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TORTS—VENDOR LIABILITY FOR SERVING ALCOHOLIC DRINKS—
ELLIS V. N.G.N. OF TAMPA, INC., 586 So. 2D 1042 (FLA. 1991)

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Torts—VENDOR LIABILITY FOR SERVING ALCOHOLIC DRINKS—
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R. FRANK MYERS

I. INTRODUCTION

On September 19, 1991, the Supreme Court of Florida ruled in *Ellis v. N.G.N. of Tampa, Inc.*¹ that, under some circumstances, a habitual drunkard who is injured in a car accident after leaving a bar may sue the vendor who served him.² Construing section 768.125, *Florida Statutes* (1987),³ the court found that Florida's dramshop act⁴ establishes a cause of action against a vendor who sells intoxicating beverages to a habitual drunkard even if written notice of the drunkard's addiction has not been delivered to the vendor.⁵ Moreover, circumstantial evidence may be used to show that the vendor knew about the patron's addiction to alcohol.⁶

As a result, bar patrons may now have a first-party cause of action against a bar if the bar serves the patron too much alcohol. This Note will address the current status of tortious liability for vendors of alcoholic beverages, analyze the *Ellis* decision, and summarize the impact of *Ellis* on Florida tort law.

II. THE COMMON LAW HISTORY OF VENDOR LIABILITY FOR SERVING DRINKS

A. *Vendor Liability in Jurisdictions Outside Florida*

"Dramshop liability" is a term of art used to describe a vendor's tort liability for selling alcoholic beverages.⁷ In American jurisdictions

1. 586 So. 2d 1042 (Fla. 1991).

2. *Id.* at 1048.

3. The Florida Legislature has made no changes to § 768.125 since it was enacted in 1980.

4. A "dramshop" is a saloon or bar where spirituous or intoxicating liquors are sold. *Snow v. State*, 9 S.W. 306 (Ark. 1888). It has also been defined as "a drinking establishment where liquors are sold to be drunk on the premises." BLACK'S LAW DICTIONARY 494 (6th ed. 1990). A dramshop act is enacted to place liability upon dramshops. A reverse dramshop act is legislation that *limits* liability placed upon dramshops. *E.g.*, FLA. STAT. § 768.125 (1991).

5. *Ellis*, 586 So. 2d at 1048. A habitual drunkard is a person who has lost the will power to resist temptation when an intoxicating beverage is offered to the person. *Pratt v. Daly*, 104 P.2d 147, 152 (Ariz. 1940), *overruled in part sub. nom.* *Ontiveros v. Borak*, 667 P.2d 200 (Ariz. 1983). See *infra* notes 64-65 and accompanying text.

6. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048-49 (Fla. 1991).

7. A "dram" is defined as "[a] drink of some substance containing alcohol; something which can produce intoxication." BLACK'S LAW DICTIONARY 494 (6th ed. 1990). See also "dramshop" defined *supra* note 4.

before 1959, bar patrons, their estates, or third parties did not have causes of action against a vendor.⁸ Courts often would determine that, in the absence of an appropriate statute, prerequisites for common law negligence had not been met.⁹ Specifically, the sale of intoxicating beverages was not considered the proximate cause¹⁰ of injuries to the patron or to third parties.¹¹ This theory was premised upon the *consumption* of alcohol as a superseding cause of a person's intoxication and resulting injuries.¹²

Any vendor liability available was premised upon a dramshop act.¹³ Dramshop acts were initially enacted in this country in the mid-1800s.¹⁴ The temperance movement was the impetus for passing these acts, and the acts were part of a movement to denounce debauchery

8. See *infra* note 25 and accompanying text. "At common law, it was not a tort to sell alcohol to a strong and able-bodied man." Julia A. Harden, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 227 n.4 (1987) (citing *Cruse v. Aden*, 20 N.E. 73, 74 (Ill. 1889)). See also Katherine M. Romeo, *Gresham v. Davenport: Minor Social Host Drinking Liability, Where Does the Duty Lie?*, 50 LA. L. REV. 875 (1990).

9. See, e.g., *Clyde Bar, Inc. v. McClamma*, 10 So. 2d 916 (Fla. 1942); *United Servs. Auto. Ass'n v. Butler*, 359 So. 2d 498 (Fla. 4th DCA 1978); *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*, 165 So. 2d 787 (Fla. 3d DCA 1964), *cert. denied*, 172 So. 2d 597 (Fla. 1965); *Davis v. Shiappacossee*, 145 So. 2d 758 (Fla. 2d DCA 1962), *quashed*, 155 So. 2d 365 (Fla. 1963).

10.

The proximate cause, involved as it may with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes?

Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

11. *Davis*, 145 So. 2d at 760.

12. In *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1044 n.1 (Fla. 1991), the Supreme Court of Florida cited these cases to support this proposition: *Cherbonnier v. Rafalovich*, 88 F. Supp. 900 (D. Alaska 1950); *Carr v. Turner*, 385 S.W.2d 656 (Ark. 1965); *Fleckner v. Dionne*, 210 P.2d 530 (Cal. Dist. Ct. App. 1949); *Nolan v. Morelli*, 226 A.2d 383 (Conn. 1967); *Colligan v. Cousar*, 187 N.E.2d 292 (Ill. App. Ct. 1963); *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966); *Lee v. Peerless Ins. Co.*, 183 So. 2d 328 (La. 1966), *overruled by Pence v. Ketchum*, 326 So. 2d 831 (La. 1976); *Beck v. Groe*, 70 N.W.2d 886 (Minn. 1955); *Hall v. Budagher*, 417 P.2d 71 (N.M. 1966), *overruled by Lopez v. Maez*, 651 P.2d 1269 (N.M. 1982); *Mitchell v. Ketner*, 393 S.W.2d 755 (Tenn. Ct. App. 1964). See generally Gerry M. Rinden, *Judicial Prohibition? Erosion of the Common Law Rule of Non-Liability for Those Who Dispense Alcohol*, 34 DRAKE L. REV. 937 (1985-86); John J. McGrath & Julius F. Lang, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1121 (1983-1984) (cited in *Ellis*, 586 So. 2d at 1044).

13. See, e.g., *Manning v. Yokas*, 132 A.2d 198 (Pa. 1957).

14. The first dramshop act was enacted in Wisconsin in 1849 and required tavern owners to post a bond to pay the expenses of all civil or criminal prosecutions arising from "traffic in alcoholic beverages." James M. Goldberg, *One for the Road: Liquor Liability Broadens*, 73 A.B.A. J. 84, 86 (July 1987). See also James R. Myers, *Dramshop Liability: The Blurry Status of Drinking Companions*, 34 ST. LOUIS U. L.J. 1153 (1990).

and public drunkards.¹⁵ When the states ratified the Eighteenth Amendment to the *United States Constitution* (instituting prohibition), these acts became obsolete.¹⁶ Some jurisdictions, however, were slow to repeal them, and the acts became active again upon the ratification of the Twenty-First Amendment (repealing prohibition).¹⁷ Although several dramshop acts were repealed in the early part of this century as a result of changed attitudes toward drinking establishments,¹⁸ the increasing use of the automobile—and the increased incidence of drinking and driving—perpetuated the movement toward increased liability for vendors of alcoholic beverages.¹⁹

Recently, an increasing number of state legislatures have enacted dramshop acts or civil damages acts, making taverns liable for injuries stemming from the sale of alcoholic beverages.²⁰ More than eighty percent of the states impose some form of liquor liability on licensed servers of alcoholic beverages, either by statute or by judicial decree.²¹ Thirty-seven states have either a dramshop act or a reverse dramshop act.²² Without regard to whether a dramshop act existed, the courts of

15. Goldberg, *supra* note 14, at 86.

16. *Id.*

17. *Id.*

18. *Id.*

19. See *infra* notes 20-23 and accompanying text.

20. These laws are intended to:

impose liability on the seller of intoxicating liquors (which may or may not include beer), when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication. Some acts apply to gifts as well as sales. Such acts protect the third party not only against injuries resulting directly from affirmative acts of the intoxicated man, such as resulting from negligent operation of vehicle or assault and battery, but also against the loss of family support due to injuries to the man himself.

William J. Tutwiler, D'Amico v. Christie: *New York High Court Finds Dram Shop Law Inapplicable to Social Organization; New Limits on Dram Shop Acts or Reinforcement of Legislators' Intent?*, 21 U. Tol. L. Rev. 317, 317 n.3 (1989).

21. Goldberg, *supra* note 14, at 84. See *infra* notes 22-23 and accompanying text.

22. ALA. CODE §§ 6-5-70, 71 (1977); ALASKA STAT. § 04.21.020 (1986); ARIZ. REV. STAT. ANN. §§ 4-301, -302, -311, -312 (1989); CAL. BUS. & PROF. CODE § 25602.1 (West 1985); COLO. REV. STAT. § 13-21-103 (1987); CONN. GEN. STAT. ANN. § 30-102 (West 1990); FLA. STAT. § 768.125 (1991); GA. CODE ANN. § 51-1-40 (Michie Supp. 1992); ILL. ANN. STAT. CH. 43 para. 135 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 7.1-5-10-15.5 (Burns 1991) (intoxicated person); IOWA CODE ANN. § 123.49 (West 1987); KY. REV. STAT. ANN. § 413.241 (Baldwin 1992); LA. REV. STAT. ANN. § 9:2800.1 (West 1991); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MASS. GEN. LAWS ANN. ch. 231, § 85T (West 1992) (intoxicated person); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1992); MINN. STAT. ANN. § 340A.801 (West 1990); MISS. CODE ANN. § 67-3-73 (1991); MO. ANN. STAT. § 537.053 (Vernon 1988); MONT. CODE ANN. § 27-1-710 (1989); N.H. REV. STAT. ANN. § 507-F:4 (Supp. 1991); N.J. STAT. ANN. § 2A:22A-1-7 (West 1987); N.M. STAT. ANN. § 41-11-1 (Michie 1989); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1989); N.C. GEN. STAT. § 18B-121 (1989); N.D. CENT. CODE § 5-01-06 (1987); OHIO REV. CODE ANN. § 4399.01-.08 (Anderson 1989); OR. REV. STAT. § 30.950 (1988); PA. CONS. STAT. ANN. § 47-4-497

at least four states and the District of Columbia have also imposed liability upon dramshops.²³ However, in the absence of direction by their legislatures, the courts of ten states have refused to impose liability upon dramshops.²⁴

In 1959 the Seventh Circuit Court of Appeals and the Supreme Court of New Jersey held that tavern owners could, under some circumstances, be held liable for negligently selling intoxicating beverages.²⁵ Since the Supreme Court of New Jersey rendered the seminal *Rappaport v. Nichols* decision, most remaining states have made dramshops liable for negligently serving drinks under certain circumstances.²⁶

The *Rappaport* court recognized that the *sale* of intoxicating beverages was the proximate cause of the plaintiffs' injuries.²⁷ Thus, if a tavern owner unlawfully and negligently sold alcoholic beverages to a minor, causing the minor's intoxication and negligent operation of the minor's vehicle, then a jury could find that the minor's injuries stemmed from the sale.²⁸ Likewise, in *Waynick v. Chicago's Last Department Store*, the Seventh Circuit declared that, under some circumstances, a bartender's *sale* of intoxicating liquors to a habitual drunkard may constitute a violation of the bartender's duty to the drunkard and may proximately cause the drunkard's injuries.²⁹

B. Vendor Liability in Florida

Florida does not have a dramshop act. Instead, the Florida Legislature passed a "reverse dramshop act" in 1980.³⁰ Section 768.125, *Flor-*

(1992); R.I. GEN. LAWS §§ 3-11-2, -3 (1987); S.D. CODIFIED LAWS ANN. §§ 35-11-1, -2 (1986); TENN. CODE ANN. §§ 57-10-101, 102 (1989); TEX. ALCO. BEV. CODE ANN. § 2.02 (West Supp. 1992); UTAH CODE ANN. § 32A-14-101 (1991); VT. STAT. ANN. tit. 7, § 501 (1988); WIS. STAT. ANN. § 125.035 (West 1989); WYO. STAT. § 12-5-502 (Supp. 1992).

23. *Norwood v. Marrocco*, 586 F. Supp. 101 (D.D.C. 1984), *aff'd*, 780 F.2d 110 (D.C. Cir. 1986); *Fischer v. Cooper*, 775 P.2d 1216 (Idaho 1989); *Edson v. Walker*, 573 So. 2d 545 (La. Ct. App. 1991), *cert. denied*, 576 So. 2d 34 (La. 1991) (tavern liable despite Louisiana's reverse dramshop act); *Daley v. Ward*, 399 S.E.2d 13 (S.C. Ct. App. 1990); *Bailey v. Black*, 394 S.E.2d 58 (W. Va. 1990).

24. *First Am. Bank of N. Little Rock v. Associated Hosts, Inc.*, 730 S.W.2d 496 (Ark. 1987); *Acker v. S.W. Cantinas, Inc.*, 586 A.2d 1178 (Del. 1991); *Bertelmann v. Taas Assocs.*, 735 P.2d 930 (Haw. 1987); *Mills v. City of Overland Park*, 837 P.2d 370 (Kan. 1992); *Fisher v. O'Connor's, Inc.*, 452 A.2d 1313 (Md. Ct. Spec. App. 1982); *Arant v. G.H., Inc.*, 428 N.W.2d 631 (Neb. 1988); *Yoscovitch v. Wasson*, 645 P.2d 975 (Nev. 1982); *Ohio Cas. Ins. Co. v. Todd*, 813 P.2d 508 (Okla. 1991); *Williamson v. Old Brogue, Inc.*, 350 S.E.2d 621 (Va. 1986); *Christen v. Lee*, 780 P.2d 1307 (Wash. 1989).

25. *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), *cert. denied sub nom. Saxner v. Waynick*, 362 U.S. 903 (1960); *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959).

26. See *supra* notes 22-24 and accompanying text.

27. 156 A.2d at 10.

28. *Id.*

29. 269 F.2d at 325.

30. Ch. 80-37, 1980 Fla. Laws 130 (currently found at FLA. STAT. § 768.125 (1991)).

ida Statutes (1991), limits a dramshop's liability, but it provides exceptions under which a dramshop may be liable for negligently serving minors or habitual drunkards.

Despite the passage of section 768.125, Florida's common law plays a significant role when determining a tavern owner's liability for selling alcohol. Before 1963 Florida, like other states, found a drunkard's injuries could not be proximately caused by the *sale* of an intoxicating beverage.³¹ However, in 1963 the Supreme Court of Florida modified this general rule in *Davis v. Shiappacossee*.³²

The issue in *Davis* was whether a cause of action for damages existed against a vendor who sold alcoholic beverages to a minor, in violation of a statute prohibiting the sale of alcohol to minors, and which sale led to the minor's intoxication and death in a traffic accident.³³ Davis, age sixteen, bought alcohol from a drive-through window at the Estuary Bar.³⁴ He drove around town while drinking the beer he had purchased.³⁵ While driving, Davis was involved in an accident that resulted in his death.³⁶ Davis' parents sued the Estuary Bar for damages, but the trial court dismissed their complaint.³⁷

After the Second District Court of Appeal affirmed the trial court's dismissal, the Supreme Court of Florida granted a writ of certiorari.³⁸ The court quashed the district court's judgment³⁹ and directed the trial court to reinstate the cause of action.⁴⁰ The supreme court found that the Estuary Bar sold beer and whiskey to Davis in violation of Florida law⁴¹ and that this was sufficient to establish negligence per se. More importantly, the court implicitly accepted an argument that the proximate cause of Davis' death was the *sale*, not the consumption, of the alcohol.⁴² According to the court, the man who sold the beer could easily foresee that Davis, who was sitting in an automobile, would have an accident.⁴³

The court in *Davis* established a Florida precedent that allowed an injured minor to sue someone who dispenses intoxicating beverages. It

31. *Davis v. Shiappacossee*, 145 So. 2d 758, 760 (Fla. 2d DCA 1962), *quashed*, 155 So. 2d 365 (Fla. 1963).

32. 155 So. 2d 365 (Fla. 1963).

33. *Id.* at 366.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 368.

40. *Id.* at 367.

41. *Id.* at 366 (citing FLA. STAT. § 562.11).

42. *Id.*

43. *Id.* at 367.

was not clear, however, whether a third party who was injured by a drunk patron had a cause of action against the bar that served drinks to the patron. A few years after *Davis*, in *Prevatt v. McClennan*, the Second District Court of Appeal removed any uncertainty.⁴⁴ In *Prevatt* the court held a tavern owner liable for injuries inflicted upon his patrons by unruly minors who were illegally served alcoholic beverages.⁴⁵ After *Prevatt*, then, third parties could sue a tavern owner for injuries inflicted by drunken minors.

The Supreme Court of Florida waited until 1984 to address the issues regarding dramshop liability.⁴⁶ In 1984 the court acknowledged that before the enactment of section 768.125, Florida's common law recognized a third-party cause of action against a dramshop when a dramshop illegally sold intoxicants to minors.⁴⁷ In *Migliore v. Crown Liquor of Broward, Inc.*, the court adopted the holding and reasoning of the Second District Court of Appeal in *Prevatt*.⁴⁸ The court held that a vendor's illegal sale of an intoxicating beverage to a minor made the vendor liable not only to the minor for the minor's injuries, but also to third parties whom the minor subsequently injured.⁴⁹

The issue of whether section 768.125 modified the law as announced in *Migliore* and *Barber* was addressed in *Armstrong v. Munford, Inc.*⁵⁰ The *Armstrong* court noted that section 768.125 required a different analysis than that in *Migliore* and *Barber*.⁵¹ The court found that selling intoxicants to minors must be done "willingly" and that there was no cause of action without allegations and proof of a vendor's willfulness.⁵² The legislative history of section 768.125 supports these judicial conclusions.

44. 201 So. 2d 780 (Fla. 2d DCA 1967).

45. *Id.* at 781 (citing *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963)).

46. See *Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984); *Barber v. Jensen*, 450 So. 2d 830 (Fla. 1984); *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978 (Fla. 1984).

47. *Migliore*, 448 So. 2d 978, specifically adopted the holding in *Prevatt*, 201 So. 2d 780.

48. *Id.* at 981. The Florida Supreme Court rendered an identical holding in *Barber*, 450 So. 2d 830. It is interesting to note that, in the following term, the court did not extend the rationale found in dramshop cases to the prescribing of drugs. See *Forlaw v. Fitzer*, 456 So. 2d 432 (Fla. 1984). In *Forlaw* the court addressed whether a physician who prescribed quaaludes to a known drug addict was liable to a third party for the negligence of the patient in driving a car while under the influence of the drug. *Id.* After taking the quaaludes and drinking alcohol, the patient fatally struck a 12-year-old girl with his car. *Id.* at 433. The court held that the mere dispensing of drugs was insufficient to make the physician liable for negligence. *Id.* at 434.

49. *Migliore*, 448 So. 2d at 980.

50. 451 So. 2d 480 (Fla. 1984). Note that the causes of action in *Migliore* and *Barber* arose before the enactment of § 768.125, even though the Supreme Court of Florida addressed those disputes after the effective date of the statute.

51. *Id.* at 481.

52. *Id.*

In 1980 the Florida Legislature enacted section 768.125, *Florida Statutes*.⁵³ Introduced as House Bill 1561, section 768.125 was amended three times before becoming law on May 24, 1980.⁵⁴ Originally, House Bill 1561 read:

562.51 Liability for injury or damage resulting from intoxication. — Whoever sells or furnishes alcoholic beverages to a person shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person; provided, that whoever willfully and unlawfully sells or furnishes alcoholic beverages to a person under 18 years of age may become liable for injury or damage caused by or resulting from the intoxication of such minor and provided further that any person convicted of a violation of s. 562.50 may become liable for injury or damage caused by or resulting from the intoxication of such drunkard.⁵⁵

The original bill thus required that a person be convicted under section 562.50, *Florida Statutes*, before the person could be civilly liable for a drunkard's injuries. According to section 562.50, a person commits a second-degree misdemeanor when the person sells, gives to, disposes of, exchanges, or barter any intoxicating substance to a habitual drunkard when the drunkard's spouse, parent, sibling, or nearest relative notifies the person, in writing, of the drunkard's addiction.⁵⁶

According to some opponents of House Bill 1561, it was highly improbable that someone would be convicted under section 562.50, so

53. Ch. 80-37, 1980 Fla. Laws 130. See generally Lucinda Burwell, *A Sobering New Approach to Liquor Vendor Liability in Florida*, 13 FLA. ST. U. L. REV. 827, 835 (1985) ("Thus, section 768.125 presently controls civil damage claims in Florida, and liability cannot be extended beyond the terms of the statute by employing common law principles, as can be done in some states.').

54. Chapter 80-37 was introduced in the Florida House on April 21, 1980. FLA. H.R. JOUR. 216 (Reg. Sess. 1980). Following amendments to the bill, discussed *infra* at notes 57-61 and accompanying text, the bill became law without the Governor's signature on May 24, 1980. The Governor vetoed a similar bill during the 1979 legislative session. See *Ellis v. N.G.N. of Tampa, Inc.*, 561 So. 2d 1209, 1213 (Fla. 2d DCA 1990), *quashed*, 586 So. 2d 1042 (Fla. 1991).

55. *Ellis*, 561 So. 2d at 1213-14 (quoting HB 1561) (emphasis omitted).

56. Specifically, § 562.50 provides as follows:

Section 562.50 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 s. 775.082 or s. 775.083.

the bill was amended to remove the provision for criminal conviction.⁵⁷ The House's April 22, 1980, amendment of House Bill 1561 passed the House by an 89-13 margin and resulted in this language:

562.51 Liability for injury or damage resulting from intoxication. — Whoever sells or furnishes alcoholic beverages to a person shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person; provided, that whoever willfully and unlawfully sells or furnishes alcoholic beverages to a person under 18 years of 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.⁵⁸

Consequently, the bill sought to limit liability—with two exceptions—and a conviction for an unlawful sale to a habitual drunkard was no longer a prerequisite for recovering civil damages. However, the issue of whether written notice was necessary to recover civilly remained uncertain.

On May 8, 1980, the Florida Senate amended House Bill 1561 by adopting the following language:

562.51 Liability for injury or damage resulting from intoxication. — Whoever 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; provided, that whoever 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. *It is the intent of the Legislature that this provision applies to any person including, but not limited to, private party hosts as well as licensees under chapter 562.*⁵⁹

This amendment was only partially acceptable to the Florida House. On May 14, 1980, the House amended the Senate's version of the bill

57. See *Ellis*, 561 So. 2d at 1214 (quoting the comments of Representative Tom Gustafson, Dem., Ft. Lauderdale, 1976-1990, on the House floor during debate of the first House amendment on April 22, 1980). The House's April 22, 1980, amendment eliminated the language about criminal conviction. See FLA. H.R. JOUR. 225 (Reg. Sess. 1980).

58. FLA. H.R. JOUR. 225, 232 (Reg. Sess. 1980) (emphasis added).

59. FLA. S. JOUR. 270 (Reg. Sess. 1980) (emphasis added). The amendment passed the Senate by a 22-14 margin. *Id.* Senate Bill 233 was similar to House Bill 1561 but used language such as "not yet attained the age of majority" instead of "under 18 years of age." House Bill 1561 was substituted for Senate Bill 233. FLA. S. JOUR. 271 (Reg. Sess. 1980).

by striking the last sentence of the Senate's amendment.⁶⁰ Subsequently, the Senate concurred with the House's latest amendment,⁶¹ and the bill was soon designated as chapter 80-37, *Laws of Florida*.

After passage, the Joint Legislative Management Committee codified chapter 80-37 in chapter 768, which deals with negligence, and not in chapter 562, which is the beverage enforcement law.⁶² This placement has not affected the substance of the act.⁶³

Since section 768.125 was enacted, Florida appellate courts have examined various issues raised by the legislation. An issue frequently litigated is whether a patron was in fact a habitual drunkard.⁶⁴ A habitual drunkard may be someone "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, excessive and be the dominant passion."⁶⁵ The habitual drunkard issue, combined with the

60. FLA. H.R. JOUR. 451 (Reg. Sess. 1980). This amendment passed the House by a 105-3 margin. *Id.* The bill was then forwarded to the Senate. *Id.* at 452. Note that the sentence struck by the amendment would have created social host liability in the State of Florida. Since the enactment of § 768.125, the Florida Supreme Court has twice refused to recognize social host liability. See *Dowell v. Gracewood Fruit Co.*, 559 So. 2d 217 (Fla. 1990); *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987).

61. FLA. S. JOUR. 323 (Reg. Sess. 1980). The bill passed the Senate by a 20-13 margin on May 15. *Id.*

62. The Committee is authorized by § 11.242(5)(e), *Florida Statutes*, to transfer acts. However, in this case, the Committee had no legislative direction to move chapter 80-37 from the section for which it was originally designated. See *Bankston v. Brennan*, 507 So. 2d 1385, 1386 (Fla. 1987).

63. *Bankston*, 507 So. 2d at 1387. Note that the Committee also changed the wording at the beginning of the statute from "Whoever" to "A person who." Compare note 59 and accompanying text with § 768.125, as quoted in this footnote. Section 768.125 has not changed since it was originally published in *Florida Statutes*, and the latest version of the statute declares:

768.125 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 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.

FLA. STAT. § 768.125 (1991). See *Burwell*, *supra* note 53 (discussing the attempts to amend the statute in the 1984 and 1985 legislative sessions); Michael L. Richmond, *Vicarious Liability of Purveyors of Liquor for the Torts of their Drunken Minor Patrons*, 13 STETSON L. REV. 267 (1984) (The limitation on liability imposed by § 768.125 "makes Florida the state in which third parties have the most difficulty reaching the pocket of the party presumptively most able to compensate them for their injuries. Section 768.125 clearly runs contrary to the interests of the people of the state, and therefore should be repealed.").

64. See, e.g., *Roster v. Moulton*, 602 So. 2d 975 (Fla. 4th DCA 1992); *Sabo v. Shamrock Communications, Inc.*, 566 So. 2d 267 (Fla. 5th DCA 1990), *approved sub nom.* *Peoples Restaurant v. Sabo*, 591 So. 2d 907 (Fla. 1991).

65. *Todd v. Todd*, 56 So. 2d 441, 442 (Fla. 1951).

question of whether the vendor knew the patron was a habitual drunkard and a requirement compelling a plaintiff to demonstrate knowledge with direct evidence, could render section 768.125 meaningless regarding liability for adult customers.⁶⁶ Circumstantial evidence, however, is sufficient to show a vendor's knowledge.⁶⁷

Another issue raised by section 768.125 is whether a vendor served a minor willfully. Demonstrating that the minor was not asked for identification is not sufficient by itself to demonstrate the vendor's willingness to sell alcoholic beverages to a minor.⁶⁸ Although a single conclusory allegation that the vendor willfully and unlawfully served the minor is insufficient, allegations that the plaintiff appeared to be a minor and that the vendor had a duty to see proper identification will probably suffice.⁶⁹ Moreover, failing to demonstrate the minor's appearance at the time of the sale may be fatal to the minor's cause of action.⁷⁰

Before the Florida Supreme Court's decision in *Ellis v. N.G.N. of Tampa, Inc.*, judicial interpretations of section 768.125, concerning vendor liability for serving alcohol to habitual drunkards who injure themselves, were unsettled. The Florida Supreme Court opinion arose as a conflict between the Second District Court of Appeal's decision in *Ellis* and the Fifth District Court of Appeal's decision in *Sabo v. Shamrock Communications, Inc.*⁷¹

III. THE SUPREME COURT OF FLORIDA'S DECISION IN *ELLIS v. N.G.N. OF TAMPA, INC.*

A. *The Facts and Procedural History*

The defendants owned and operated a bar called the Dallas Bull Lounge in Tampa, Florida.⁷² On one March evening in 1988, Gilbert Ellis consumed twenty drinks served to him at the bar.⁷³ After drink-

66. *Sabo*, 566 So. 2d at 268. The *Ellis* court found the Fifth DCA's analysis of this issue to be persuasive. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048-49 (Fla. 1991).

67. *Sabo*, 566 So. 2d at 268. Likewise, circumstantial evidence may demonstrate a vendor's knowledge that a patron's age was less than the lawful drinking age. *Gorman v. Albertson's, Inc.*, 519 So. 2d 1119, 1120 (Fla. 2d DCA 1988); *Willis v. Strickland*, 436 So. 2d 1011 (Fla. 5th DCA 1983), *rev. denied sub nom. ABC Liquors, Inc. v. Willis*, 446 So. 2d 99 (Fla. 1984).

68. *Tuttle v. Miami Dolphins, Ltd.*, 551 So. 2d 477, 481 (Fla. 3d DCA 1988), *rev. denied*, 563 So. 2d 635 (Fla. 1990).

69. *French v. City of W. Palm Beach*, 513 So. 2d 1356, 1358 (Fla. 4th DCA 1987).

70. *Id.*

71. *Compare Ellis v. N.G.N. of Tampa, Inc.*, 561 So. 2d 267 (Fla. 2d DCA 1990), *quashed*, 586 So. 2d 1042 (Fla. 1991), *with Sabo v. Shamrock Communications, Inc.*, 566 So. 2d 267 (Fla. 5th DCA 1990), *approved sub nom. Peoples Restaurant v. Sabo*, 591 So. 2d 907 (Fla. 1991).

72. Brief for Appellant at 1, *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991).

73. *Ellis*, 586 So. 2d at 1043.

ing the alcoholic beverages, Ellis drove and wrecked his automobile in a single-car accident.⁷⁴ Ellis sustained severe injuries, including permanent brain damage.⁷⁵ Mary Evelyn Ellis, Gilbert's mother, brought a civil action against defendants because Gilbert Ellis was incompetent and unable to bring the suit on his own.⁷⁶ Ms. Ellis sued the defendants in the Circuit Court for Hillsborough County and sought compensatory and punitive damages.⁷⁷ The defendants filed a motion to dismiss on the grounds that: (1) no first-party cause of action existed under section 768.125 against a vendor of alcoholic beverages; and (2) even if there was a first-party cause of action under these circumstances, the plaintiff failed to allege that the defendants were given written notice of Gilbert Ellis' habitual addiction to alcohol.⁷⁸ The defendants argued that, based upon section 562.50, *Florida Statutes*, a prerequisite to recovery was an allegation that written notice was given to the defendants.⁷⁹

The trial court granted the motion to dismiss, finding section 768.125 did not provide a first-party cause of action against a vendor of intoxicating beverages.⁸⁰ The Second District Court of Appeal affirmed for a different reason.⁸¹ Ms. Ellis then petitioned the Supreme Court of Florida to review the Second District's decision.⁸² Review was granted based on conflict with *Sabo*.⁸³

B. The District Court of Appeal Opinion

On April 18, 1990, just over two years after Gilbert Ellis' accident, the Second District Court of Appeal⁸⁴ affirmed the trial court's dismissal, but its decision turned on its analysis of the relationship between sections 562.50 and 768.125.⁸⁵

Ms. Ellis relied upon the First District Court of Appeal's opinion in *Pritchard v. Jax Liquors, Inc.*⁸⁶ to argue that her first-party cause of

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Ellis v. N.G.N. of Tampa, Inc.*, 561 So. 2d 1209 (Fla. 2d DCA 1990), *quashed*, 586 So. 2d 1042 (Fla. 1991). *See also infra* notes 84-95 and accompanying text.

82. Brief for Appellant at 3, *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991).

83. *Ellis*, 586 So. 2d at 1043.

84. 561 So. 2d 1209 (Fla. 2d DCA 1990), *quashed*, 586 So. 2d 1042 (Fla. 1991).

85. *Id.* at 1210.

86. 499 So. 2d 926 (Fla. 1st DCA 1986), *rev. denied*, 511 So. 2d 298 (Fla. 1987).

action should be allowed.⁸⁷ The Second District Court of Appeal agreed because it found that the class of persons to be protected under section 562.50 includes the habitual drunk driver *and* those whom the driver injures.⁸⁸ The Second District Court disagreed, however, with the *Pritchard* court's conclusion that the statute did not require a written notice.⁸⁹ Instead, the Second District Court found that sections 562.50 and 768.125 must be read *in pari materia*.⁹⁰ The court disagreed with the reasoning in *Pritchard* because the Florida Supreme Court had declared in no uncertain terms that "section 768.125 does not create any new cause of action but is merely a limitation on existing liability."⁹¹ The Second District Court then analyzed section 768.125's legislative history and found the Legislature had contemplated applying the written notice prerequisite to civil actions.⁹² According to the Second District Court, in amendments to the original bill, the House struck language requiring criminal conviction according to section 562.50 as a prerequisite to a civil recovery, but the House did not amend the requirement of notice.⁹³ Also, the fact that the floor discussion concerned a criminal conviction provision helped convince the Second District Court that the Legislature did not intend to affect the written notice requirement with its amendments.⁹⁴ Based on this legislative history, the Second District Court found the intent of the Legislature was to require written notice to a commercial provider of liquor before it could be subjected to criminal or civil liability.⁹⁵

As a consequence of this decision, Ms. Ellis obtained recognition of the first-party cause of action but still lost. She was, therefore, in no better position than before the appeal to the Second District Court; her claim was barred. This decision set the stage for the Supreme Court of Florida's involvement.

87. *Ellis*, 561 So. 2d at 1211.

88. *Id.*

89. *Id.* The *Pritchard* court stated § 768.125 does not require that a written notice be served upon the vendor; a vendor need only to serve the drunkard "knowingly." *Pritchard*, 499 So. 2d at 929.

90. *Ellis v. N.G.N. of Tampa, Inc.*, 561 So. 2d 1209, 1211-12 (Fla. 2d DCA 1990), *quashed*, 586 So. 2d 1042 (Fla. 1991).

91. *Id.* at 1212 (citing *Dowell v. Gracewood Fruit Co.*, 559 So. 2d 217 (Fla. 1990)).

92. *Id.* at 1212-15. See also *supra* notes 55-63 and accompanying text. Cf. *Sabo v. Shamrock Communications, Inc.*, 566 So. 2d 267 (Fla. 5th DCA 1990), *approved sub nom.* *Peoples Restaurant v. Sabo*, 591 So. 2d 907 (Fla. 1991).

93. *Ellis*, 561 So. 2d at 1212-15.

94. *Id.*

95. *Id.* at 1215.

C. *Analysis of the Supreme Court's Decision*

The Florida Supreme Court accepted Ms. Ellis' petition for review based on conflict with *Sabo*.⁹⁶ Justice Overton wrote the opinion for a unanimous court.⁹⁷ It was rendered on September 19, 1991—three and one-half years after Gilbert Ellis' accident.⁹⁸ After discussing factual and procedural matters, Justice Overton's analysis was divided into two parts.⁹⁹ The first part discussed the common law history of vendor liability for serving alcoholic drinks.¹⁰⁰ The second portion discussed section 768.125, its legislative history, and its effects on Florida common law.¹⁰¹

1. *The Issues*

The primary issue was whether a habitual drunkard has a first-party cause of action against a vendor of intoxicating beverages when the vendor served the drunkard drinks and the drunkard was severely injured in an automobile accident after departing the vendor's establishment.¹⁰² The court also addressed two other issues. The court considered whether, assuming the plaintiff had a cause of action, the cause of action could proceed under the restrictions placed upon it by section 768.125.¹⁰³ The court also analyzed what constituted knowledge sufficient to hold a vendor liable for negligence.¹⁰⁴

2. *The Court's Findings and Reasoning*

The court held that under certain circumstances there is a cause of action against a vendor for the negligent sale of alcoholic beverages to a habitual drunkard that results in injury to the drunkard or a third party.¹⁰⁵ The Florida Supreme Court partially justified its holding based on a summary of Florida's common law history of vendor liability to minors.¹⁰⁶ First, the court found that since the 1963 *Davis v.*

96. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991).

97. *Id.*

98. On remand, the *Ellis* case is still pending trial. Telephone Interview with Stevan Northcutt, attorney for Petitioner (Jan. 19, 1993).

99. *Ellis*, 586 So. 2d at 1044-49.

100. *Id.* at 1044-47.

101. *Id.* at 1047-49. See also *supra* notes 55-63 and accompanying text for a discussion of § 768.125's legislative history.

102. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1043 (Fla. 1991).

103. *Id.* at 1047.

104. *Id.* at 1048.

105. *Id.* at 1047.

106. *Id.* at 1045-47.

*Shiappacosse*¹⁰⁷ decision, Florida courts have recognized a first-party cause of action for a minor who is injured after a vendor illegally sold the minor an intoxicating beverage.¹⁰⁸ *Davis* recognized a cause of action based upon negligence per se.¹⁰⁹

Continuing its summary of common law liability, the court cited *Migliore v. Crown Liquors, Inc.*¹¹⁰ The *Migliore* court recognized that before section 768.125's enactment, a third party had a cause of action against a vendor who illegally supplied alcoholic beverages to a minor when the third party was injured in an automobile accident with the minor.¹¹¹ The *Migliore* court also denounced any claim that section 768.125 created a new cause of action against vendors of intoxicating beverages.¹¹²

The court's final step in resolving whether *Ellis* had a cause of action was to examine *Bankston v. Brennan*.¹¹³ In *Bankston* the Florida Supreme Court held that section 768.125 did not create a new cause of action against social hosts.¹¹⁴ *Ellis*, however, did not involve a social host. Gilbert *Ellis* was served drinks by a vendor licensed by the state to do so. The *Ellis* court probably discussed *Bankston* to demonstrate that section 768.125 applies to the liability of vendors, not social hosts. If that was its purpose, the court accomplished that task, but otherwise left the relevance of a social host case unexplained.

As a result of this discussion, the court concluded that there is a cause of action in Florida against vendors of alcoholic beverages for negligently selling alcoholic beverages to a minor when the minor or a third party's injuries are proximately caused by the vendor's sale.¹¹⁵

107. 155 So. 2d 365 (Fla. 1963).

108. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1045 (Fla. 1991). See, e.g., *Bryant v. Jax Liquors*, 352 So. 2d 542 (Fla. 1st DCA 1977), cert. denied, 365 So. 2d 710 (Fla. 1978); *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. 2d DCA 1967).

109. 155 So. 2d at 367.

110. *Ellis*, 586 So. 2d at 1046 (citing *Migliore v. Crown Liquors, Inc.*, 448 So. 2d 978 (Fla. 1984)).

111. 448 So. 2d at 980 (adopting the holding and rationale of *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. 2d DCA 1967)).

112. *Id.*

113. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1047 (Fla. 1991) (discussing *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987)).

114. 507 So. 2d at 1387. In *Bankston* the Fourth District Court of Appeal certified the following question for the Supreme Court: "Does Section 768.125, Florida Statutes, create a cause of action, against a social host, and in favor of a person injured by an intoxicated minor who was served alcoholic beverages by the social host?" *Id.* at 1385. Compare *Dowell v. Gracewood*, 559 So. 2d 217 (Fla. 1990) (applying similar issue to habitual drunkard with same results: no social host liability). See generally David Cohen, *Intoxicating Liquor: Social Host Liability for Serving Alcohol to Minors*, *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987), 39 U. FLA. L. REV. 963 (1987).

115. *Ellis*, 586 So. 2d at 1047.

The same general rule that applies to minors currently applies to habitual drunkards because (1) the Legislature made an explicit exception for them and (2) habitual drunkards are members of the class the statute was designed to protect—those who lack the ability to make responsible decisions concerning the consumption of alcohol.¹¹⁶

After finding a cause of action, the court determined how to proceed within the limitations set forth by section 768.125.¹¹⁷ The court concluded that to comply with section 768.125 a plaintiff is required to show the vendor *knowingly* served a habitual drunkard.¹¹⁸ In contrast, a minor must show the vendor's willfulness and unlawful conduct to establish a cause of action.¹¹⁹

Examining section 768.125, the court noted that the Legislature used the phrase "willfully and unlawfully" in the exception for minors and the word "knowingly" in the exception for habitual drunkards.¹²⁰ According to the court, the Legislature used "unlawfully" for the minor's exception because it wanted a plaintiff to prove all the elements of the criminal statute (for the sale of intoxicating liquor to minors) to recover in a civil suit.¹²¹ The absence of "unlawfully" in the habitual drunkard's exception similarly implied that a plaintiff need not prove the elements of the associated criminal statute.¹²²

One impact of this interpretation is it is more difficult for a minor, or a third party injured by a minor, to successfully win a lawsuit brought against a vendor. This may not be the desired result. The Legislature should reexamine this disparity in section 768.125 and produce two exceptions to the general rule of vendor liability that have similar prerequisites.¹²³ Public policy should not be that a third party's chances of proving a *prima facie* case of negligence turn on the age of the drunk driver.

The court also resolved the issue of what constitutes knowledge. It found that a vendor's knowledge in an action based upon ordinary negligence could be shown by circumstantial evidence.¹²⁴

116. *Id.*

117. *Id.*

118. *Id.* at 1047-48.

119. *Id.* at 1048.

120. *Id.* at 1047.

121. *Id.* at 1048. The criminal statute is codified at § 562.11, *Florida Statutes*.

122. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991). The associated criminal statute is found at § 562.50, *Florida Statutes*.

123. The 1992 Legislature did not change any provision in § 768.125.

124. *Ellis*, 586 So. 2d at 1048-49. However, the court noted that serving a habitual drunkard multiple drinks on *one* occasion would be insufficient, in and of itself, to establish that a vendor knowingly served the drunkard. *Id.* at 1048. The court, unfortunately, did not delineate what would constitute sufficient circumstantial evidence to establish knowledge. For example, was

3. *Public Policy Considerations*

The *Ellis* court carefully pointed out that a societal concern exists whereby society is to look out for those individuals who are unable to make rational decisions. In the context of vendor liability, the court sought to protect minors and adults addicted to alcohol because they are in "a class of persons who lack the ability to make a responsible decision in the consumption of alcohol."¹²⁵ Such public policy is beneficial to all Florida citizenry. However, is it desirable to assign the cost of such a policy to tavern owners?

In *Ellis* the court applied the principles of section 768.125 to the owner of a bar. However, the reach of the decision goes beyond the liability of taverns. Would not any establishment selling alcohol fall within the general rule propounded by the *Ellis* court, i.e., grocery stores, package stores, restaurants, convenience stores?¹²⁶ Not all of these establishments have an opportunity to observe customers for any length of time, but a scenario where a customer comes into a convenience or package store every day for a week to purchase several fifths of whiskey might rise to the level of circumstantial evidence called for in *Ellis*.

As a consequence of the *Ellis* decision, all establishments selling liquor would seem to have a duty to watch their customers for circumstantial evidence of alcohol addiction. Hence, the supreme court has now appeared to endorse the societal movement requiring businesses to stand as watchdogs over those who drink alcoholic beverages. In other words, to fulfill this role, vendors of intoxicating beverages should become more attuned to helping society rid itself of the devastating effects of drinking and driving. After *Ellis* the principle of being responsible for one's own actions, i.e., a drunkard being responsible for his own drunken state, seems to be pushed aside in favor of this class of overseers.

4. *The Soundness of the Court's Decision and Its Effect on Florida Law*

In a unanimous decision, the Florida Supreme Court found a dramshop liable for a patron who became drunk and then injured himself

Ellis a regular who was served multiple drinks every time he came to the Dallas Bull Lounge? See also *Roster v. Moulton*, 602 So. 2d 975 (Fla. 4th DCA 1992) (examining whether evidence of a vendor's knowledge is sufficient to avoid summary judgment).

125. *Ellis*, 586 So. 2d at 1047.

126. See, e.g., *Eddy v. Casey's Gen. Store, Inc.*, 485 N.W.2d 633 (Iowa 1992) (plaintiffs unsuccessfully sued grocery store that had sold them alcohol).

in an accident.¹²⁷ In doing so, it followed the substantial national trend to increase liability for those who sell intoxicating beverages.¹²⁸ Unfortunately, it did so by construing a statute that appeared to be designed to limit such liability¹²⁹ and did so despite previously holding that section 768.125 creates no new cause of action against vendors.¹³⁰ The Florida Legislature is better suited to address the boundaries of liability for those who tend bars. It should take the steps necessary to clarify the ambiguities found in section 768.125.

The principles of law applied in *Ellis* were not unique to Florida law. Since 1963 vendors have been forewarned that their responsibilities to minors go beyond the criminal statutes.¹³¹ They could, therefore, anticipate being made civilly liable for serving intoxicated guests. A Florida criminal statute already existed to thwart such behavior.¹³² What the *Ellis* decision brings to Florida law is a renewed sense of obligation on the part of dramshops to protect the citizenry from the detrimental effects of imbibing alcohol. With this obligation in mind, bartenders will be forced to promote the sales of liquor on one hand, while restricting the sales to habitual drunkards—thereby affecting the bartenders' own livelihood—on the other.

Ellis effectively modified dramshop liability so that it is more analogous to products liability. Before *Ellis*, the nexus between an injury to a consumer and the selling of alcohol to that consumer was more strained. It can be currently shown that a direct connection exists between the person selling the product, alcohol, and the injuries that a person inflicts upon himself with that product.

The concepts developed by the *Ellis* court may also be applied to other areas where a vendor sells a product to a consumer, and the consumer's self-inflicted injuries result from the product's misuse.¹³³ For example, a pharmacist selling a drug to a customer may, notwithstanding the other elements of a cause of action based upon negligence, proximately cause the customer's injuries if it is found that the customer was in no state to purchase the drug in the first place. Of course, *Ellis* can only be used as an analogous situation because the decision relies upon the construction of section 768.125, a statute applying only to alcoholic beverages.

127. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1049 (Fla. 1991).

128. See *supra* notes 22-23 and accompanying text.

129. *Ellis*, 586 So. 2d at 1047-48.

130. See, e.g., *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987).

131. *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963); *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. 2d DCA 1967).

132. See FLA. STAT. § 562.50 (1991).

133. See *Burwell*, *supra* note 53, at 828.

IV. SUMMARY OF TORT LIABILITY FOR SERVING ALCOHOL IN FLORIDA¹³⁴

A. Vendor Liability

1. Minors

According to *Migliore v. Crown Liquor of Broward, Inc.*¹³⁵ and before the enactment of section 768.125, a third party had a cause of action against vendors who served minors illegally when the minor caused the third party's injuries. Can a minor sue a vendor for the minor's injuries? *Davis v. Shiappacosee* recognized such a cause of action,¹³⁶ and clearly section 768.125 provides an exception for such a lawsuit. It is necessary, however, to show the vendor willfully and unlawfully furnished alcohol to the minor.¹³⁷

2. Patrons

Ellis has explicitly declared that some patrons may sue the tavern owners who furnished them too many drinks.¹³⁸ It must be shown that the tavern owner furnished the drinks while knowing the patron was habitually addicted to alcohol.¹³⁹ This knowledge may be shown using circumstantial evidence.¹⁴⁰

3. Third Persons

Whether the lawsuit involves minors or adults, third parties may sue for their own injuries caused by the drunken minors or adults.¹⁴¹ Unfortunately, the elements of a cause of action turn on the age of the drunken tortfeasor. If the tortfeasor is a minor, a plaintiff must show the dramshop illegally sold the alcoholic beverages to the minor and the dramshop willingly sold those beverages.¹⁴² If the tortfeasor is

134. This Note will not discuss a vendor's liability for the criminal acts of its patrons brought on by the consumption of alcohol.

135. 448 So. 2d 978 (Fla. 1984).

136. 155 So. 2d 365 (Fla. 1963).

137. For discussions about the application of § 768.125 to lawsuits involving minors, see also *Baker v. Casualty Indem. Exchange*, 561 So. 2d 1314 (Fla. 4th DCA 1990); *Barnes v. B.K. Credit Serv., Inc.*, 461 So. 2d 217 (Fla. 1st DCA 1984), *rev. denied*, 467 So. 2d 999 (Fla. 1985); *Puglia v. Drinks on the Beach, Inc.*, 457 So. 2d 519 (Fla. 2d DCA 1984); *McCarthy v. Danny's West*, 421 So. 2d 756 (Fla. 4th DCA 1982).

138. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991).

139. *Id.*

140. *Id.*

141. *Peoples Restaurant v. Sabo*, 591 So. 2d 907 (Fla. 1991); *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. 2d DCA 1967).

142. *Migliore v. Crown Liquor of Broward, Inc.*, 448 So. 2d 978 (Fla. 1984).

above the lawful drinking age, then a plaintiff need only show the dramshop sold the beverages to the tortfeasor knowing the tortfeasor was habitually addicted to alcoholic drinks.¹⁴³

*B. Social Host Liability*¹⁴⁴

Although this Note made only passing references to liability for social hosts under Florida law, social host liability will be noted here as well.¹⁴⁵ According to the Supreme Court of Florida, section 768.125 does not provide a cause of action against a social host that provides liquor to a minor or to a habitual drunkard, even though the statute clearly and unambiguously refers to "anyone who sells or furnishes alcoholic beverages."¹⁴⁶

143. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991).

144. For detailed discussions of social host liability in, and outside, Florida, see Tutwiler, *supra* note 20. See also Jacob R. Pritcher, Jr., *Is It Time To Turn Out the Lights? Social Host Liability Extended to Third Persons Injured by Intoxicated Adult Guests*: Beard v. Graff, 801 S.W.2d 158 (Tex. App.—San Antonio 1990, Writ Granted) (*en banc*), 22 TEX. TECH L. REV. 903 (1991); Romeo, *supra* note 8, at 875.

145. For social host liability, see *supra* note 114 and accompanying text. See generally *Ellis*, 586 So. 2d 1042.

146. *Dowell v. Gracewood*, 559 So. 2d 217 (Fla. 1990); *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987).

