces the same obvious risks to the public. It makes no sense at all that the legislature would have attempted to distinguish between the two situations. *See, e.g., Prevatt v. McClennan,* 201 So. 2d 780, 781 (Fla. 2d DCA 1967) (in recognizing a cause of action for violating the criminal statute, the court notes that it is the foreseeable consumption of the liquor which is a proximate cause of the injury--not the sale itself); *Adamian v. Three Sons, Inc.,* 233 N.E. 2d 18, 19-20 (Mass. 1968) (purpose of statute is to protect public, whether the injury is on or off the premises); *Mitchell v. Ketner,* 393 S.W. 2d 755 (Tenn. 1964) (violation where consumption was off the premises).

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V
CONCLUSION

It is respectfully submitted that the order of the district court should be reversed, and the cause remanded with instructions that the circuit court's judgment be reversed, and the cause remanded to the circuit court for further proceedings.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of October, 1994, to: SHELLY H. LEINICKE, ESQ., Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Lane, P.A., One E. Broward Blvd., Fifth Floor, Barnett Bank Plaza, Ft. Lauderdale, Florida 33301; SERIL GROSSFELD, ESQ., 408 S. Andrews Ave., Suite 101, Ft. Lauderdale, Florida 33301; and to CHRIS MANCINO, ESQ., 1215 S.E. 2d Ave., Suite 102, Ft. Lauderdale, Florida 33316.

Respectfully submitted,

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-and-

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By: 
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