

Liquor Liability

I. Evolution of Liquor Liability (Approximately 50 minutes)

- A. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991), includes a discussion of the evolution of liquor liability laws in general and Florida's liquor laws in particular.
- B. Initially, at common law, there was no established liability for a commercial vendor of alcoholic beverages regarding the negligence of his purchaser when either his purchaser or third parties were injured as a result of the consumption of alcohol. Florida law has never recognized a cause of action against the furnisher of an intoxicant for the injuries sustained as the result of the intoxicated adult. *Barnes v. B.K. Credit Service, Inc.*, 461 So.2d 217 (Fla. 1st DCA 1984).
- C. This non-liability was premised on the notion that the proximate cause of the injury was the *consumption* of the intoxicating beverage rather than the *sale* of that beverage. As such, there was no valid claim against the vendor for the sale.
- D. The first crack in a vendor's immunity occurred in 1959 when the New Jersey Supreme Court "took upon itself to fill a judicially-perceived vacuum of restraint on commercial vendors of alcoholic beverages." Gerry M. Rinden, *Judicial Prohibition? Erosion of the Common Law Rule of Non-liability for Those Who Dispense Alcohol*. 34 Drake L.Rev. 937, 938 (1984-85).
1. In *Rappaport v. Nichols*, a commercial vendor of alcoholic beverages sold intoxicating beverages to a known minor. After imbibing the beverages, the minor became intoxicated, drove an automobile, and killed a third party.
 2. In holding the vendor liable, the New Jersey Supreme Court stated:
 "[W]e are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care."
- E. In 1963, the Florida Supreme Court was forced to address the issue of potential vendor liability in *Davis v. Shiappacossee*, 155 So.2d 365 (Fla. 1963).
1. In *Davis*, a 16 year old accompanied by two friends, ages 17 and 18, went to an establishment that delivered intoxicating beverages to them in their vehicle without inquiring about their ages. The boys purchased 24 cans of beer and ½ pint of whiskey. They proceeded to a drive-in theatre and then

drove to a school park where they consumed the whiskey and 14 of the cans of beer. The 16 year old died when he lost control of the vehicle while driving home, struck an oak tree, and flipped over.

2. Petitioner, the 16 year old's father, contended that since Respondent, the establishment, provided the boys with alcoholic beverages, they had violated *Florida Statutes*, section 562.11. Further, Petitioner argued that such violation of the law should amount to negligence per se.
 3. Respondent asserted that (1) the proximate cause of death was the consumption of the alcohol not the sale of it, and (2) the fatal crash was not a reasonably foreseeable event.
 4. Although the Court noted that a "Dram Shop Act" had not been enacted in Florida, and previously a seller of liquor had not been responsible for injury to the person who consumed it, the Court stated:

"[The minors] were seated in a dangerous instrumentality when the transaction occurred; in a dangerous instrumentality they departed under the drivership of a 16-year old. It seems to us that these cogent circumstances could and should convert the word "possible" in the rule to "probable"; that the very atmosphere *surrounding the sale* should make foreseeable to any person, such as Farmer, with the intelligence to represent the respondent and treat with his customers, that trouble for someone was in the offing."
 5. The Court concluded that the sale of intoxicating beverages to minors was a violation of a previously enacted statute, and thus, it was negligence per se.
 6. The court did not expressly address the issue of liability of the vendor to third parties who may be injured by the intoxicated minor.
- F. The trend to allow some negligence claims against vendors of alcoholic beverages on the basis that a sale could be the proximate cause of an injury is now substantial. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991)
- G. In *Prevatt v. McClennan*, a minor became intoxicated while in the vendor's establishment, drew a pistol, and shot a patron of the tavern. The patron was able to succeed in a personal injury cause of action. The court held that violation of the statute forbidding the sale of liquor to a minor constituted negligence per se. The court noted that "the very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making," and that "the proximate cause of the injury is the sale rather than the consumption." By allowing the patron to recover, the court found that *Florida Statutes*, section 562.11 was intended to prevent harm to third parties who may be injured by an intoxicated minor. *Prevatt v. McClennan*, 201 So.2d 780 (Fla. 2nd DCA 1967).
- H. A major shift in the vendor's liability had occurred. No longer was the vendor

absolved of liability because consumption of the intoxicating beverage was considered the cause of the conduct and the resulting damages. Now, the critical fact was the foreseeability that injury or damage would occur after a sale. When the sale is made to persons who lacked the capacity to make responsible decisions regarding the consumption of alcohol, such as minors and those habitually addicted to alcohol, foreseeability is more likely. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991)

- I. In 1980, the legislature enacted *Florida Statutes*, section 562.51 (now § 768.125, Fla. Stat.) in response to the judicial trend of extending liability towards vendors.

II. “Dram Shop Law” (Approximately 100 minutes)

A. In General

1. The term “Dram Shop” arose in the 18th Century, referring to taverns in England where gin was sold in spoonfuls, or “drams.”
2. Dram Shop Laws hold retail establishments liable for injury their patrons may cause after becoming intoxicated in said establishment.
3. The States are responsible for determining to what, if any, degree of liability an establishment should be held. The varying degrees range from no liability, liability only for illegal sales, and liability for injury caused by serving an obviously intoxicated patron.
4. In some states, a social host can be held liable for the actions of his guest after the guest leaves the host’s home.

B. *Florida Statutes*, section 768.125 limits the liability of commercial hosts:

1. “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.”
2. This statute codified the common law rule of absolving a vendor from liability with two notable exceptions:
 - a. Minors
 - b. Persons habitually addicted to alcoholic beverages
3. Florida law does not impose a general duty on the owner of a business to ensure the safety of an intoxicated person about to leave the premises of the business. *Aguila v. Hilton, Inc.*, 878 So.2d 392 (Fla. 1st DCA 2004), rehearing denied, review denied 891 So.2d 549.
4. This statute covers only vendors who place food or drink before habitual drunkard, such as bars, taverns, or restaurants. The liability under this

statute does not apply to social hosts and liquor stores selling closed containers intended to be consumed off premises. *Williams v. Anheuser-Busch, Inc.*, 957 F.Supp 1246 (M.D. Fla. 1997).

5. This statute only limits the liability of vendors, people, or businesses that sell alcoholic beverages. It does not apply to social hosts. *Bankston v. Brennan*, 507 So.2d 1385 (Fla. 1987).
6. Florida law does not prohibit a bar owner from serving alcoholic beverages to an already drunk patron. As such, no cause of action exists when that drunk patron later drunkenly and negligently injures another. *Lonestar Florida, Inc. v. Cooper*, 408 So.2d 758 (Fla. 4th DCA 1982).
7. Prior to the effective date of § 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 § 562.11. *Barber v. Jensen*, 450 So.2d 830 (Fla. 1984).
8. However, § 768.125 did not endeavor to create a third party cause of action against a vendor for injuries caused by an intoxicated minor or person habitually addicted to alcoholic beverages. So, a third party action is not available under this statute. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991).

C. “Intoxication”

1. In order to establish liability under § 768.125, the plaintiff must show that the minor or habitually addicted person was intoxicated.
2. Any degree of impairment of normal faculties should be sufficient to find intoxication. The degree of intoxication required under the current version of the manslaughter statute, *Florida Statutes*, section 316.193, is that the defendant must be under the influence of alcoholic beverages and affected to the extent that his normal faculties are impaired. The same standard is applied regardless of the extent of injury caused.
3. The term “normal faculties” includes, but is not limited to “the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and, in general, normally perform the many mental and physical acts of daily life.” § 316.1934(1), Fla. Stat. (2007).

D. Habitually Addicted Person

1. Whether or not an individual is habitually addicted to alcohol can be established with proof that “the will is dethroned by frequent indulgence and failure to control one's appetite for strong drink....[O]ne whose habit of indulgence in strong drink is so fixed that he cannot resist getting drunk anytime the temptation is offered. Inebriety must be frequent, exclusive, and be the dominant passion. The habitual but moderate use of intoxicating liquors does not meet the test.” *Sabo v. Shamrock*

- Communications, Inc.*, 566 So.2d 267 (Fla. 5th DCA 1990).
2. “Knowingly”
 - a. Written notice is not required because *Florida Statutes*, section 768.125 does not have to be read *in pari materia* with *Florida Statutes*, section 562.50. As such, with regard to a civil action against a vendor for the sale of alcoholic beverages to a habitual drunkard, the plaintiff need only prove that the vendor “knowingly,” rather than “willfully and unlawfully” sold alcoholic beverages to a person who was a habitual drunkard. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991).
 - b. The knowledge required by *Florida Statutes*, section 768.125 to establish liability on the part of a bar establishment can be proved by circumstantial evidence. *Sabo v. Shamrock Communications, Inc.*, 566 So.2d 267 (Fla. 5th DCA 1990).
 - c. Serving an individual multiple drinks on one occasion would be insufficient, in and of itself, to establish that the vendor knowingly served a habitual drunkard alcoholic beverages. However, serving an individual a substantial number of drinks on multiple occasions would be circumstantial evidence to be considered by the jury in determining whether the vendor knew that the person was a habitual drunkard. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991).
 3. “Serves”
 - a. § 768.125 as ultimately passed subjects a vendor to civil liability for furnishing intoxicants to an adult only where the vendor “knowingly serves” alcoholic beverages to a person habitually addicted to alcohol.
 - b. The legislature intended the habitual drunkard exception to cover only vendors who “place food or drink before” a habitual drunkard, such as bars, taverns, or restaurants. *Persen v. Southland Corp.*, 656 So.2d 453 (Fla. 1995).
 - c. The legislature did not intend liability to be extended to vendors who sell alcoholic beverages in closed containers to adults for off-premises consumption. *Persen v. Southland Corp.*, 656 So.2d 453 (Fla. 1995).
 - d. To “serve” means to place food or beverage before. *Persen v. Southland Corp.*, 656 So.2d 453 (Fla. 1995).
 4. Criminal liability,
 - a. *Florida Statutes*, section 562.50 states:

“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.”

- b. Written notice is required before liability exists under this statute.

E. Minors

- 1. A bar or tavern has a legal duty to refrain from serving alcoholic beverages to minors. A breach of that duty may subject the bar or tavern to liability caused by an intoxicated minor. *Aguila v. Hilton, Inc.*, 878 So.2d 392 (Fla. 1st DCA 2004), rehearing denied, review denied 891 So.2d 549.
- 1. For whose consumption was the alcohol purchased?
 - a. If a vendor sells alcohol to minor A, and there are facts putting the vendor on notice that minor A will furnish the alcohol to minor B, then, for the purposes of § 768.125, the vendor sold or furnished alcohol to both minor A and B. *O’Neale v. Hershoff*, 634 So.2d 644 (Fla. 3rd DCA 1993).
 - b. However, the vendor must be on some sort of notice to be liable under § 768.125. A bowling alley, which sold beer to adults, could not be held liable to the estate of a deceased minor involved in a traffic accident after consuming said beer because the bowling alley did not furnish the beer to the minor within the meaning of the statute. There was no evidence the bowling alley sold or gave beer to minors, nor was there evidence that it knew when it sold the beer to an adult it would wind up in the minor’s possession. *Dixon v. Saunders*, 565 So.2d 802 (Fla. 2nd DCA 1990).
- 2. “Willfully and unlawfully...”
 - a. Negligence not enough under § 768.125
 - b. § 768.125 requires that the selling or furnishing of the alcoholic beverage to a minor must be done willfully. *Armstrong v. Munford, Inc.*, 451 So.2d 480 (Fla. 1980).
 - c. No cause of action exists under Florida law against a commercial vendor of alcoholic beverages for the vendor’s mere negligence in providing such alcoholic beverages to a minor who subsequently became involved in a vehicular accident. Only willful and unlawful sale, not mere negligent sale of alcoholic beverages would subject a vendor to liability in tort. *Publix Supermarkets v. Austin*, 658

- So.2d 1064 (Fla. 5th DCA 1995).
- d. The use of the term “unlawfully” requires that a plaintiff must establish each of the elements of the criminal offense to prevail in a civil action. *Ellis v. N.G.N of Tampa, Inc.*, 586 So.2d 1042 (Fla. 1991).
3. Criminal liability,
- a. *Florida Statutes*, section 562.11(1) states:

“It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises. A person who violates this subparagraph commits a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.”
 - b. A holder of a license to sell alcoholic beverages must exercise reasonable diligence to determine who is under 21 years of age and refuse to sell to them. *Cohen v. Schott*, 48 So.2d 154 (Fla. 1950).
 - c. § 562.11 does not create a cause of action against a social host for injuries sustained by one injured as a result of a host’s dispensing alcoholic beverages to a minor. *United Services Auto. Ass’n. v. Butler*, 359 So.2d 498 (Fla. 4th DCA 1978).
 - d. Defense against civil liability, *Florida Statutes*, section 562.11(2)(c) states:
 1. “A licensee who violates paragraph (a) shall have a complete defense to any civil action therefor, except for any administrative action by the division under the Beverage Law, if, at the time the alcoholic beverage was sold, given, served, or permitted to be served, the person falsely evidenced that he or she was of legal age to purchase or consume the alcoholic beverage and the appearance of the person was such that an ordinarily prudent person would believe him or her to be of legal age to purchase or consume the alcoholic beverage and if the licensee carefully checked one of the following forms of identification with respect to the person: a driver's license, an identification card issued under the provisions of § 322.051 or, if the person is physically handicapped as defined in § 553.45(1), a comparable identification card issued by another state which indicates the person's age, a passport, or a United States Uniformed Services identification card, and acted in good faith and in reliance upon the representation and appearance of the person in the belief that he or she was of legal age to purchase or

consume the alcoholic beverage.”

2. “Licensee” means a legal or business entity, person, or persons that hold a liquor license. § 561.01(14), Fla. Stat. (2007).

III. Social Host Liability (Approximately 25 minutes)

A. Common law

1. Vendor liability had been broadened by judicial decisions. The legislative response to that trend was to limit that liability by enacting § 768.125. “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 at common law.” *Bankston v. Brennan*, 507 So.2d 1385 (Fla. 1987).
2. Specifically, a social host who served alcohol to a known alcoholic could not be held liable for injuries caused by his intoxication. *Dowell v. Gracewood Fruit Co.*, 559 So.2d 217 (Fla. 1990).
3. Additionally, no cause of action exists under *Florida Statutes*, section 768.125 for third-party injuries resulting from the intoxication of a minor to whom alcoholic beverages had been furnished at a private function. *Kirkland v. Johnson*, 499 So.2d 899 (Fla. 1st DCA 1986), review denied 511 So.2d 298.

B. “Open House Party”

1. *Florida Statutes*, section 856.015(2), enacted in 1988, provides that:
“No person having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the person knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.”
2. The “Open house party” statute is designed to protect minors from harm that could result from consumption of alcohol or drugs by those who are too immature to appreciate potential consequences. This statute extends criminal responsibility to social host at a residence with an open house party. Additionally, social hosts have a duty of care and there is a civil cause of action of negligence per se for a statutory violation. *Newsome v. Haffner*, 710 So.2d 184 (Fla. 1st DCA 1998), review denied 722 So.2d 193.
3. A cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm. As such, violation of this statute results

in a negligence per se cause of action. *Newsome v. Haffner*, 710 So.2d 184 (Fla. 1st DCA 1998), review denied 722 So.2d 193.

4. By enacting § 856.015, the legislature has imposed a duty of care that did not previously exist on social hosts and created a civil cause of action for a statutory violation. *Newsome v. Haffner*, 710 So.2d 184 (Fla. 1st DCA 1998), review denied 722 So.2d 193.

IV. Employer Liability (Approximately 25 minutes)

A. Employer as Social Host

1. The Florida Supreme Court has flatly ruled out social host liability. If the Employer is considered a social host, there is no liability.
2. Concerning former employees attending an event hosted by their ex-employer, the ex-employer stands as a social host. *Dowell v. Gracewood Fruit Co.*, 559 So.2d 217 (Fla. 1990).

B. Employer as Business Host

1. For liability to be found, Employer must be considered in the role of something besides a social host. Some courts have found liability by concluding that the Employer was a “business host” rather than a social one. Jason Vail, *Company Liability for Employee Drinking*, 67 APR Fla. B.J. 22, 24 (1993).
2. Unlike the social host, an employer has a far greater ability to control the actions of its employees. *Carroll Air Systems, Inc. v. Greenbaum*, 629 So.2d 914 (Fla. 4th DCA 1993).
3. *Respondeat Superior* - legal doctrine which holds an employer responsible for the actions of employees performed within the course and scope of their employment.
 - a. Test to determine if conduct is within the course and scope of employment:
 - 1) The conduct is the kind the employee is hired to perform.
 - 2) The conduct occurs substantially within the time and space limits authorized or required by the work to be performed.
 - 3) The conduct is activated at least in part by a purpose to serve the master. *Sussman v. Florida East Coast Properties, Inc.*, 557 So.2d 74 (Fla. 3rd DCA 1990).
 - b. Where the event is not purely social and is in furtherance of the employer's interest, employer may be found liable for actions of its employee under a theory of *respondeat superior*. *Carroll Air Systems, Inc. v. Greenbaum*, 629 So.2d 914 (Fla. 4th DCA 1993).
4. An Employer may be additionally liable for punitive damages based on the willful, wanton, or outrageous conduct of its employee because of its negligence in allowing its employee to drive when it knew or should have known that the employee was intoxicated. *Carroll Air Systems, Inc. v.*

Greenbaum, 629 So.2d 914 (Fla. 4th DCA 1993).

V. Liquor Liability Insurance (Approximately 15 minutes)

- A. This insurance does not cover sales to minors and other sales which are prohibited by law.

- B. A liquor liability policy should include:
 - 1. Assault and battery coverage
 - 2. Defense costs
 - 3. Coverage for employees
 - 4. A damage definition that include mental damages
 - 5. Potential reduced premiums based on safety and claims

- C. Potential types of liquor liability insurance
 - 1. Liquor liability insurance: liability for bodily injury or property damage arising out of the business enterprise of serving or distribution of alcoholic beverages
 - 2. Host liquor liability insurance: liability for bodily injury or property damage arising out of the serving or distribution of alcoholic beverages by a party not engaged in this activity as a business enterprise.
 - 3. Special event insurance: provides short term liability coverage for a function
 - 4. Commercial general liability insurance: covers liability from incidents that occur on the policyholder's premises or the non-professional aspects of the insured's practice.
 - 5. Umbrella Policy: sits on top of home and auto insurance to provide extra coverage.

VI. Potential Ways to Limit Liability at Functions (Approximately 15 minutes)

- A. Hire outside bartenders to serve at functions.

- B. Make sure all vendors at an event are licensed and insured.

- C. Stipulate that only those trained in the safe service of alcohol should serve or sell alcohol.

- D. Purchase liquor liability insurance, that includes an indemnification clause, for all events.

- E. Try to prevent guests or patrons from becoming intoxicated and have a specific plan for dealing with those who do over imbibe.

- F. Arrange for transportation or a "designated driver" program.

VII. Alcohol or Drug Defense (Approximately 20 minutes)

- A. Pursuant to *Florida Statutes*, section 768.36, a defendant is relieved of all liability in a civil action when:
1. The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and
 2. As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm."
- B. In order to invoke the "Drug or Alcohol Defense" a plaintiff must be intoxicated, as evidenced either by an impairment in normal functioning or a blood alcohol level higher than that of 0.08 percent. Fla. Stat. § 768.36 (2007).
1. In *Pearce v. Deschesne*, plaintiff, a tree trimmer, consumed several alcoholic drinks and fell from a tree. Plaintiff was ruled against in defendant's motion for summary judgment. Plaintiff admitted in his deposition that he was intoxicated, but not drunk according to his understanding of the terminology. *Pearce v. Deschesne*, 932 So.2d 640 (Fla. 4th DCA 2006)
 2. While the case was reversed because lower court judge acted as a "trier of fact" in determining that plaintiff was more than fifty percent at fault, this case should stand for construing the statute as meaning that a plaintiff does not have to be legally intoxicated to be barred from recovering damages - as long as the plaintiff is under the influence to the extent his normal faculties are impaired and as a result of that influence is found to be more than 50 percent at fault. *Pearce v. Deschesne*, 932 So.2d 640 (Fla. 4th DCA 2006)
- C. Under the rule of comparative negligence, the quantity of negligence is a jury question. So, where the evidence is sufficient to support an inference of comparative fault on the plaintiff's part, the issue of comparative negligence is properly submitted to the jury. *Langmead v. Admiral Cruises, Inc.*, 610 So.2d 565, 566 (Fla. 3rd DCA 1992).