A31253/159351/SHL:fl

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93-00928 84,368

TERJE PERSEN and ELIZABETH DRYHURST, as Personal Representative of the Estate of METTE VALLAND,

Petitioner,

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 OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT, THE SOUTHLAND CORPORATION, a Texas corporation

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STATEMENT OF THE CASE AND FACTS*

The following question has been certified by the District Court of Appeal, Fourth District as a question of great public importance:

> Does § 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?

Persen was injured in automobile accident as a result of the negligence of a drunk driver, Preloh. The complaint alleged that Preloh was intoxicated as a result of consuming alcoholic beverages at Phil & Eddy's Bar and at the Blue Jay Lounge owned by Carol Bray Enterprises.[1] Preloh then went to a 7-11 store owned and operated by Southland, purchased a twelve pack of Budweiser, then left the premises. The auto accident occurred some time thereafter. Persen sued Preloh for negligent operation of his motor vehicle and alleged that Preloh was a habitual drunkard.[2] The auto accident occurred some time thereafter. Persen sued Preloh for negligent operation of his motor vehicle and alleged that Preloh was a

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*All emphasis is added unless noted to appear in the original.

[1]The District Court's opinion incorrectly references "trial testimony" in Footnote 1, although the case against Southland was resolved on a motion to dismiss the complaint and without trial.

[2]There are no deposition transcripts in the record and, hence, there is no record support for Persen's assertions that Preloh has admitted that he is an alcoholic or that on one prior occasion Preloh "had driven his car through" the 7-11 store while under the influence.

habitual drunkard. Persen also joined the Southland, as well as the owners of the two bars who served alcohol to Preloh.

Southland moved to dismiss the complaint on the grounds that it was not liable under § 768.125 because this statute creates liability for service of alcoholic beverages to adult habitual drunkards by taverns or bars and does not create liability for any sale to an adult by a retail store. The trial court accepted Southland's argument that because 7-11 is not a bar or a tavern, and there is no allegation or evidence that Preloh is a minor, there could be no liability for the sale for off-premises consumption. The trial court ruled that the complaint did not state a cause of action against Southland, granted the motion to dismiss and entered a final judgment dismissing only the claims made against Southland. Persen's lawsuit against the other three defendants was not disturbed by this ruling and was allowed to proceed.

On appeal, the Fourth District affirmed the trial court's ruling. The District Court agreed that the plain language of § 768.125[3] makes precise

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[3] § 768.125, Fla. Stat. provides :

> **Liability for Injury or Damages 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.

distinctions between not only minor and habitual drunkards, but also separates the activities that will lead to liability. The appellate court stated that the statute carefully establishes liability only against one who "willfully sells or furnishes" alcohol to a minor or who "knowingly serves" a habitual drunkard. The court said that this distinction precludes liability for sale of a closed container to an adult for off-premises consumption because this activity does not constitute "service" of alcoholic beverages.

The Fourth District also explained that "thus far no Florida court has ever ruled that § 768.125 is applicable to the sale to an adult of packaged alcoholic beverages intended for consumption off the premises." The court acknowledged that the legislative intent was to limit liability for vendors of alcoholic beverages and allowed only two exceptions, "neither of which apply to 7-11 in this instance," in which liability attaches.

Despite the two announced bases for holding that no cause of action was stated against Southland, 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."

ISSUE

WHETHER THE RETAIL SALE TO AN ADULT OF A CLOSED CONTAINER OF ALCOHOLIC BEVERAGE FOR OFF-PREMISES CONSUMPTION FALLS OUTSIDE THE HABITUAL DRUNKARD EXCEPTION TO FLORIDA STATUTE § 768.125, WHICH PROHIBITS ONLY SERVICE OF ALCOHOL.

ARGUMENT SUMMARY

At common law, commercial vendors of alcoholic beverages had no liability to other intoxicated consumers or to third persons who were injured as a result of someone's consumption of alcohol. Limited statutory exceptions have been carved out for sale or service to minors and for service to habitual drunkards. Southland is neither a bar nor a tavern, but rather is a retail vendor like a grocery store or a supermarket. Southland did not serve any alcohol. Because no minors are involved in this accident, and the statutory prohibition of service to a habitual drunkard is in applicable to Southland, the District Court correctly ruled that no claim could be stated as a matter of law.

All cases in Florida which find liability for injuries caused by a habitual drunkard relate to service of alcohol by tavern owners or bars. There are no Florida cases which permit liability under § 768.125 for sale of a closed container of alcohol by a store to an adult for off-premises consumption.

There is no merit to Persen's convoluted argument that prior to the enactment of § 768.125, a common law cause of action existed for a retail store's sale to an adult of a closed container of alcoholic beverages for consumption off the premises. Persen's argument that he would have had a common law claim predicated on criminal statute § 562.50, entitled "Habitual Drunkards; Furnishing Intoxicants to, After Notice," is flatly wrong. The case law specifically holds that there is no civil liability under the habitual drunkard statute unless there is written notice of the purchaser's habitual addiction. The cases predating § 768.125 which

discuss civil liability based upon the violation of criminal statute § 562.11 (which prohibits sale of alcohol to a minor) are irrelevant. Because the record establishes that Preloh was an adult and that Southland had no written notice that he was a habitual drunkard, there could be no common law liability against a retail vendor's sale of a closed container of alcoholic beverages for off-premises consumption.

Persen can take no comfort from his argument that the term "serve" can be defined broadly enough to include a sale. This position ignores the plain wording of § 768.125 which crisply distinguishes between "sell or serve" to a minor and "serve" to an adult habitual drunkard. Well settled statutory construction establishes that where different terms are used, it is presumed that the language has a different intent and purpose.

ARGUMENT

THE RETAIL SALE TO AN ADULT OF A CLOSED CONTAINER OF ALCOHOLIC BEVERAGE FOR OFF-PREMISES CONSUMPTION FALLS OUTSIDE THE HABITUAL DRUNKARD EXCEPTION TO FLORIDA STATUTE § 768.125, WHICH PROHIBITS ONLY SERVICE OF ALCOHOL.

The District Court's decision is flatly and categorically correct. Persen's arguments rest on a misunderstanding and/or misconstruction of liquor liability under both the Florida common law and § 768.125.

At common law, there was no cause of action against anyone who furnished alcoholic beverages for any injury caused by either the intoxicated consumer to himself or to third persons. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991) ("the common law established that a commercial vendor of alcoholic beverages could not be liable for the negligent sale of those beverages when either the purchaser or the third persons were injured as a result of their consumption."); *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963) ("in the absence of statute, a seller of liquor is not responsible for injury to the person who drinks it"); *Barnes v. B.K. Credit Service, Inc.*, 461 So. 2d 217 (Fla. 1st DCA 1984) ("at common law, no cause of action existed against one furnishing alcoholic beverages in favor of those injured by the intoxication of the person so furnished, the reason generally given for this rule being that the voluntary drinking of the

alcohol, not the furnishing of it, was the proximate cause of the injury"); "Dramshop Liability", Fla. State Univ. Law Review, Vol. 18, p. 827.

Florida then created a single statutory exception to the common law by prohibiting sale of alcohol to minors. Fla. Stat. § 562.11. Following passage of this criminal statute, the courts then ruled that violation of this statute constituted negligence per se and subjected violators to civil liability. *Davis v. Shiappacossee, supra.*; *Prevatt v. McClellan*, 201 So. 2d 780 (Fla. 2d DCA 1967); *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978 (Fla. 1984); *Bryant v. Jax Liquors*, 351 So. 2d 542, cert. den. 365 So. 2d 710 (Fla. 1978); *Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984). In each and every instance, the civil liability arose because of the sale or service of alcoholic beverages to a minor. There are no decisions which attempt to establish civil liability for sale to an adult prior to the enactment of § 768.125 in 1980.

In 1980, the legislature enacted § 768.125, which provides:

> **Liability for Injury or Damages 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.

The enacting title states that this is

> An act relating to the Beverage Law; creating § 562.51, Florida Statutes [codified as § 768.125], providing that *a person selling*

> *or furnishing* alcoholic beverages to another person *is not thereby liable* for injury or damage caused by or resulting from the intoxication of such persons; *providing exceptions*; providing an effective date. Chapter 80-37, Laws of Florida (1980).

The courts of this state have routinely held, as Persen readily acknowledges, that § 768.125 must be strictly construed because it acted as a restriction on the common law. *Migliore, supra*; *Bankston v. Brennan*, 505 So. 2d 1385 (Fla. 1987); *Roster v. Moulton*, 602 So. 2d 975 (Fla. 4th DCA 1992).

Since the enactment of this statute, there have been a number of cases deciding the liability of tavern owners or bars who serve alcohol to an adult habitual drunkard. Early decisions turned on the application of § 768.125 to incidents which predated its enactment. *Lonestar Florida, Inc. v. Cooper*, 408 So. 2d 758 (Fla. 4th DCA 1982). Other cases focused on whether a tavern or bar could "knowingly" serve a habitual drunkard in the absence of written notice that the patron was a habitual addict to the use of alcoholic beverages. *Roberts v. Roman*, 457 So. 2d 578 (Fla. 2d DCA 1984); *Decker v. Natl. Financial Realty Trust*, 587 So. 2d 1045 (Fla. 4th DCA 1991); *Ellis v. N.G.N. of Tampa, Inc., supra.*

Persen argues that because of the existence of criminal statute § 562.50 (which prohibits furnishing intoxicants to habitual drunkards after written notice), which was in effect prior to the enactment of § 768.125, that there was a common law right of action for injuries caused by either the sale or service of alcoholic

beverages to a habitual drunkard.[4] The case of *Roberts v. Roman, supra,* specifically holds that this statute does not create civil liability for selling alcoholic beverages to a habitual drunkard in the absence of written notice of the habitual intoxication.[5] It is Persen who is therefore "simply and flatly incorrect" in arguing that prior to the enactment of § 768.125 that Florida's common law recognized a cause of action for the mere sale of a closed container of an alcoholic beverage to a habitual drunkard. As Persen states, "this point if simply not debatable." (Petitioner's Brief, p. 8) But, contrary to Persen's assertion, the law unequivocally establishes that prior to the enactment of § 768.125, there could be no civil liability whatsoever for "dispensing" alcohol to an adult without written notice that he was a habitual drunkard.

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[4]This statute provides:

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

[5]Contrast with *Decker v. Natl. Financial Realty Trust* and *Ellis v. N.G.N. of Tampa, Inc., supra*, which hold that written notice is not necessary after passage of § 768.125 where a tavern serves a habitual drunkard.

While the decisions concerning liability stemming from serving a habitually intoxicated adult have occasionally used the term "vendor" when referring to the tavern, in every instance the cases involved a bar or lounge; there has never been a suit against a retail vendor such as a grocery store or a convenience store. See, e.g., *Ellis, supra* (20 alcoholic drinks served at a bar); *Lonestar, supra* (service at a bar called Red Dog Sally's Lounge); *Migliore v. Crown Liquors of Broward, Inc.*, 425 So. 2d 20, quashed by 448 So. 2d 978 (Fla. 1984) (service of eight to ten "Kamikaze's" at the Crown Liquor Lounge); *Roster, supra* (consuming numerous alcoholic beverages at Nick's Bar). No Florida court has ever ruled that § 768.125 is applicable to the sale of packaged beverages to an adult.

Just as the courts are precluded from judicially expanding the liquor liability statute to include a social host who serves an adult (because of the applicable rules of strict statutory construction), the court is not free to judicially expand the statute to create liability on the part of a retail vendor who sells packaged beverages. *Bankston v. Brennan, supra.*, *Dowell v. Gracewood Fruit Co.*, 559 So. 2d 217 (Fla. 1990). The same rationale which prevents the expansion of this statute to create liability on the part of a social host who serves liability to an intoxicated adult is equally applicable to preclude the creation of liability against a vendor who sells a closed container of spirits:

> As we explicitly recognized in *Migliore*, 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 [citation omitted] and which has heretofore been unrecognized by statute or judicial decree. (Emphasis in original)

Bankston v. Brennan, supra. at 1386-1387. It is equally illogical to assume that this same statute, which was specifically enacted to limit preexisting vendor liability, intended to simultaneously create a new cause of action for a retail vendor's sale of a closed container of alcohol to an adult, where such claim did not exist at common law.

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. It is well settled that "where language used in one section of a statute is different from that used in other sections of the same chapter, it is presumed that the language is used with a different intent." 49 FLA. JUR. 2d "Statutes", § 133. Further, "courts are not to presume that a given statute employs 'useless language'". *Johnson v. Feder*, 485 So. 2d 409 (Fla. 1986). The fact that Persen finds several potential dictionary definitions for the word "serve" is interesting but irrelevant. The statute will be interpreted in accordance with its plain meaning and in such a manner as to effectuate the legislative intent. 49 FLA. JUR. 2d (Statutes), § 121, 151, 153. As the District Court noted, the only dictionary definition which meets this test is the one which defines "serve" as "to place food or beverage before"; the other definitions are not meaningful within the context of this statute.

The term "serve" cannot encompass the sale of a closed container to an adult where the contents are intended to be consumed off the premises. Unlike a bartender in a tavern who sees the patron consume the drink that he has mixed and served, there is no way for a vendor of a closed container to know whether the purchaser will personally consume the product or over what period of time it will be consumed. *O'Neale v. Hershoff*, 18 FLA. L. WEEKLY D 224 (Fla. 3d DCA Oct. 19, 1993). The sale of a closed container of beer is no different than the sale of any other commodity that someone might purchase from a retail establishment. An adult who buys a can of baby formula is unlikely to personally drink it. There has never been an assumption that a person who buys a sack of groceries will personally consume all of the products, or that one who pays for a spouse's prescription medication will not deliver it to the intended recipient.

A review of the legislative history and efforts to amend § 768.125 confirm that this statute solely applies to taverns and bars which serve intoxicating liquors and that it does not apply to stores which may happen to sell closed container of alcoholic beverages. "Dramshop Liability", Fla. State Univ. Law Review, supra. at 838-844.

Even, assuming *arguendo*, that this court should find any ambiguity existing in § 768.125, the ambiguity must be construed in favor of Southland. There is no dispute that a statute which is in derogation of the common law must be strictly construed, and any doubt must be resolved in favor of Southland, who is the citizen who would otherwise be charged with a statutory violation. *Nell v.*

State, 277 So. 2d 1 (Fla. 1973). The statute must necessarily be interpreted to maintain the common law absence of liability on the part of Southland. If §768.125 is interpreted as Persen suggests, then there is an abundance of superfluous and useless language used by the legislature. The legislature specifically establishes civil liability for one who "sells or furnishes" alcoholic beverages to a minor, yet limits liability to the sole circumstance where one "knowingly serves" a habitual drunkard. The same distinction appears in the statute's enacting title. Particularly in light of the broad and all encompassing language utilized by the legislature within § 562.50, if something more than service of alcoholic beverages in a tavern setting was intended, the legislature was well aware of a wealth of descriptive terms.

In the course of Persen's brief, a number of foreign decisions are referenced. Each case is irrelevant, immaterial, and factually far afield. These foreign jurisdiction cases all arise either from sale to a minor, *see for example*: *Elder v. Fisher*, 217 N.E. 2d 847 (Ind. 1966); *McClellan v. Tottenhoff*, 666 P. 2d 408 (Wyo. 1983); *Rappaport v. Nickles*, 31 N.J. 188, 156 A. 2d 1 (1959); or involved a tavern owner as the defendant, *see for example*, *Adamian v. Three Sons, Inc.*, 233 N.E. 2d 18 (Mass. 1968); *Amusement Club Inc. v. Guam*, 156 F. Supp. 443 (1957); *Birgance v. Velvet Dove Rest., Inc.*, 725 P. 2d 300 (Okla. 1986); *Browder v. Internatl. Fidelity Ins. Co.*, 413 Mich. 603, 321 N.W. 2d 668 (1982); *Mitchell v. Ketner*, 393 S.W. 2d 755 (Tenn. 1964); *Picadilly, Inc. v. Colvin*, 519 N.E. 2d 1217 (Ind. 1988); *Wright v. Moffitt*, 437 A. 2d 554 (Dela. 1981); *Waynick*

v. Chicago, 259 F. 2d 322 (7th Cir. 1959). The final foreign decision cited by Persen involved an illegal sale of liquor in 1915 on a Mississippi river boat in violation of Tennessee blue laws. *Kinnane v. State*, 178 S.W. 439 (Tenn. 1915). Clearly, these decisions are all irrelevant to resolution of the issue before this court. The intent and provisions of the Florida Legislature in the enactment of § 768.125 require a review only of the Florida legislative history and of the law of this state. The statute was properly interpreted by the District Court based upon the settled precedent and the clear and precise provisions of the statute.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court affirm the decision of the District Court and answer the certified question in the negative.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 3nd day of November, 1994, to: Norman E. Ganz, Esq., P. O. Box 840437, 1465 La Costa Drive, Pembroke Pines, FL 33084, Attorneys for Plaintiffs/Appellants; Frederick E. Morello, Esq., P. O. Box 1007, 118 Orange Avenue, Daytona Beach, FL 32115; Joel S. Perwin, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, Co-counsel for Appellants; Seril Grossfeld, Esq., 408 South Andrews Avenue, Suite 101, Fort Lauderdale, FL 33301, Attorneys for Carol Bray Enterprises; Chris Mancino, Esq., 1215 S. E. 2nd Avenue, Suite 102, Fort Lauderdale, FL 33316.

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