IN THE SUPREME COURT OF FLORIDA

CASE NO. 93-00928

84,268

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

Petitioners,

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 CERTIFICATION FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF OF PETITIONERS

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I
ARGUMENT

SECTION 768.125, FLA. STAT., WHICH IMPOSES LIABILITY ON ONE WHO "KNOWINGLY SERVES" AN 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.

Southland has frankly acknowledged that if the above-stated proposition is correct, then the district court's opinion must be reversed. Only if a cause of action did not exist at common law for the sale of closed-container alcohol to a known alcoholic was the district court correct (and is Southland correct) in invoking this Court's decisions to the effect that § 768.125 did not create any causes of action which had not theretofore existed at common law. In contrast, as Southland has conceded, if such a cause of action did exist at common law, then the district court's first rationale for decision is wrong. And by the same token, as Southland recognizes, it is only on the assumption that such a cause of action did not exist at common law that the district court (and Southland) were empowered to construe the statute strictly against the plaintiff (*see* sub-point B, *infra*). As we argued, and as Southland acknowledges, if such a cause of action did exist at common law, then the statute must be construed, if at all possible, to assure the broadest possible retention of the pre-existing common-law rule.

Both parties are in full agreement, therefore, that the outcome of this appeal depends upon the question of whether, before the enactment of § 768.125, Florida's common law recognized a cause of action for the knowing sale of alcohol in closed containers to an habitual drunkard. We are delighted to have the outcome of this appeal rest on that question.

1. *Florida's Common-Law Cause of Action, Based on Violation of the Criminal Statute, Clearly Encompassed Closed-Container Sales of Alcohol.*

As we pointed out (brief at 7), and as Southland has reiterated (answer brief at 7), before 1963 Florida's common law did not recognize such a cause of action. The early Florida decisions declined to recognize such potential liability. However, it hardly follows from that observation that Florida's common law *never* recognized such a cause of action—a statement which Southland makes repeatedly in its brief.[1/] To the contrary, as we pointed out, in 1963 (a time when there was no Florida Statute creating civil liability in this area), this Court invoked the *common-law rule* that the violation of a criminal statute is negligence per se, and the Court recognized *civil liability*, under the *common law*, predicated on a violation of Florida's criminal statute (§ 562.50). That was a common-law decision. It embraced the enforcement of a common-law rule—the rule recognizing civil liability for the violation of a criminal statute. To the extent that the criminal statute proscribed the knowing sale of alcohol to an habitual drunkard, Florida's *common law* imposed civil liability.

The question, then, is whether the criminal statute (§ 562.50) proscribed not only the sale of alcohol to minors, but also the sale of alcohol in certain circumstances to habitual drunkards. Even a cursory review of the language of the criminal statute (quoted in our initial brief at pp. 7-8, and in Southland's answer brief at 10 n.4) rebuts Southland's contention that the criminal statute applied only to minors. Southland may say (answer brief at 8; *see also id.* at 6) that the criminal statute "created a single statutory exception to the common law by prohibiting sale of alcohol to minors," but the language of the criminal statute says otherwise. It provided that

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[1/] *See, e.g.*, Southland's answer brief at 5 ("At common law, commercial vendors of alcoholic beverages had no liability to any other intoxicated consumers or to third persons who were injured as a result of someone's consumption of alcohol"); answer brief at 7 ("At common law, there was no cause of action against anyone who furnished alcoholic beverages for any injuries caused by either the intoxicated consumer to himself or to third persons").

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"[a]ny person, who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage . . . to any person habitually addicated to the use of any or all such intoxicating liquor . . . shall be guilty of a misdemeanor of the second degree . . . ."

Please note that the criminal statute covered (and still covers) all forms of providing alcohol ("sell, give away, dispose of," etc.) and that it applied to "any alcoholic beverage," whether in closed containers, open containers, or anything else. As the court put it in *Lonestar Florida, Inc. v. Cooper,* 408 So. 2d 758, 759 (Fla. 4th DCA 1982), the criminal statute prohibits "the sale of alcohol or other intoxicants to minors or habitual drunkards after notice." Before the enactment of § 768.125, Florida's common law recognized a civil cause of action for the violation of that criminal statute. It recognized a civil cause of action for the unlawful sale of "any alcoholic beverage" to an habitual drunkard. This is true whether or not there are any extant Florida decisions recognizing such a cause of action (*see* Southland's answer brief at 8). There *are* Florida decisions stating that the violation of a criminal statute is negligence per se at common law. And there *is* a criminal statute proscribing (in certain circumstances, *see infra*) the knowing sale of alcohol in closed containers to an habitual drunkard. Nothing more is required to resolve the first point—to reject the district court's first rationale for its decision. That rationale, and Southland's defense of it, are simply and flatly incorrect.

2. *Even if the Common-Law Cause of Action Included a Requirement of Written Notice of the Alcoholic's Condition, the Plaintiff's Statutory Cause of Action, Under § 768.125, Does Not. In any Event, the Common-Law Cause of Action Did Not Include Such a Requirement.*

Southland protests (answer brief at 10) that criminal liability for such a sale depends upon written notice of the habitual intoxication, and thus that the corresponding common-law cause of action, before the enactment of § 768.125, necessarily also depended upon such written notice. Before we address the point, please note that it directly contradicts Southland's first point—that there was *no* common-law liability *at all* for the knowing sale of an alcoholic

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beverage to an habitual drunkard. Having made that statement repeatedly in the first nine pages of its brief, Southland then chooses to abandon it, acknowledging that there *was* civil liability for the knowing sale of alcohol to an habitual drunkard, but protesting that such liability was predicated upon written notice of the drunkard's condition. Southland's apparent back-up argument is that because the plaintiff's complaint in the instant case did not allege that there was any such written notice, even if there was a common-law cause of action for such a sale, the instant case does not satisfy its prerequisites.

The short answer is that Southland's contention, even if it were correct (which it is not, *see infra*), has no bearing on the outcome of this proceeding, because the plaintiff's complaint was not brought under the common-law rule, but under § 768.125. That statute supplanted the common-law rule, and the statute does *not* incorporate any requirement of written notice. Two Florida decisions leave no doubt of that conclusion—*Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991) and *Decker v. National Financial Realty Trust,* 589 So. 2d 1045 (Fla. 4th DCA 1991). In light of *Ellis*, we cannot comprehend Southland's representation (answer brief at 5) that "[t]he 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." *Ellis* held explicitly that § 768.125 did *not* incorporate the criminal statute's requirement of written notice: "We find the cause of action [under the statute] in this circumstance only requires evidence that the vendor had knowledge that the individual the vendor served was a habitual drunkard." The *Decker* decision reiterrated that holding.[2/] In light of *Ellis*, it simply does not matter whether

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[2/] We are aware of *Roberts v. Roman,* 457 So. 2d 578 (Fla. 2d DCA 1984) (*see* Southland's answer brief at 10). The primary holding of *Roberts* is that § 768.125 was not applicable, because the statute was not in effect at the time of the plaintiff's injury. In *dictum*, however, the *Roberts* court opined that even if § 768.125 had been in effect, there could be no civil cause of action under the statute in the absence of written notice, in compliance with the criminal statute. But *Roberts* was decided before this Court's decision in *Ellis v. N.G.N. of Tampa, Inc.*, which held that § 768.125 embraces no such requirement. *Roberts* was overruled by *Ellis*.

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the common-law cause of action did or did not incorporate the criminal statute's requirement of written notice. Any such requirement was abrogated by § 768.125, upon which the plaintiff's complaint is based.

Moreover, to the extent that the point matters at all, we think that *Ellis* (and *Decker*) necessarily must be read to have held that the common-law cause of action which pre-dated § 768.125 did *not* incorporate the criminal statute's requirement of written notice. Southland has protested (brief at 10 n.5) that *Ellis* and *Decker* are both decisions interpreting § 768.125—the statute codifying civil liability—and not the pre-existing common-law rule. As Southland puts it, *Decker* and *Ellis* "hold that written notice is not necessary after passage of § 768.125 . . . ." But please note the enormous shift-of-position inherent in Southland's protest. As Southland has repeatedly reminded us, as the district court itself recognized, and as we observed at the outset of our initial brief (pp. 5-6), § 768.125 did not *create* any *new* cause of action which had not *already* been recognized at common law. We cited numerous decisions of this Court and the district courts to precisely that effect—that § 768.125 did not *create* anything; it merely preserved what had *already existed* at common law. Therefore, when *Ellis* and *Decker* held that the cause of action *preserved* by § 768.125 did *not* require written notice of habitual intoxication, *Ellis* and *Decker* necessarily held that the pre-existing common-law cause of action embraced no such requirement either.

In light of the foregoing, the district court's first rationale for its decision is simply wrong. Florida's common law did recognize a cause of action for the knowing sale of alcohol in closed containers to an habitual drunkard. Such conduct in proper cases was proscribed by the criminal statute, and Florida's common law recognized a civil cause of action for the violation of that statute. Whether or not that civil cause of action included the criminal statute's requirement of written notice of the habitual drunkard's condition, this Court held in *Ellis* that no such requirement is found in § 768.125, and the plaintiff's claim is based upon § 768.125.

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Moreover, *Ellis* necessarily held that the pre-existing common-law cause of action also eschewed such a requirement, because the decisions of this Court repeatedly have held that § 768.125 did nothing more than to codify the pre-existing common-law cause of action. Either way, there can be no debate that before the enactment of § 768.125, Florida law did recognize a civil cause of action for the sale of closed-container liquor to alcoholics. The district court's first rationale for decision is wrong.

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.

We noted first (brief at 10-12) that at the least, the statute is ambiguous. It proscribes "service" of alcohol to an habitual drunkard, and that word is easily sufficient to encompass the sale of alcohol in a closed container by a retail establishment. One dictionary definition of "serve" is "to wait on (a customer) in a store"; another dictionary definition is "[t]o provide goods and services for"; and even a Florida Statute (§ 562.51) uses the word "service" to forbid all retail alcoholic beverage establishments—including package stores—to refuse service on the basis of color, religion, sex, or other specified characteristics. Unquestionably, therefore, the word "serve" is sufficiently broad to encompass the sale of liquor in a closed container to an habitual drunkard.

Southland finds this point "interesting but irrelevant" (answer brief at 12). But that cavalier dismissal depends upon the erroneous assumption that the plaintiffs in the instant case would not have had a cause of action at common law (*see* Southland's answer brief at 9, 11-12, 13-14). As Southland has pointed out, where the asserted cause of action did *not* exist at common law, § 768.125 must be strictly construed against the creation of such a cause of action. *See, e.g., Bankston v. Brennan,* 507 So. 2d 1385 (Fla. 1987) (no common-law cause of action

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existed for service of liquor by a social host; § 768.125 strictly construed against creation of such a cause of action). But as we established (brief at 12 & n.9), where the asserted cause of action *did* exist at common law, the statute must be construed *in favor* of the pre-existing common-law rule. Indeed, whenever any statute abrogates a pre-existing common-law right of action, any ambiguity in that statute must be construed in favor of the broadest possible retention of the pre-existing common-law rule. Therefore, if the word "serve" is broad enough to encompass the sale of alcohol in a closed container, that is the definition which must be adopted.

Southland has offered two responses. First (answer brief at 12-13), Southland says that the language of the statute precludes resort to any such rule of construction. In reference to minors, the statute applies to one who "sells or furnishes alcoholic beverages"; but in reference to habitual drunkards, the statute regulates only one who "knowingly serves." Because the legislature must be presumed to have perceived a difference between those two phrases, Southland insists that the word "serves" must have a more restrictive meaning. Southland's assumption is that the only available restriction—the only way that the latter phrase can be narrower than the former—is to limit the word "serve" to the provision of open containers for consumption on the premises.

But there is an easier and more-obvious reconciliation of the statutory language, which is consistent with the rules of statutory construction prescribed by this Court. We agree with Southland that in utilizing the phrase "sells or furnishes" in reference to minors, the legislature did intend to impose a broader compass of potential liability than it did in using the word "serves" in relation to habitual drunkards. The most likely distinction, we submit—a distinction confirmed by subsequent judicial decisions, *see infra*—is that the legislature intended the potential liability for providing liquor to minors to encompass both direct and indirect provision—that is, not only the service provided by either a bar or a package store in dealing directly with the minor, but also when the seller provides the alcohol to someone else, but does

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so with the knowledge that its recipient will be providing that alcohol to a minor. As we noted (brief at 12 n.9), at least two Florida decisions have held that § 768.125 creates a cause of action in a minor (or in one injured by a minor) who did not himself purchase the liquor, but instead was given it by the purchaser, if the seller had reason to know that the purchaser would be furnishing the alcohol to the minor. *See O'Neale v. Hershoff,* 634 So. 2d 644, 646 (Fla. 3d DCA 1993); *Dixon v. Saunders,* 565 So. 2d 802, 803 (Fla. 2d DCA 1990). Those holdings would not have been possible if the legislature had used only the word "serve" in relation to minors, because the word "serve" by definition implies some form of privity—some one-to-one contact. To make certain that liability would be imposed in circumstances like those in *O'Neale* and *Dixon*, the phrase "sells or furnishes" was utilized, to make clear that strict privity between the seller and the minor is not always an essential prerequisite.

In contrast, the legislature intended that the scope of potential liability for providing alcohol to an habitual drunkard be more limited. Here the legislature chose the word "serve," because that word necessarily embraces a direct commercial relationship. Whether the "service" is provided by a bartender or by a package store, it is provided directly to the habitual drunkard, and not to someone else whom the purchaser might reasonably be expected to provide with alcohol. An establishment liable for "service" can only be liable to one of its customers. Thus, the word "serve" was carefully chosen to distinguish the broader compass of the protection afforded by the statute to minors. This explanation is perfectly consistent with the statutory language, and also with the rule of construing ambiguities in favor of the broadest possible retention of the pre-existing common-law cause of action. It is therefore the interpretation which must be adopted.

Southland's second and final argument (answer brief at 13) is a policy argument—that the legislature could not have intended to proscribe the knowing sale of closed-container alcohol to an habitual drunkard, because the vendor in such circumstances cannot "know whether the

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purchaser will personally consume the product or over what period of time it will be consumed." In this context, Southland argues that "[t]he 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." Southland suggests that an habitual drunkard is no more likely to be the ultimate consumer of a closed container of alcohol than an adult is likely to consume the baby formula which he purchases.

The short answer, of course, is that Southland's argument is for the legislature—not for the courts. If the language of the statute is broad enough to encompass the interpretation which we have advanced, then that interpretation must be adopted, because it better preserves the pre-existing common-law rule. But the more-direct answer is that Southland's suggestion is nonsense. Please remember that we are concerned here with *known habitual drunkards*. When a known habitual drunkard buys a closed container of alcohol, the conclusion is inescapable that the alcohol is intended for his own immediate consumption. That is the definition of a known habitual drunkard; he is compelled by his condition to consume at once any and all alcohol which he possesses. It is fanciful to suggest that a known alcoholic is no more likely to consume his purchase than the parent who purchases baby formula for his child. Without question, the knowing sale of liquor to an habitual drunkard—regardless of the container in which the liquor is found—embraces an obvious risk to the public. Indeed, it can be argued that the danger is greater when the alcohol is taken off the premises. There is simply no rational basis for distinguishing the sale of such liquor in an open container from the sale of such liquor in a closed container. The distinction offered by Southland simply makes no sense.

In proscribing "service" of alcohol to an habitual drunkard, the legislature utilized a word which applies reasonably and equally to bars and to package stores. At the least, the statute's language is susceptible of that reasonable interpretation—an interpretation which preserves to a broader extent than the district court's holding the pre-existing common-law cause of action.

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As this Court has held repeatedly, the broader definition therefore must be adopted. The district court erred in concluding otherwise, and its decision must be reversed.

II
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.

III
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of November, 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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