St. Thomas Law Review

Volume 29
Issue 1 *Fall 2016*

Article 5

2016

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FLORIDA'S ANTI-DRAM SHOP LIABILITY ACT: IS IT TIME TO EXTEND LIABILITY TO SOCIAL AND COMMERCIAL HOSTS?

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I. INTRODUCTION

Since primeval times, "the [peril] of alcoholism from prolonged and excessive consumption of alcoholic beverages has been widely known and recognized."[1] In the United States, drivers who mix alcohol with gasoline are the leading contributors to the motor vehicle crash fatality dilemma.[2] In 2014, Florida ranked third, among all states, for alcohol-impaired[3] driving fatalities.[4] From 2003 to 2012, Florida also ranked third for having one of the highest fatality rates (8,476), across the nation, resulting from motor vehicle crashes involving an alcohol-impaired driver.[5] "There is no doubt that the clear public policy of our nation and [the] state[s] is to prevent

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1. Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991).

2. *See* ALAN BLOCK, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SURVEY OF DWI COURTS 1 (2016) ("Alcohol-impaired driving is a leading contributor to the motor vehicle crash fatality problem.").

3. *See, e.g.*, Hall v. West, 157 So. 3d 329, 330 n.1 (Fla. Dist. Ct. App. 2015) (explaining that, under Florida law, an individual is impaired if he or she has a blood-alcohol level of 0.08 or higher).

4. *See Alcohol-Impaired Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. 3 (Dec. 2015), http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf ("In 2014, there were 9,967 people killed in [the U.S. from] alcohol-impaired- driving crashes, an average of 1 alcohol-impaired-driving fatality every 53 minutes."). "Alcohol-impaired-driving fatalities were highest in Texas (1,446), followed by California (882) and Florida (685), and lowest in the District of Columbia (5)." *Id.* at 6.

5. *See Injury Prevention & Control: Motor Vehicle Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/motorvehiclesafety/impaired_driving/states-data-tables.html (last updated Mar. 28, 2016) (revealing data from 2003 to 2012 that shows the number of drunk driving deaths in each state); *see also* LAWRENCE BLINCOE ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE CRASHES, 2010 (REVISED) 3 (May 2015), http://www-nrd.nhtsa.dot.gov/Pubs/812013.pdf (stating that in the United States "[a]lcohol-involved crashes resulted in 13,323 fatalities, 430,000 nonfatal injuries, and $52.5 billion in economic costs in 2010.").

individuals from driving while [drunk]."[6] However, "[p]reventing the future loss of innocent lives because of intoxicated drivers requires both legislative and judicial action in a combined effort to win the war against the devastating consequences of drunk driving."[7]

In Florida, the war against drunk driving has been an ongoing dilemma.[8] Yet, under Florida's Dram Shop Act (Act), the Florida Legislature has failed to expressly provide for a cause of action against both *social and commercial hosts* who provide alcoholic beverages to *visibly intoxicated persons*.[9] Because of the legislature's reluctance to extend civil liability under the Act, there have been numerous instances where both the victims of drunk driving catastrophes and their families are uncompensated[10] for their emotional, physical, and financial loss.[11] The ultimate question then becomes: "[d]oes our society morally approve of the decision to continue to allow the charm of unrestrained social drinking when the cost is the lives of others, sometimes of the guests themselves?"[12]

This Comment focuses on Florida's Dram Shop Act, in a moral societal context, and how such civil liability should be extended to include *social and commercial hosts* under limited circumstances, for subsequent causally related damages to third persons. Part II of this Comment provides and defines the necessary terms to fully understand the practice area of Dram Shop Liability. Part III discusses the evolution of Florida's Dram Shop Act, beginning with the traditional common law approach and ending with a glance at previously proposed legislation. Part IV examines

6. Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995).

7. *Id.*

8. *See supra* notes 4–5 and accompanying text.

9. *See* FLA. STAT. § 768.125 (2016) (creating a cause of action only against "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." (emphasis added)); discussion *infra* Part IV.

10. *See* discussion *infra* Part IV. *But see* Gross v. Lyons, 721 So. 2d 304, 311 (Fla. Dist. Ct. App. 1998) (Warner, J., concurring in part and dissenting in part) (explaining that under Florida's "tort system" an injured party is supposed to be compensated for the losses that he or she suffered).

11. *See, e.g.*, Bankston v. Brennan, 507 So. 2d 1385, 1386–87 (Fla. 1987) (holding that Florida's Dram Shop Act does not create a cause of action against "social hosts" and in favor of a person or his or her family that is injured by an intoxicated minor who is served alcohol by a social host); De La Torre v. Flanigan's Enters., Inc., 187 So. 3d 330, 330–31, 333 (Fla. Dist. Ct. App. 2016) (affirming the lower court's dismissal of a suit brought by individuals against a commercial host after they were hit by a drunk driver who was provided alcohol by the commercial host and noting that extending liability under Florida's Dram Shop Act would be contrary to the legislature's intent).

12. Kelly v. Gwinnell, 476 A.2d 1219, 1229 (N.J. Sup. Ct. 1984).

the rise of social and commercial host immunity, in Florida, by tracing its origin from early case precedents. Part V provides an analysis that lends support to this Comment's proposal by examining how Florida courts in the late 1990s have shifted away from the traditional common law rule and began recognizing a limited exception to social host immunity under a theory of *negligence per se*. Additionally, Part V argues that Florida law should impose a duty on hosts who serve alcoholic beverages to persons who are visibly intoxicated and looks to other states that have expanded liability to social and commercial hosts. Finally, Part VI proposes an amendment to Florida's Dram Shop Act that would incorporate additional subsections and, therefore, extend liability to both social and commercial hosts that provide alcoholic beverages to *visibly intoxicated persons*.

II. BACKGROUND

A. WHAT IS A DRAM SHOP?

1. Generally

The term "dram shop" is a legal term that refers to a commercial establishment where alcoholic beverages are served to the general public to be consumed on the premises.[13] "Examples of dram shops are bars, taverns, and some restaurants."[14] "Traditionally, the [legal] term referred to a shop where spirits were sold by the dram, an English unit of liquid."[15]

2. Dram Shop Liability

The phrase "dram shop liability" refers to the body of law that governs the liability of commercial establishments that serve alcohol.[16]

13. *See e.g.*, Evans v. McCabe 415, Inc., 168 So. 3d 238, 239 (Fla. Dist. Ct. App. 2015) (defining "dram shop" as "an establishment that serves alcoholic beverages to the public."); *see also* ERIC J. HANDELMAN, J.D., PROOF OF TAVERN KEEPER'S LIABILITY UNDER DRAM SHOP ACT § 1, 137 AM. JUR. 3D *Proof of Facts* 195 (2016) (noting that a "dram shop" can be a "bar, tavern, or other commercial establishment" that serves alcohol for public consumption).

14. ELIZABETH O'CONNOR TOMLINSON, J.D., CAUSE OF ACTION FOR PERSONAL INJURY TO THIRD PARTY CAUSED BY COMMERCIAL SERVICE OF ALCOHOL UNDER DRAM SHOPS OR CIVIL DAMAGE ACTS § 2, 49 CAUSES OF ACTION 2D 363 (2016) (stating that a dram shop is "any type of drinking establishment where alcohol is sold to be consumed on the premises.").

15. HANDELMAN, *supra* note 13, § 1 (explaining the difference between the modern and traditional use of the word "dram shop").

16. *Id.* ("'Dram shop liability' has been defined as the civil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer.").

Generally, dram shop statutes exist throughout the states to impose civil liability on commercial establishments that furnish alcohol "to either visibly intoxicated persons or minors . . . who[,] by operation of a vehicle or other measure[,] cause personal injury or death to third parties who have no relationship to the commercial establishment."[17] Dram shop liability aims to police the conduct of, and protect the commercial interests of, commercial establishments "selling alcoholic drinks responsibly, while at the same time prohibiting [commercial establishments] from making money by irresponsibly plying intoxicated people with drink[s] who may, because of their intoxication, pose a hazard to others."[18]

B. SOCIAL HOST V. COMMERCIAL HOST

"A *social host* is a noncommercial supplier of [alcoholic beverages] . . . who, 'in his [or her] own house or elsewhere, gives a glass of intoxicating [alcohol] to a friend as a mere act of courtesy and politeness.'"[19] "The typical example of a social host . . . is where a host invites associates to participate in a social gathering, in a private setting, and furnishes and serves alcohol to a guest."[20] However, "not every [social] host entertains guests at home[;] [m]any entertain at hotels, clubs or resorts."[21] It is common for a social host to even entertain guests in settings outside of the home (i.e., by opening a tab at a tavern or bar), and still be considered a social host.[22]

A "commercial host" is distinguishable from a social host.[23] Commercial hosts are persons or commercial establishments that are

17. *Id.*

18. *Id.* (citing Fort Mitchell Country Club v. LaMarre, 394 S.W.3d 897, 900 (Ky. 2012)).

19. Bell v. Hutsell, 931 N.E.2d 299, 303 (Ill. App. Ct. 2010) (emphasis added) (quoting Cruse v. Aden, 20 N.E. 73, 77 (Ill. 1889)); *see* Delfino v. Griffo, 257 P.3d 917, 924 (N.M. 2011) (defining a "social host" as "one who provides his or her guest with gratuitous alcohol in a *social* setting."); Solberg v. Johnson, 760 P.2d 867, 870 (Or. 1988) (defining a "social host" as "one who receives guests, whether friends or associates, in a social or commercial setting, in which the host serves or directs the serving of alcohol to guests."); Hinebaugh v. Pa. Snowseekers Snowmobile Club, 63 Pa. D. & C.4th 140, 151 (Pa. Ct. C.P. Lawrence Cty. 2003) (defining a "social host" as a "person or entity that provides free alcoholic beverages.").

20. *Solberg*, 760 P.2d at 870.

21. *Id.*

22. *Id.* ("Hosting at taverns is not uncommon. One does not need to belong to or utilize the services of [a] club to [be] a host. One may pay a monthly liquor bill to a club *or ante up per drink at a tavern* and still be a host." (emphasis added)).

23. *See, e.g.*, McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 143–44 (Mass. 1986) ("There are . . . differences between the operation of a commercial establishment selling alcoholic beverages for consumption on the premises and the furnishing of alcoholic beverages to

licensed[24] to sell alcoholic beverages in a commercial setting.[25] In Florida, commercial hosts must apply for a license through the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, in order to sell alcoholic beverages[26] to the general public.[27] In contrast, a social host is not subject to Florida's alcohol licensing requirements.[28] Social hosts are free to serve and provide alcoholic beverages, in a private setting, subject to minimal restrictions. For example, in Florida, criminal penalties[29] are prescribed against social hosts "if any alcoholic beverage . . . is possessed or consumed at the residence [of a social host] by [a] minor."[30]

Currently, the possibility of imposing *civil liability* on social and commercial hosts in Florida varies.[31] For example, section 768.125, Florida Statutes (Florida's Dram Shop Act), is dormant when it comes to

guests in one's home."); Fritsch v. Rocky Bayou Country Club, Inc., 799 So. 2d 433, 436 (Fla. Dist. Ct. App. 2001) (finding that a situation involving the selling and serving of alcoholic beverages to a person by a corporation—with a license—is factually distinguishable from a "social host" situation).

24. *See* FLA. STAT. § 561.01(14) (2016) ("'Licensee' means a legal or business entity, person, or persons that hold a license issued by the [Florida Division of Alcoholic Beverages and Tobacco] . . . ."); *see also infra* notes 27–28 and accompanying text.

25. *See* discussion *supra* Part II, Section A, Subsection 1 (discussing the term "dram shop").

26. *See* FLA. STAT. § 561.01(4)(a) (2016) ("'Alcoholic beverages' means distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume.").

27. FLA. STAT. § 561.17(1) (2016) (detailing the application and registration process for obtaining an alcohol license in Florida); *see also* FLA. STAT. § 561.15 (2016) (detailing the qualifications required to obtain an alcohol license in Florida); State ex rel. Hoffman v. Vocelle, 31 So. 2d 52, 54 (Fla. 1947) (en banc) ("The state under the police power may by statutory enactment prescribe rules, regulations, terms and conditions under which intoxicating liquors may be sold to the public.").

28. *See* FLA. STAT. § 561.02 (2016) ("[T]he Division of Alcoholic Beverages and Tobacco . . . shall supervise the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within [Florida] of all alcoholic beverages . . . .").

29. *See* FLA. STAT. § 856.015(4) (2016) ("Any person who violates any of the provisions of subsection (2) [under section 856.015, Florida Statutes] commits a misdemeanor of the second degree . . . . A person who violates subsection (2) a second or subsequent time commits a misdemeanor of the first degree . . . .").

30. FLA. STAT. § 856.015(2) (2016) (imposing criminal penalties—under section 856.015(4), Florida Statutes—on a social host who "knows" minors are possessing or consuming alcohol at an "open house party."); *see also* FLA. STAT. § 856.015(1)(e) (2016) (defining the term "open house party" as "a social gathering at a residence.").

31. *Compare* Dowell v. Gracewood Fruit Co., 559 So. 2d 217, 218 (Fla. 1990) (finding that Florida's Dram Shop Act does *not* create a cause of action against a social host), *with* Evans v. McCabe 415, Inc., 168 So. 3d 238, 239–40 (Fla. Dist. Ct. App. 2015) (entertaining a cause of action against a commercial host that served a "habitual drunkard" alcohol on the night he crashed his car into a tree and died).

imposing liability on social hosts, but conscious when it comes to imposing liability on commercial hosts.[32]

C. SOCIAL HOST LIABILITY

Social host liability is an area of tort law controlling the duties owed by a social host to both his or her guests and the general public.[33] The phrase "social host liability" is used to designate a negligence claim against a person (the social host) who gratuitously furnishes intoxicating beverages to another person (the guest), which subsequently causes the guest or a third party to sustain injury as a result of the guest's intoxicated state.[34] Such liability is premised on the theory that, because the social host furnished the alcoholic beverages, the social host should, therefore, be liable for the resulting injuries.[35]

III. THE EVOLUTION OF FLORIDA'S DRAM SHOP ACT

A. THE TRADITIONAL COMMON LAW APPROACH

"To resolve this [moral dilemma], it is first necessary to review the legal history of the duty placed on [commercial hosts] . . . ."[36] Originally, prior to 1959, Florida's common law provided that a commercial host could not be liable for the negligent sale of alcoholic beverages when either the purchaser or third parties were injured as a result of the consumption of those beverages.[37] "This common law principle was based on the

32. *See* FLA. STAT. § 768.125 (2016); *see, e.g.*, Doe v. NCL (Bahamas) Ltd., No. 11-22230-Civ, 2012 WL 5512347, at *4 (S.D. Fla. 2012) ("[Section 768.125 of the Florida Statutes] bars claims [against commercial hosts] for over service of alcohol except in two limited circumstances, i.e[.,] when the liquor is furnished to a minor or to a person habitually addicted to alcohol."); *see also* discussion *infra* Part II, Section C.

33. *See* Silva v. Markham, 25 Mass. L. Rptr. 567, at *3 (Mass. Super. Ct. 2009) ("Social host liability is premised under negligence, where the plaintiff cannot recover if the host owed no duty of care.").

34. Kapres v. Heller, 640 A.2d 888, 889 n.1 (Pa. 1994).

35. *Id.*

36. Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1044 (Fla. 1991).

37. *Id.*; *see also* United Servs. Auto. Ass'n v. Butler, 359 So. 2d 498, 499 (Fla. Dist. Ct. App. 1978) ("At common law one injured by an intoxicated person had no cause of action against the dispenser of the intoxicating liquor, and that has been the general rule in this country in the absence of statute."); Luque v. Ale House Mgmt., Inc., 962 So. 2d 1062, 1064 (Fla. Dist. Ct. App. 2007) ("Originally, under Florida common law, 'a commercial vendor of alcoholic beverages was not liable to either the purchaser or to third persons injured as a result of the consumption of those beverages.'" (quoting Publix Supermarkets v. Austin, 658 So. 2d 1064, 1066 (Fla. Dist. Ct. App. 1995))).

conclusion that the proximate cause of the injury was the *consumption* of the intoxicating beverage by the person, rather than the *sale* of intoxicating beverages to the person and, [therefore], there could be no valid claim against a [commercial host] for damages."[38] For example, the drinking of the wine, not the furnishing of wine, was considered the legal cause of the injuries.[39]

B. JUDICIAL MODIFICATION OF THE COMMON LAW

1. Out-of-State Precedent

In 1959, a modification to this common law view first occurred when the Supreme Court of New Jersey, in *Rappaport v. Nichols*,[40] modified the common law's consumption-sale distinction and "took [it] upon itself to fill a judicially-perceived vacuum of restraint on commercial [hosts]."[41] In *Rappaport,* a commercial host sold and served intoxicating beverages to a minor under circumstances in which the commercial host knew that the purchaser was a minor and, therefore, could not lawfully be served such beverages.[42] After ingesting the alcohol, the minor became drunk and killed a third party while driving an automobile.[43] In holding that the commercial host could be civilly liable to the deceased's estate, the Supreme Court of New Jersey explained:

> [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

38. *Ellis*, 586 So. 2d at 1044; *see United Servs. Auto. Ass'n*, 359 So. 2d at 499 ("The rationale ascribed to [Florida's common law] rule is that the drinking of the liquor and not the serving of it is the proximate cause of the injury."); Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217, 219 (Fla. Dist. Ct. App. 1984).

> [T]he logic behind the [common law] rule is that the proximate cause of the injury was the intoxicated patron's voluntary act of rendering himself or herself incapable of driving a vehicle. The tavern owner's act of furnishing the alcohol was considered only to be a remote cause of the injury.

Id.

39. *See* Bennett v. Godfather's Pizza, Inc., 570 So. 2d 1351, 1354 (Fla. Dist. Ct. App. 1990) (per curiam).

40. Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959).

41. *Ellis*, 586 So. 2d at 1044 (internal quotation marks omitted) (quoting 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) (explaining how the Supreme Court of New Jersey modified the common law view that the Florida courts originally followed).

42. *Rappaport*, 156 A.2d at 3.

43. *Id.*

> 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 [commercial hosts] who can always discharge their civil responsibilities by the exercise of due care.[44]

Analogously, the same year that *Rappaport* was decided, the Seventh Circuit Court of Appeals, in *Waynick v. Chicago's Last Dep't Store*,[45] abolished the consumption-sale distinction by placing a duty on commercial hosts when legislation was dormant.[46] In *Waynick*, commercial hosts in Illinois sold and served alcohol to two men who were subsequently involved in an automobile collision in Michigan due to their intoxication, which resulted in one fatality.[47] Because the Illinois Dram Shop Act was not applicable in Michigan and the Michigan Liquor Control Act was not applicable in Illinois, the Seventh Circuit applied the common law duty of care to commercial hosts and stated the following:

> In applying the common law to the situation presented in this case, we must consider the law of tort liability, even though the chain of events, which started when the defendant [commercial hosts] unlawfully sold intoxicating liquor to two drunken men, crossed state boundary lines and culminated in the tragic collision in Michigan. We hold that, under the facts appearing in the complaint, the [commercial hosts] are liable in tort for the damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former.[48]

2. Florida Courts

In 1963, four years after *Rappaport* and *Waynick,* the Florida Supreme Court, in *Davis v. Shiappacossee*,[49] addressed the issue of commercial host liability.[50] In *Davis*, several minors, after purchasing a case of beer and one-half pint of whiskey, went to a drive-in theater and then drove to a park.[51] During these visits, the minors drank the beer and the whiskey.[52] Six hours after the initial purchase of the alcohol, one of the

44. *Id.* at 10.
45. Waynick v. Chi.'s Last Dep't Store, 269 F.2d 322 (7th Cir. 1959).
46. *See id.* at 325 ("Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him.").
47. *See id.* at 323–24.
48. *Id.* at 324, 326 (footnote omitted) (applying Michigan's common law duty of care).
49. Davis v. Shiappacossee,155 So. 2d 365 (Fla. 1963).
50. *See id.* at 366–67.
51. *Id.* at 366.
52. *Id.*

minors, while driving at a rate of fifty-five miles per hour, lost control of the automobile, struck a tree, and was killed.[53] Subsequently, the decedent's parent brought an action against the commercial host.[54]

At the inception of the lawsuit, the trial court dismissed the complaint for failure to state a cause of action.[55] On appeal, the Second District Court of Appeal affirmed, finding that the consumption of the alcohol was the primary cause of the injury and that "the automobile accident and the death of the driver were not reasonably expected or probable results of the sale of the beverages."[56] However, the Florida Supreme Court, in *Davis*, rejected this conclusion, and found that a violation of a statute, which criminalizes the sale of alcohol to minors,[57] gave rise to a cause of action in *negligence per se*.[58]

After the *Davis* decision, Florida was put in the forefront with those jurisdictions that modified the traditional common law rule[59] to allow negligence claims, against commercial hosts, on the basis that the sale of alcoholic beverages could be the proximate cause of an injury caused by drunk driving.[60] Four years after *Davis*, the Second District Court of

53. *Id.*

54. *Id.* at 366–67. Although Florida's Dram Shop Act had not yet been enacted at the time of the lawsuit, the plaintiff nevertheless contended that the commercial host was liable under a theory of "negligence per se" for violating a Florida statute that prohibited the sale of alcohol to minors. *Davis*, 155 So. 2d at 366–67.

55. *See* Davis v. Shiappacossee, 145 So. 2d 758, 758 (Fla. Dist. Ct. App. 1962), *quashed by* 155 So. 2d 365 (Fla. 1963).

56. *Id.* at 760.

57. *See Davis*, 155 So. 2d at 366–67 (noting that the plaintiff's lawsuit against the defendant commercial host in the lower court was based on the violation of section 562.11, Florida Statutes); *see also* FLA. STAT. § 562.11(1)(a)(1) (2016); FLA. STAT. § 775.082(4)(a)–(b) (2016); FLA. STAT. § 775.083(1)(d)–(e) (2016). Section 562.11(1)(a)(1), Florida Statutes, provides as follows: "[a] person may not sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or permit a person under 21 years of age to consume such beverages on the licenses premises." § 562.11(1)(a)(1). Anyone convicted of a violation of section 562.11(1)(a)(1), Florida Statutes, may be subject to a term of imprisonment of up to sixty days or one year, and a fine in the amount of $500 or $1,000. *See* §§ 775.082(4)(a)–(b), 775.083(1)(d)–(e); § 562.11(1)(a)(1) (citing §§ 775.082, 775.083).

58. *See Davis*, 155 So. 2d at 366–68; *see also* Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064, 1066 (Fla. Dist. Ct. App. 1995) ("The common law view was modified in Florida in 1963 by the [Florida Supreme Court's] decision in *Davis v. Shiappacossee* . . . ."); *see also* Fla. Freight Terminals, Inc. v. Cabanas, 354 So. 2d 1222, 1225 (Fla. Dist. Ct. App. 1978) ("It is *negligence per se* to violate a statute designed to protect a particular class of persons from their inability to protect themselves or to violate a statute which establishes a duty to take precautions to protect a particular class of persons from a particular type of injury." (emphasis added)).

59. *See supra* Part III, Section A (discussing Florida's traditional common law approach).

60. *See* Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1045 (Fla. 1991) (revealing those jurisdictions that had modified the traditional common law approach).

Appeal, in *Prevatt v. McClennan*,[61] applied the Florida Supreme Court's rationale in *Davis* in ruling on a similar case where a commercial host illegally sold intoxicating beverages to a minor.[62] In *Prevatt*, a minor became intoxicated while he was in a tavern, drew a firearm, and shot a patron in the back.[63] The injured patron brought an action against the commercial host, and the Second District affirmed a jury verdict and judgment in favor of the injured patron.[64] At the conclusion of *Prevatt*, the Second District held that a violation of a statute, which prohibits the sale of alcohol to minors, constitutes *negligence per se*.[65] In coming to that holding, the Second District explained that "[t]he very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making."[66] The Second District stressed the differences between the sale and consumption of alcoholic beverages by noting that "[t]he proximate cause of the injury is the sale rather than the consumption."[67]

As these cases highlight, a significant change had occurred, among some states, in the legal principles governing a commercial host's liability. Under Florida's traditional common law doctrine, the commercial host was immune from liability because consumption of the intoxicating beverage was considered to be the proximate cause of the conduct and resulting injuries that the commercial host had no way to control.[68] However, after *Rappaport*, *Waynick*, *Davis*, and *Prevatt*, the critical element was not consumption of the alcohol, but whether it was foreseeable that injury or damage would occur after a sale of alcohol, particularly when the sale was made to an individual who lacked the capacity to make a responsible decision in the ingestion of alcohol.[69]

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61. Prevatt v. McClennan, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967).

62. *Ellis*, 586 So. 2d at 1045–46; *see Prevatt*, 201 So. 2d at 781 ("*Davis v. Shiappacossee* . . . is but one of a number of recent cases holding that in the absence of a Dram Shop Act, a liquor vendor may be liable for consequential results of illegal sales." (emphasis added)).

63. *Ellis*, 586 So. 2d at 1046; *see Prevatt*, 201 So. 2d at 780–81.

64. *Ellis*, 586 So. 2d at 1046; *see Prevatt*, 201 So. 2d at 780–81.

65. *Ellis*, 586 So. 2d at 1046; *Prevatt*, 201 So. 2d at 781 ("[T]he statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibing such liquors."); *see also supra* note 58 and accompanying text (explaining the meaning of the term *negligence per se*).

66. *Prevatt*, 201 So. 2d at 781.

67. *Id.*

68. *Ellis*, 586 So. 2d at 1046; *see supra* Part III, Section A (discussing Florida's traditional common law approach).

69. *E.g.*, *Ellis*, 586 So. 2d at 1046, 1048 ("[S]erving an individual a substantial number of drinks on multiple occasions would be circumstantial evidence to be considered by the jury in

C. THE TEXT AND LEGISLATIVE HISTORY

1. The Legislative History

As a result of this judicial crusade to extend liability towards commercial hosts, in 1980, the Florida Legislature intervened and enacted section 562.51, Florida Statutes,[70] which is now codified as section 768.125, Florida Statutes.[71] The legislative history of section 768.125, Florida Statutes, began in April of 1980, when Florida Senator Winn introduced Senate Bill 233, which was ultimately passed in the Florida Legislature as House Bill 1561.[72] Senate Bill 233 was substituted for House Bill 1561, on the Senate floor, and "passed both Houses of the [Florida] Legislature and became law as Chapter No. 80-37 without the Governor's signature."[73]

The Senate Staff Analysis and Economic Impact Statement for House Bill 1561 provided in pertinent part:

> The bill would expressly eliminate the civil liability of a person who sells or furnishes alcoholic beverages to a person of lawful drinking age for any injury or damage caused by or resulting from the intoxication of such person.
>
> However, this bill would also provide the exception that any person who willfully and unlawfully sells or furnishes alcoholic beverages to a person not of lawful drinking age may be liable for

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determining whether the [commercial host] knew that the person was a habitual drunkard.").

70. *See Ellis*, 586 So. 2d at 1046; Bardy v. Walt Disney World Co., 643 So. 2d 46, 49 n.2 (Fla. Dist. Ct. App. 1994) (Diamantis, J., dissenting) ("Section 768.125 (formerly section 562.51) became effective on May 23, 1980.").

71. Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064, 1066 (Fla. Dist. Ct. App. 1995); *see* Estate of Massad *ex rel.* Wilson v. Granzow, 886 So. 2d 1050, 1052 (Fla. Dist. Ct. App. 2004) ("In 1980, as alcohol vendors' civil liability continued to increase, the legislature enacted section 768.125 to limit the expansion of vendors' exposure."); *see also* Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 981 (Fla. 1984) ("When the legislature enacted [section 768.125] it was presumed to be acquainted with the judicial decisions on this subject, including *Davis* and *Prevatt*."); *infra* Part III, Section C, Subsection 2 (discussing section 768.125, Florida Statutes).

72. *See* S. JOURNAL, 1980 Leg., 12th Reg. Sess. 26 (Fla. April 8, 1980) (noting that Florida Senator Winn sponsored and introduced Senate Bill 233 on April 8, 1980); S. COMMERCE COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S., 1980 Leg., Reg. Sess., at 1 (Fla. Apr. 24, 1980) (on file with the State Archives of Florida and the *St. Thomas Law Review*); S. COMMERCE COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S., 1980 Leg., Reg. Sess., at 1–2 (Fla. June 11, 1980) (on file with the State Archives of Florida and the St. Thomas Law Review) [hereinafter June 11, 1980, SENATE STAFF ANALYSIS STATEMENT] (noting that Senate Bill 233 passed as House Bill 1561).

73. June 11, 1980, SENATE STAFF ANALYSIS STATEMENT, *supra* note 72, at 2.

> injury or damage caused by or resulting from the intoxication of the minor as provided in [section] 562.11, [Florida Statutes].
>
> This bill also expresses the intent of the legislature to apply the provisions of the bill to private party hosts as well as licensees under [c]hapter 562, Florida Statutes.
>
> Since the bill could eliminate a licensee's liability in certain situations, premiums paid by alcoholic beverage licensees for liability insurance would be reduced. Some licensees are experiencing difficulty in obtaining liability coverage and premiums have been increasing in recent years.[74]

The Florida Legislature clearly intended that section 768.125, Florida Statutes, limit the existing liability of commercial hosts based on this language, as well as its enacting title: "An act relating to the Beverage Law; creating [section] 562.51, Florida Statutes . . . providing that a person selling or furnishing alcoholic beverages to another person is not thereby liable for injury or damage caused by or resulting from the intoxication of such other person; providing exceptions; providing an effective date."[75] As indicated in the enacting title, the Florida Legislature also "intended [section 768.125, Florida Statutes] to be included within chapter 562, Beverage Law: Enforcement[;] [however,] [w]ithout any legislative direction, [section 768.125] was subsequently codified by the Joint Legislative Management Committee . . . in the chapter dealing with Negligence."[76]

When initially introduced, section 768.125, Florida Statutes, required a plaintiff to establish the elements of the criminal offense provided in section 562.50, Florida Statutes,[77] for liability to be imposed in a civil

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74. *Id.* at 1.

75. *See Migliore*, 448 So. 2d at 981 (internal quotation marks omitted) (quoting Chapter 80-37, Laws of Florida (1980)).

76. Bankston v. Brennan, 507 So. 2d 1385, 1386 (Fla. 1987).

77. *See* FLA. STAT. § 562.50 (2016); *see also* discussion *infra* Part III, Section C, Subsection 3. Section 562.50, Florida Statutes, reads as follows:

> Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to 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 a[] 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 . . . .

§ 562.50.

action.[78] "However, the bill was amended on the floor of the House to delete the language requiring proof of all elements of the criminal offense and to specify only that the [commercial host] *knowingly* serve a habitual drunkard."[79]

2. The Text

The substantive provision, now section 768.125, Florida Statutes, titled "Liability for injury or damage resulting from intoxication," reads as follows:

> 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.[80]

As evidenced from the statutory text, section 768.125 codifies Florida's traditional common law rule, absolving commercial hosts from civil liability for the sale of alcoholic beverages, but provides two narrow exceptions to the common law rule of non-liability.[81]

3. Statutory Interpretation

The Florida Supreme Court first addressed section 768.125, Florida Statutes, in *Migliore v. Crown Liquors of Broward, Inc.*[82] In *Migliore*, the issue presented was whether, prior to the effective date of section 768.125, a commercial host who sells alcoholic beverages to a minor is liable to third parties injured by the intoxicated minor's operation of an automobile.[83] At the conclusion of *Migliore*, the Florida Supreme Court held that, prior to the effective date of section 768.125, such a cause of

78. Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1048 (Fla. 1991).

79. *Id.*

80. FLA. STAT. § 768.125 (2016).

81. *See* Publix Supermarkets, Inc. v. Austin, 658 So. 2d 1064, 1066 (Fla. Dist. Ct. App. 1995) (noting that the two exceptions that allow liability to be imposed on a commercial host apply when either the commercial host sells alcohol to a minor or a person habitually addicted to the consumption of alcohol (citing *Ellis*, 586 So 2d. at 1046)); Pritchard v. Jax Liquors, Inc., 499 So. 2d 926, 929 (Fla. Dist. Ct. App.1986) (explaining that section 768.125 provides two narrow exceptions to Florida's common law rule).

82. *See* Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 978 (Fla. 1984).

83. *Id.*

action against a commercial host did exist.[84] However, the Florida Supreme Court went further and rejected the Fourth District Court of Appeal's holding that, once effective, section 768.125 created a cause of action for third parties, against commercial hosts, for injuries caused by intoxicated minors and, instead, held that section 768.125 was a limitation on the liability of commercial hosts.[85]

Seven years after the *Migliore* opinion, the Florida Supreme Court, in *Ellis v. N.G.N. of Tampa, Inc.*,[86] outlined the causes of action that remained against commercial hosts under section 768.125, Florida Statutes, and stated:

> [A]lthough limited by the provisions of section 768.125, there is a cause of action against a [commercial host] for the negligent sale of alcoholic beverages to a minor that results in the injury to or death of the minor or a third party. While we have not expressly addressed a case involving a habitual drunkard, we find that the same law applies because: (1) it is an express exception to the statute limiting a [commercial host's] liability, and (2) it is also a sale of alcohol to a class of persons who lack the ability to make a responsible decision in the consumption of alcohol.[87]

To fully understand the purpose behind Florida's Dram Shop Act, it is necessary to scrutinize section 768.125 in its entirety.[88] In *Ellis*, the Florida Supreme Court interpreted section 768.125 thoroughly, and explained:

> The statute has three parts. The first part codifies the original common law rule that 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. *The statute then provides two exceptions. The first*, the minor

84. *Id.* at 978, 981; *see also* Armstrong v. Munford, Inc., 451 So. 2d 480, 481 (Fla. 1984) ("In our recent decision[] of *Migliore* . . . we held that prior to the effective date of section 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 . . . ."); Forlaw v. Fitzer, 456 So. 2d 432, 433 (Fla. 1984) (per curiam).

85. *Migliore*, 448 So. 2d at 980; *see, e.g.*, *Armstrong*, 451 So. 2d at 481 (reaffirming the holding in *Migliore* that section 768.125 provides a limitation on the existing liability of commercial hosts and only "controls . . . those cases arising after its effective date."); *see also Forlaw*, 456 So. 2d at 433–34 (noting the holding in *Migliore* established that section 768.125 provided a limitation on the existing liability of commercial hosts).

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

87. *Id.* at 1047 (footnote omitted); *see also* Luque v. Ale House Mgmt., Inc., 962 So. 2d 1062, 1065 (Fla. Dist. Ct. App. 2007) ("[S]ection 768.125 . . . delineates the elements that a party must establish in bringing a civil action against sellers of alcohol."); Fritsch v. Rocky Bayou Country Club, Inc., 799 So. 2d 433, 436 (Fla. 1st Dist. Ct. App. 2001) ("A plaintiff is not required to prove the exact manner of the injury to support a claim under section 768.125.").

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

> exception, provides that one who "*willfully and unlawfully* sells or furnishes alcoholic beverages to a person who is not of lawful drinking age . . . may become liable for injury or damage caused by or resulting from the intoxication of such minor." *The second*, the habitual drunkard exception, provides that a person "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 . . . person." It is important to note the distinction in the operative language of these two provisions.[89]

The Florida Supreme Court went one step further in its statutory interpretation and noted that, in applying the exceptions set forth in section 768.125, the statute's terms must be construed together with those stated in the criminal statutes that deal with the sale of alcohol.[90] There are two separate criminal offenses that pertain to the sale of alcoholic beverages to a minor and to a person addicted to alcohol.[91]

With regard to the sale of intoxicating beverages to a minor, section 768.125 incorporates the following terms: willfully and unlawfully.[92] Section 562.11(1)(a), Florida Statutes, sets forth the criminal offense relating to the unlawful sales of alcoholic beverages to minors.[93] In interpreting the term "unlawfully," the Florida Supreme Court, in *Ellis*, held that the legislature's use of the term "unlawfully" in section 768.125 "requires that [a] plaintiff . . . establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action."[94] According to

89. *Id.* (emphasis added) (internal citations omitted) (quoting FLA. STAT. § 768.125 (1987)); *see also* Hetherly v. Sawgrass Tavern Inc., 975 So. 2d 1266, 1267 (Fla. Dist. Ct. App. 2008) ("Then there is the text itself. [Section 768.125] says the [commercial host] *may* be held liable. It does not say *shall* be liable in damages. . . . Given this text and history, one may not plausibly characterize the Dram Shop Act as a strict liability statute."); West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80, 90 (Fla. 1976) ("Strict liability means negligence as a matter of law or negligence per se, the effect of which is to remove the burden from the user of proving specific acts of negligence.").

90. *Ellis*, 586 So. 2d at 1047; *see also, e.g.*, Pritchard v. Jax Liquors, Inc., 499 So. 2d 926, 929 (Fla. Dist. Ct. App. 1986) (explaining that section 768.125 is not a penal statute).

91. *Ellis*, 586 So. 2d at 1047; *see infra* notes 93 and 96 and accompanying text (discussing sections 562.11(1)(a) and 562.50, Florida Statutes).

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

93. *Id.* at 1047–48 (quoting the language of FLA. STAT. § 562.11(1)(a) (1987)); *see* FLA. STAT. § 562.11(1)(a) (2016) ("A person may not sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or permit a person under 21 years of age to consume such beverages on the licensed premises."); *see also* Puglia v. Drinks on the Beach, Inc., 457 So. 2d 519, 521 (Fla. Dist. Ct. App. 1984) ("We must assume that when the legislature enacted section 562.11, it was acquainted with judicial decisions on the subject, including *Prevatt*[] [and] *Migliore*.").

94. *Ellis*, 586 So. 2d at 1048; *see also* Persen v. Southland Corp., 656 So. 2d 453, 454 (Fla. 1995) ("The minor exception [contained in section 768.125, Florida Statutes] has been construed

the Florida Supreme Court, "[o]nce these elements have been proven, [a] plaintiff has established negligence per se."[95]

Section 562.50, Florida Statutes, sets forth the criminal offense pertaining to the unlawful sales of intoxicating beverages to habitual drunkards.[96] "However, with regard to the liability arising from the sale to a habitual drunkard, the legislature used the word *knowingly* in section 768.125 and did not repeat the phrase *willfully and unlawfully* used in the exception for the sale to a minor."[97] Therefore, the Florida Supreme Court, in *Ellis*, concluded that, "under the habitual drunkard exception to section 768.125, a plaintiff need only show that the [commercial host] *knowingly* sold alcoholic beverages to a person who is a habitual drunkard."[98]

In *Ellis*, the Florida Supreme Court was also asked to determine whether written notice, as required under section 562.50, was a requisite to proving that a commercial host *knowingly served*[99] a habitual alcoholic.[100] Given the legislative history[101] of section 768.125, and the Florida Legislature's use of the term "knowingly" in the statute's habitual drunkard

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as mirroring liability under the criminal statute . . . .").

95. *Ellis*, 586 So. 2d at 1048.

96. *Id.* at 1048 (quoting the language of FLA. STAT. § 562.50 (1987) and recognizing that section 768.125 was initially enacted as section 562.51, which immediately followed the provision in section 562.50 pertaining to habitual drunkards); *see* FLA. STAT. § 562.50 (2016). Section 562.50, Florida Statutes, as relied upon by the *Ellis* court, provides, in pertinent part, as follows:

> Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to 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 a[] 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 . . . .

Id.; *see also* Pritchard v. Jax Liquors, Inc., 499 So. 2d 926, 929 (Fla. Dist. Ct. App. 1986) ("Section 562.50 was enacted in 1945 and subjects the provider of alcohol to criminal liability for serving . . . a 'habitually addicted' person if the person's family has previously provided written notice that the person has a drinking problem. The statute's purpose is the protection of the . . . drunkard and his family.").

97. *Ellis*, 586 So. 2d at 1048.

98. *Id.*

99. *See supra* notes 96–98 and accompanying text (discussing the term "knowingly" as used in section 768.125, Florida Statutes).

100. *Ellis*, 586 So. 2d at 1048 (determining what constitutes "knowledge" for purposes of proving negligence on the part of a commercial host); Persen v. Southland Corp., 656 So. 2d 453, 454 (Fla. 1995).

101. *See supra* Part III, Section C, Subsection 1 (discussing the legislative history of section 768.125, Florida Statutes).

exception rather than the term "unlawfully" as used in the minor exception, the Florida Supreme Court held that written notice was not a prerequisite to proving that a commercial host *knowingly* served intoxicating beverages to a habitual alcoholic.[102]

At the conclusion of *Ellis*, the Florida Supreme Court went further and supplemented its initial holding by asserting:

> Serving an individual multiple drinks on one occasion would be insufficient, in and of itself, to establish that the [commercial host] knowingly served a habitual drunkard alcoholic beverages. On the other hand, 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 [commercial host] knew that the person was a habitual drunkard. We agree . . . that this element can properly be established by circumstantial evidence.[103]

In *Ellis*, the defendants were the owner and the operator of a bar that served several alcoholic drinks to the plaintiff's adult son, a habitual alcoholic, prior to the incident causing his injury.[104] However, the *Ellis* court never addressed the type of commercial host that may be held liable for "knowingly serving" a habitual alcoholic.[105]

Four years after the *Ellis* opinion, the Florida Supreme Court, in *Persen v. Southland Corp.*,[106] addressed this issue by considering the meaning of the term "serves" as used in the habitual drunkard exception contained in section 768.125, Florida Statutes.[107] In *Persen*, the Florida Supreme Court found that, because section 768.125 draws a distinction "between one who 'willfully and unlawfully *sells or furnishes*' alcoholic beverages," as set forth in the minor exception, "and one who 'knowingly *serves*' alcoholic beverages," as set forth in the habitual drunkard exception, "the [Florida] [L]egislature intended the habitual drunkard exception to cover only [commercial hosts] [that] 'place food or drink before' a habitual drunkard, such as bars, taverns, or restaurants."[108] The *Persen* court explained that the legislature did not intend civil liability to be

102. *Ellis*, 586 So. 2d at 1048; *Persen*, 656 So. 2d at 454–55.

103. *Ellis*, 586 So. 2d at 1048–49 (citations omitted).

104. *Persen*, 656 So. 2d at 455; *see Ellis*, 586 So. 2d at 1043.

105. *Persen*, 656 So. 2d at 455 (acknowledging that the Florida Supreme Court, in *Ellis*, did not identify the type of commercial establishment that would be subject to liability for "knowingly serving" a habitual drunkard, even though the *Ellis* court used the terms "vendor" and "sells" in its opinion).

106. Persen v. Southland Corp., 656 So. 2d 453 (Fla. 1995).

107. *See id.* at 455.

108. *Id.* (quoting Persen v. Southland Corp., 640 So. 2d 1228, 1230 (Fla. Dist. Ct. App. 1994)).

extended to commercial hosts that sell intoxicating beverages to adults, in closed containers, for consumption off of the premises belonging to the commercial hosts, and held, commercial hosts that sell alcoholic beverages to adults, in closed containers, for off-premises consumption, are not subject to liability under section 768.125.[109]

D. PROPOSED LEGISLATION IN THE PAST TWENTY YEARS

In the past twenty years, a number of bills have been introduced to the Florida Legislature in an effort to amend section 768.125, Florida Statutes. For example, in 1997, Representative Johnnie Byrd[110] introduced House Bill 849, with the intent of imposing civil liability against "[commercial hosts] who negligently provide alcoholic beverages to visibly intoxicated persons."[111] House Bill 849 would have amended section 768.125, in part, to read:

> Any person licensed under chapter 561 who negligently sells, gives, furnishes, or otherwise provides alcoholic beverages to a person who is visibly intoxicated shall be liable for injury or damage caused by or resulting from the intoxication of such person. Any person who willfully and unlawfully sells, gives, furnishes, or otherwise provides alcoholic beverages to a person who, through reasonable procedures, should have been known to be not of lawful drinking age or who negligently serves a person habitually addicted to the excessive 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.[112]

That same year, Senator Ronald A. Silver[113] introduced House Bill 1535.[114] As originally introduced, House Bill 1535 proposed an amendment to section 768.125 that would extend liability to "[commercial hosts] who

109. *Id.* ("This construction is consistent with the legislature's apparent decision that liability under the habitual drunkard exception not mirror liability under the criminal statute . . . .").

110. *See Former Florida Representative Johnnie Byrd (R)*, LOBBYTOOLS.COM, http://public.lobbytools.com/index.cfm?type=legislators&id=102 (last visited Dec. 22, 2016) (noting that former Florida Representative Byrd was a republican that represented the Plant City district from 1996 to 2004).

111. *See* H.R. 849, 1997 Leg., Reg. Sess. (Fla. 1997) (proposing an amendment to section 768.125, Florida Statutes).

112. *Id.*

113. *See Former Florida Senator Ronald A. Silver (D)*, LOBBYTOOLS.COM, http://public.lobbytools.com/index.cfm?type=legislators&id=38 (last visited Dec. 22, 2016) (noting that former Florida Senator Silver was a democrat that represented the North Miami district from 1992 to 2002).

114. *See* H.R. 1535, 1997 Leg., Reg. Sess. (Fla. 1997) (proposing an amendment to section 768.125, Florida Statutes).

knowingly provide alcoholic beverages to visibly intoxicated persons."[115] Despite numerous attempts to amend and reform section 768.125, the Florida Legislature has remained stagnant and content with the way Florida courts have interpreted the statute.[116]

IV. THE RISE OF HOST IMMUNITY IN FLORIDA

A. THE DAWN OF SOCIAL HOST IMMUNITY

1. *United Services Auto. Ass'n v. Butler* [117]

The first Florida court to address the issue of whether a social host is liable for injuries as a result of providing alcohol to his or her guest was the Fourth District Court of Appeal in *United Services Auto. Ass'n v. Butler*.[118] In *United Services Auto. Ass'n*, an individual was killed while riding as a passenger in an automobile driven by an intoxicated minor.[119] The accident happened after the minor and the decedent attended a party at the defendants' home.[120] At the party, the defendants served alcoholic beverages to all of their guests, including the minor.[121] While driving home with the decedent after the party, the intoxicated minor caused the automobile to roll over, killing the decedent.[122] As a result, the decedent's father brought a wrongful death action against the intoxicated minor and his father, the owner of the automobile, and the social hosts.[123] The intoxicated minor subsequently filed a third party complaint against the social hosts for contribution, which the trial court later dismissed.[124]

115. *See id.*; *see also* S. 1792, 2002 Leg., Reg. Sess. (Fla. 2002) (proposing an amendment to section 768.125, Florida Statutes, which would have read, "a person who, by failing to request and check one of the forms of identification listed in [section] 562.11(1)(b), sells or furnishes [alcohol] to a person who is not of lawful drinking age . . . may become liable for injury or damage caused by or resulting from the [minor's] intoxication."); H.R. 1309, 2002 Leg., Reg. Sess. (Fla. 2002) (providing a bill identical to S.B. 1792 in the Florida House of Representatives).

116. *See* Dowell v. Gracewood Fruit Co., 559 So. 2d 217, 218 (Fla. 1990) ("Several legislative sessions have passed . . . but no amendments to section 768.125 have been forthcoming. Therefore, we must assume that the legislature is content with our interpretation of the statute."); *see also supra* notes 111, 114–15 and accompanying text.

117. United Servs. Auto. Ass'n v. Butler, 359 So. 2d 498 (Fla. Dist. Ct. App. 1978).

118. *See id.* at 499–500.

119. *Id.* at 499.

120. *Id.*

121. *See id.*

122. *Id.*

123. *United Servs. Auto. Ass'n*, 359 So. 2d at 499.

124. *Id.*

On appeal, the Fourth District made plain that "the common law rule precluded liability attaching to a social host for dispensing intoxicants to a minor," and emphasized that "[i]f [the common law] rule is to be abrogated it should be done by the Legislature."[125] At the conclusion of *United Services Auto. Ass'n*, the Fourth District held that section 562.11, Florida Statutes,[126] did not create a cause of action against a social host for injuries that one sustains as a result of a social host providing intoxicating beverages to a minor.[127] The Fourth District also held that the intoxicated minor's third party complaint against the social hosts failed to state a cause of action since Florida's common law does not recognize a cause of action against an individual who unlawfully provides alcoholic beverages to a minor.[128]

2. *Bankston* [129] and its Progeny

Nine years after *United Services Auto. Ass'n*, the Florida Supreme Court, for the first time in its history, granted certiorari to address the issue of whether section 768.125, Florida Statutes, created a cause of action against a social host, and in favor of an individual injured by a drunken minor who was served intoxicating beverages by the social host.[130] In answering the certified question in the negative, the *Bankston* court expressly held that section 768.125 does not create a cause of action against a social host and, therefore, rejected extending liability to social hosts.[131] In reaching its decision, the *Bankston* court explained that "[i]t would . . . be anomalous and illogical to [conclude] that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law, and . . . unrecognized by

125. *Id.* at 500.

126. *See supra* notes 92–95 and accompanying text (discussing section 562.11, Florida Statutes).

127. *See United Servs. Auto. Ass'n*, 359 So. 2d at 500.

128. *Id.*; *see also* Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987) (noting that Florida common law did not recognize a cause of action against a social host, and in favor of a person injured by an intoxicated person who was served alcohol by the social host (citing Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963)); discussion *supra* Part III, Section B, Subsection 2 (discussing Florida's common law rules regarding commercial host liability, which the Florida Legislature later modified by statute).

129. Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987).

130. *See id.*

131. *See id.* at 1385, 1387.

statute or judicial decree."[132] Despite the fact that the *Bankston* court admitted that it was "mindful of the misery caused by drunken drivers and the losses sustained by both individuals and society at the hands of drunken drivers,"[133] the court nevertheless noted that:

> [W]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch. The issue of civil liability for a social host has broad ramifications, and as we recently observed, "of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus." The legislature has evidenced, through chapter 562 and section 768.125 for example, a desire to make decisions concerning the scope of civil liability in this area. While creating such a cause of action may be socially desirable . . . the legislature is best equipped to resolve the competing considerations implicated by such a cause of action.[134]

In 1990, three years after *Bankston*, the Florida Supreme Court tackled a similar issue in *Dowell v. Gracewood Fruit Co.*[135] In *Dowell*, the Florida Supreme Court, again, was faced to answer an issue of first impression: "[u]nder the law of Florida may a social host be held liable for serving alcohol to a known alcoholic?"[136] Relying on *Bankston*, the Florida Supreme Court rejected extending liability to social hosts and held that "the imposition of social host liability is a matter best left to the legislature."[137]

B. THE BIRTH OF COMMERCIAL HOST IMMUNITY

1. *Reed v. Black Caesar's Forge Gourmet Rest., Inc.* [138]

The Third District Court of Appeal's decision in *Reed v. Black Caesar's Forge Gourmet Rest., Inc.*, set the precedent, in Florida, when it

132. *Id.* at 1387 (citation omitted).

133. *Id.* (quoting Holmes v. Circo, 244 N.W.2d 65, 70 (Neb. 1976)).

134. *Id.* (citation omitted) (quoting Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986)).

135. Dowell v. Gracewood Fruit Co., 559 So. 2d 217 (Fla. 1990).

136. *Id.*

137. *Id.* at 218; *see* Cantalupo v. Lewis, 47 So. 3d 896, 901 (Fla. Dist. Ct. App. 2010) ("To the extent the defendant's brother drank more at the defendant's home, the defendant was a 'social host' during that time. . . . [*A*] *person injured by an impaired person does not have a cause of action against a social host* who served alcoholic beverages to the impaired person." (emphasis added) (citing *Bankston*, 507 So. 2d at 1387)).

138. Reed v. Black Caesar's Forge Gourmet Rest., Inc., 165 So. 2d 787 (Fla. Dist. Ct. App. 1964).

addressed the issue of whether a commercial host is liable for injuries that result from it serving alcoholic beverages to a *visibly intoxicated* patron.[139] In *Reed*, the plaintiff's husband went to a bar that the defendants operated.[140] Upon his arrival, the husband "relinquished possession of his motor vehicle and his ignition keys to defendants' servant."[141] While at the bar, the husband became so intoxicated that his physical and mental faculties were visibly impaired.[142] Despite his intoxicated condition, the husband left the defendants' bar and subsequently drove his automobile into a bay and drowned.[143] As a result, the decedent's wife brought a wrongful death action against the bar's operators on the ground that the defendants wrongfully caused the death of her husband.[144] In response, the defendants moved to dismiss the action for failure to state a cause of action, which the trial court subsequently granted.[145]

On appeal, the Third District, applying the common law rules of liability,[146] held that the trial court properly dismissed plaintiff's wrongful death action since "the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing the liquor, or delivering the ignition keys and possession of the automobile."[147] The Third District clarified its narrow holding by stating:

> We expressly exclude from consideration the possibility of liability by the [commercial host] to third persons injured by an intoxicated person. We find no authority, absent legislative enactment, to extend the same protection to those who become voluntarily drunk so that a right of action arises in them because of injury caused by their own intoxication as is sometimes extended to third persons who are injured by such intoxicated persons.[148]

139. *See id.* at 788–89.
140. *See id.* at 788.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Reed*, 165 So. 2d at 788.
145. *Id.*
146. *See id.* ("The common law requirement is that for the act of a defendant to give rise to civil liability the act must be the proximate cause of the damage claimed by the plaintiff.").
147. *Id.*
148. *Id.* at 788–89.

2. Post 1980—Commercial Host Immunity

In 1982, two years after the Florida Legislature's enactment of section 768.125, the Fourth District Court of Appeal, in *Lonestar Florida, Inc. v. Cooper*,[149] combated the issue of whether a cause of action exists against a commercial host that provides alcoholic beverages to an obviously intoxicated patron who later drunkenly and negligently injures another person.[150] In *Lonestar Florida, Inc.*, the parents of a minor that was killed in an accident with an intoxicated driver sued the intoxicated driver and the owner of the automobile that the intoxicated driver was driving at the time of the accident.[151] The owner of the automobile subsequently joined the commercial host in a third party claim for contribution alleging that if the owner of the automobile was liable to the plaintiff, then the commercial host should also be liable to the owner of the automobile.[152] The car owner's claim was premised on the legal theory that the commercial host was negligent in serving alcohol to a visibly intoxicated patron "and that such negligence was the proximate cause of [the] automobile accident and death."[153]

In *Lonestar Florida, Inc.*, the Fourth District found that no cause of action exists under section 768.125, Florida Statutes, against a commercial host that provides alcoholic beverages to an obviously intoxicated person.[154] Despite this finding, the Fourth District recognized that section 768.125 was inapplicable to the case since the statute was not in effect at the time of the accident.[155] Nevertheless, relying on *Reed v. Black Caesar's Forge Gourmet Rest., Inc.*, the Fourth District held that there was no cause of action, under common law, against a commercial host for injuries caused to another by the intoxicated person.[156]

149. Lonsestar Fla., Inc. v. Cooper, 408 So. 2d 758 (Fla. Dist. Ct. App. 1982).

150. *Id.* at 759.

151. *See id.*

152. *Id.*

153. *Id.*

154. *See id.* ("There is no question that the present Florida law on this subject is that no cause of action exists.").

155. *See Lonestar Fla., Inc.*, 408 So. 2d at 759.

156. *See id.* After the Fourth District's initial holding in *Lonestar Florida, Inc.*, the court went further and entertained the car owner's argument that a "municipal ordinance prohibiting the sale of alcohol to intoxicated persons gives rise to a cause of action . . . and[,] [therefore,] the conduct of the [commercial host] constitutes negligence per se." *Id.* at 760. However, the Fourth District disagreed with that contention and concluded that a "municipal ordinance *does not serve* to create a civil cause of action in a situation where the state statute[] on the subject and the common law are to the contrary." *Id.* (emphasis added).

Two years after the Fourth District decided *Lonestar Florida, Inc. v. Cooper*, the First District Court of Appeal, in *Barnes v. B.K. Credit Serv., Inc.*, decided a case based on similar facts, and similarly held that section 768.125 does not recognize a cause of action against a commercial host that serves alcohol to a visibly intoxicated adult, which later results in injury due to the adult's intoxicated condition.[157] In coming to that holding, the *Barnes* court relied on *Reed v. Black Caesar's Forge Gourmet Rest., Inc.*, for the proposition that Florida has adhered to the common law rule of non-liability as it pertains to the sale of alcoholic beverages to adults.[158] At the conclusion of the opinion, the *Barnes* court emphasized that "[w]hether it would have been wiser for the legislature to . . . include under [section 768.125, Florida Statutes] *obviously intoxicated adults* is not an issue that [the court] may resolve."[159]

3. Florida's Modernized Trend: Continuing Commercial Host Immunity

For more than half a century, Florida courts have continued the trend of finding commercial hosts immune from liability when commercial hosts—negligently—continue to serve intoxicating beverages to adults who are either visibly or obviously intoxicated, which results in injury to the intoxicated adult or third persons due to the adult's intoxicated condition. Recently, in 2015, the Second District Court of Appeal, in *Hall v. West*, affirmed a summary final judgment in favor of a commercial host that provided excessive amounts of intoxicating beverages to an adult patron,

157. *See* Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217 *passim* (Fla. Dist. Ct. App. 1984) ("Plaintiff . . . as representative of her daughter's estate, brought an action for wrongful death against defendants[,] . . . as owners and operators of a bar, alleging that their negligence in serving alcohol to her obviously intoxicated daughter was the proximate cause of her daughter's death."); *see also Lonestar Fla., Inc.*, 408 So. 2d at 759. In *Barnes*, the obviously intoxicated patron "left the bar in the early morning after several hours of drinking[,] [and,] [u]pon departing, her senses were so inundated with alcohol that she lost consciousness behind the wheel of her automobile, swerved from the road and collided with a tree." *Barnes*, 461 So. 2d at 218. Like in *Lonestar Florida, Inc.*, the commercial host in *Barnes* continued to serve alcohol to a patron who was intoxicated. *See Lonestar Fla., Inc.*, 408 So. 2d at 759; *Barnes*, 461 So. 2d at 218. However, unlike in *Lonestar Florida, Inc.*, where the party suing the commercial host was the owner of the automobile that the intoxicated person was driving at the time of the accident, the party suing the commercial host in *Barnes* was the mother of the intoxicated patron. *See Lonestar Fla., Inc.*, 408 So. 2d at 759; *Barnes*, 461 So. 2d at 218.

158. *See Barnes*, 461 So. 2d at 219; *see also, e.g.*, Goodell v. Nemeth, 501 So. 2d 36, 37 (Fla. Dist. Ct. App. 1986) (concluding that a plaintiff is unable to shield himself from his own negligence due to his voluntary intoxication (citing Reed v. Black Caesar's Forge Gourmet Rest., Inc., 165 So. 2d 787, 788 (Fla. Dist. Ct. App. 1964)).

159. *Barnes*, 461 So. 2d at 220 (emphasis added).

who later hopped in his car and crashed into an individual.[160] In *Hall*, the adult patron drank intoxicating beverages before and after arriving at the commercial establishment—he was drunk.[161] Yet, the commercial host's security personnel told the intoxicated patron "to leave the premises and escorted him and his friends to their car."[162] As a result, the intoxicated patron got behind the wheel and drove away.[163] Nearly two hours later, the intoxicated patron struck an individual with his speeding car, causing the individual to suffer serious injuries.[164]

In the ensuing lawsuit, the trial court found that the commercial host did not owe a duty of care to the victim of the car accident.[165] In affirming the trial court's ruling, the Second District rationalized that the exceptions permitting liability to attach to a commercial host under section 768.125, Florida Statutes, did not apply, since the intoxicated patron was of lawful drinking age, and there was no evidence in the record suggesting that the commercial host knew whether or not the intoxicated patron was habitually addicted to the use of alcohol.[166] The Second District went one step further and explained the unjustified limitations that the statutory scheme provides:

> Unfortunately for [the victim], the legislature has barred his theory of recovery. Except for the exceptions noted above, the statute excuses [the commercial host's] liability for injury or damage "caused by or resulting from the intoxication" of the person served. Although [the victim] suffered horrible injuries, [the drunk's] intoxication put into motion the events that led to the tragic accident that changed [the victim's] life. [The commercial host's] alleged negligence did not break that chain. The "caused by or resulting from" language limits [the commercial host's] exposure. The legislature has set the boundaries of the duty owed to [the victim]. On that basis alone, we must affirm the trial court's judgment.[167]

In 2016, one year after the *Hall* decision, the Fourth District Court of Appeal, in *De La Torre v. Flanigan's Enterprises, Inc.*, decided a case with similar facts by agreeing with several of its sister courts, which have repeatedly held that commercial hosts shall not be liable for resulting

160. *See* Hall v. West, 157 So. 3d 329, 330–32 (Fla. Dist. Ct. App. 2015).
161. *Id.* at 330.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Hall*, 157 So. 3d at 331.
167. *Id.*; *see id.* at 332 ("Because section 768.125 bars [the victim's] theory of liability, . . . [the commercial host has] no general duty to prevent [the drunk] from driving away . . . .").

injuries caused by the actions of third parties who drink and drive.[168] The *De La Torre* court emphasized that "the legislative intent behind section 768.125 was to limit liability for the actions of others" and held that "an expansion of liability would be contrary to [those] goals."[169]

V. ANALYSIS

A. FLORIDA COURTS MAKE A 180° MOVE TO HOLD SOCIAL HOSTS LIABLE: NEGLIGENCE PER SE

In the late 1990s, Florida courts began to shift away from the traditional common law rule and recognize a limited exception for holding social hosts liable.[170] The first case to solidify the limited exception was *Newsome v. Haffner*, wherein the First District Court of Appeal recognized a civil cause of action against a social host under a theory of negligence per se grounded on an alleged violation of section 856.015, Florida Statutes,[171]

168. *See* De La Torre v. Flanigan's Enters., Inc., 187 So. 3d 330, 333 (Fla. Dist. Ct. App. 2016); *see also* Boynton v. Burglass, 590 So. 2d 446, 448 (Fla. Dist. Ct. App. 1991) (en banc) ("Florida courts have long been loathe to impose liability based on a defendant's failure to control the conduct of a third party."); Weber *ex rel.* Estate of Weber v. Marino Parking Sys., Inc., 100 So. 3d 729, 729 (Fla. Dist. Ct. App. 2012) (holding, as a matter of law, that a valet parking service has no duty to refrain from returning car keys to an obviously intoxicated driver). The facts in the *De La Torre* case were as follows: "[the] [d]river went to the restaurant operated by [the defendant] . . . . While there, [the] [d]river became intoxicated. . . . Subsequently, [the] [d]river left the restaurant in her vehicle. At some point later that night, she crossed into oncoming traffic and struck a vehicle containing [the plaintiffs], who were injured in the accident." *De La Torre*, 187 So. 3d at 331.

169. *De La Torre*, 187 So. 3d at 333.

170. *See, e.g.*, Newsome v. Haffner, 710 So. 2d 184, 186 (Fla. Dist. Ct. App. 1998); Trainor v. Estate of Hansen, 740 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1999).

171. *See* FLA. STAT. § 856.015 (2016); *Newsome*, 710 So. 2d at 185; *see also supra* notes 29–30 and accompanying text (discussing the criminal penalties imposed on social hosts who violate section 856.015). Section 856.015(2), Florida Statutes, provides as follows:

> A person having control of any residence may not allow an open house party to take place at the residence if any alcoholic beverage or drug is possessed or consumed at the 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 the residence and where the person fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

§ 856.015. At the time that the *Newsome* case was decided, section 856.015(2) provided as follows:

> No *adult* 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 *adult* knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the *adult* fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

commonly referred to as the "open house party"[172] statute.[173] In *Newsome*, the limited facts suggest that a minor was injured by a self-inflicted gunshot wound while at the social host's residence.[174] As a result, the minor's estate brought a civil action against the social host,[175] which the trial court dismissed for failure to state a cause of action.[176] On appeal, the First District reversed the trial court's ruling dismissing the claim for social host liability and in doing so reasoned:

> Section 856.015 extends such criminal responsibility to a social host at a residence with an open house party. Although a corresponding civil liability was not previously recognized at common law, 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. By enacting section 856.015, the legislature has therefore imposed a duty of care on social hosts and created a civil cause of action for a statutory violation.[177]

One year after the *Newsome* decision, the Second District Court of Appeal decided *Trainor v. Estate of Hansen*,[178] a case factually different from *Newsome*. In *Trainor*, the decedent was killed when a drunk minor, who was driving the car in which the decedent was a passenger, lost control of the car and crashed.[179] Prior to the accident, the minor driver had become intoxicated at a house party hosted by the social hosts.[180] Following the tragedy, the decedent's mother brought a wrongful death action against the social hosts alleging negligence per se on the grounds that the social hosts violated section 856.015, Florida Statutes.[181] However, like in *Newsome v. Haffner*, the trial court dismissed the complaint for

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Newsome, 710 So. 2d at 185 (quoting FLA. STAT. § 856.015(2) (1998)) ("The statute makes a violation of this provision a criminal offense, and is clearly designed to protect minors from the harm that could result from the consumption of alcohol . . . by those who are too immature to appreciate the potential consequences.").

172. *See supra* note 30 and accompanying text (defining the term "open house party").

173. *See Newsome*, 710 So. 2d at 185–86 ("By enacting section 856.015, the legislature has therefore imposed a duty of care on social hosts and created a civil cause of action for a statutory violation.").

174. *Id.* at 186.

175. *See id.* at 185.

176. *See id.* at 185, 186.

177. *Id.* at 185–86 (citations omitted); *see, e.g.*, Juliano v. Simpson, 962 N.E.2d 175, 179 (Mass. 2012) (explaining that, when dealing with negligence per se, "the standard of lawful conduct in a criminal statute *also sets a standard of care for tort actions* and thus violation of a statute, without more, may establish a breach of duty." (emphasis added)).

178. Trainor v. Estate of Hansen, 740 So. 2d 1201 (Fla. Dist. Ct. App. 1999).

179. *Id.* at 1202.

180. *See id.*

181. *Id.*

failure to state a cause of action.[182] Nevertheless, relying on precedent established by the *Newsome* court, the Second District reversed the trial court's ruling and concluded that "the complaint should not have been dismissed because it stated a cause of action for social host liability under a theory of negligence per se based on an alleged violation of section 856.015, Florida Statutes."[183]

B. A FORESEEABLE ZONE OF RISK

Due to the vast use of automobiles and endless fatalities involving stoned drivers in Florida, a social or commercial host that serves alcoholic beverages to a person who is "visibly intoxicated" can reasonably foresee that the visibly intoxicated person is likely to injure someone as a result of his or her negligent operation of a car.[184] As Justice Adkins once proclaimed in a persuasive dissenting opinion, "[t]he foreseeability of injury which is apparent when the [commercial host] provides the alcohol is no less apparent when the social host provides the intoxicating beverages."[185] "Whatever the motive behind making alcohol[ic] [beverages] available to [individuals] who will subsequently drive, [a host] has a duty to the public not to create foreseeable, unreasonable risks by this activity."[186] "Foreseeability [is therefore] crucial [when outlining] the scope of the general duty [imposed] on every person [in order] to avoid negligent acts or omissions."[187]

In Florida, like in many other jurisdictions, a legal duty arises whenever a human endeavor "creates"[188] a foreseeable zone of risk that

182. *Id.* at 1201; *see* Newsome v. Haffner, 710 So. 2d 184, 185, 186 (Fla. Dist. Ct. App. 1998).

183. *See Trainor*, 740 So. 2d at 1201–02.

184. *See supra* notes 2–5 and accompanying text; *see, e.g.*, MO. REV. STAT. § 537.053(2)–(3) (2016) (defining the term "visibly intoxicated" and stating that "a person is 'visibly intoxicated' when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction."); N.J. STAT. ANN. § 2A:22A-3 (West 2016) (defining "visibly intoxicated" as "a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication.").

185. Bankston v. Brennan, 507 So. 2d 1385, 1390 (Fla. 1987) (Adkins, J., dissenting).

186. Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984).

187. McCain v. Fla. Power Corp., 593 So. 2d 500, 503 (Fla. 1992).

188. *See id.* at 503–04. The Florida Supreme Court, in *McCain*, used the word "create" several times throughout the opinion to emphasize that when it comes to the duty element of negligence, "the proper inquiry . . . is whether the defendant's conduct *created* a foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred." *See id.* at 503–04 (second emphasis added).

poses a general threat of harm to others.[189] In fact, "as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken."[190] For example, as the law stands now in Florida, a commercial host has a legal duty to abstain from serving alcohol to minors, and a breach of that duty may subject the commercial host to civil liability for injuries caused by a drunk minor.[191]

However, a host, whether social or commercial, must have the ability to avoid the risk.[192] The *McCain* court makes this point, by implication, when it states that a person who creates a foreseeable zone of risk has a duty "either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."[193] In so stating, the *McCain* court was clearly implying that a person must be in a situation to control the risk; if a host stops serving, or does not serve, a "visibly intoxicated" person, then the host should *not* be liable for injuries that the intoxicated person later causes.[194]

Therefore, it is evident that Florida law imposes a duty on hosts who serve, or continue to serve, alcoholic beverages to a person who is "visibly intoxicated," since by serving alcohol to such an intoxicated person, the host clearly creates a foreseeable zone of risk. In Florida, it is apparent that drunk drivers who get intoxicated in the homes and bars of hosts are causing substantial personal and financial destruction.[195] Yet, this author questions how Florida's judicial and legislative branches can remain

189. *Id.* at 503; *see also id.* at 503 n.2 (stating that a legal duty may also arise from (1) legislative enactments, (2) judicial interpretations of legislation, (3) other judicial precedents, and (4) the general facts of the case).

190. *Id.* at 503.

191. *See* FLA. STAT. § 768.125 (2016); *see also* Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 980 (Fla. 1984) ("Providing alcoholic beverages to minors involves the obvious *foreseeable risk* of the minor's intoxication and injury to himself or a third person." (emphasis added)).

192. *See McCain*, 593 So. 2d at 503.

193. *See id.* (internal quotation marks omitted) (quoting Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989)).

194. *See id.*; *see, e.g.*, Pirkle v. Hawley, 405 S.E.2d 71, 74–75 (Ga. Ct. App. 1991) (holding that "[i]f the alcohol provider stops serving a noticeably intoxicated person, he [or she] is not liable for the damages that person later inflicts."). In *Pirkle*, the court also held that "[i]f the alcohol provider continues to serve and knows the intoxicated person is about to drive, the provider creates for himself or herself 'a duty not to subject third parties to an unreasonable risk of harm caused by the intoxicated driver.'" *Id.* at 74–75 (quoting Southern Bell 359 S.E.2d 385). "Fulfillment of the additional duty [of refraining from serving the intoxicated person alcohol] acts to remove the breach of the earlier, initial duty [for serving the intoxicated person alcohol] . . . ." *Id.* at 75.

195. *See supra* notes 4–5 and accompanying text (discussing the consequences of the drunk driving epidemic).

dormant and refuse to implement a cause of action against a host who serves intoxicating beverages to a "visibly intoxicated" person.[196] Do the courts and legislature need to know more?

C. THE EXPANSION OF LIABILITY AMONG THE SEVERAL STATES

A review of out-of-state precedent and legislation illustrates that many states have expanded liability to hosts who provide intoxicating beverages to persons, of legal drinking age, who are otherwise intoxicated. "The crucial consideration has been the condition of the [person] at the time the . . . host serve[s] him or her [the] alcoholic [beverage]."[197]

1. The Expansion of Social Host Liability

Several states have judicially imposed, as well as legislatively mandated, liability upon a social host who provides alcohol to an intoxicated adult, who subsequently causes harm to a third party. These states include the following: Connecticut,[198] Georgia,[199] Idaho,[200] Maine,[201] Massachusetts,[202] Montana,[203] New Jersey,[204] New Mexico,[205] North

196. *See* discussion *supra* Part IV, Section B, Subsections 1 through 3.

197. McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 146 (Mass. 1986).

198. *See, e.g.*, Kowal v. Hofher, 436 A.2d 1, 3 (Conn. 1980) (imposing liability, judicially, on a social host who serves intoxicating beverages to an intoxicated person when doing so manifests wanton and reckless misconduct).

199. *See* GA. CODE ANN. § 3-3-22 (2016) ("No alcoholic beverage shall be sold, bartered, exchanged, given, provided, or furnished to any person who is in a state of noticeable intoxication."); *see, e.g.*, *Pirkle*, 405 S.E.2d at 75 (holding that a social host may be liable to third persons for furnishing alcohol to a "noticeably" intoxicated person).

200. *See* IDAHO CODE § 23-808(3)(b) (2016) (stating that a person who suffers injuries may bring a cause of action against a social host who furnishes alcoholic beverages to an "obviously intoxicated" person).

201. *See* ME. REV. STAT. ANN. tit. 28-a, § 2506(2) (2016) ("A [social host] who negligently serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.").

202. *See, e.g.*, *McGuiggan*, 496 N.E.2d at 146 (holding that a social host is liable to a person injured by an intoxicated guest's negligent operation of a motor vehicle when the social host "knew or should have known" that his or her guest was drunk, and nevertheless provided alcohol to the guest, or allowed the guest to continue consuming alcohol).

203. *See* MONT. CODE ANN. § 27-1-710(3)(b) (2015) (providing a cause of action against a social host who furnishes alcohol to a person who is "visibly" intoxicated).

204. *See* N.J. STAT. ANN. § 2A:15-5.6(b)(1)(a) (West 2016) (stating that a person who sustains injury as a result of the negligent provision of intoxicating beverages by a social host to a person who has attained the legal age to purchase alcohol may recover damages from a social host only if the social host "willfully and knowingly" provided alcohol to a "visibly intoxicated" person).

205. *See* Delfino v. Griffo, 257 P.3d 917, 923 (N.M. 2011) ("For a suit against a . . . social

Carolina,[206] and Oregon.[207] In extending such liability to social hosts, one state supreme court defended its ruling by highlighting the following:

> The goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving. The imposition of [a] duty [on social hosts] certainly will make such fair compensation more likely. While the rule in this case will tend also to deter drunken driving, there is no assurance that it will have any significant effect. The lack of such assurance has not prevented us in the past from imposing liability on [commercial hosts]. Indeed, it has been only recently that the sanction of the *criminal* law was credited with having some significant impact on drunken driving. We need not, however, condition the imposition of a duty on scientific proof that it will result in the behavior that is one of its goals. No one has suggested that the common-law duty to drive carefully should be abolished because it has apparently not diminished the mayhem that occurs regularly on our highways. We believe the rule will make it more likely that hosts will take greater care in serving alcoholic beverages at social gatherings so as to avoid not only the moral responsibility but the economic liability that would occur if the guest were to injure someone as a result of his [or her] drunken driving.[208]

Despite the expansion of social host liability among the several states, there has been great criticism by those who oppose the movement. For example, those who oppose the expansion have maintained that such an expansion "will interfere with accepted standards of social behavior; will intrude on and . . . diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings [where] alcohol is served; and that such

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host, the plaintiff must show that the host provided alcoholic beverages 'recklessly in disregard of the rights of others, including the social guest.'" (quoting N.M. STAT. § 41-11-1(E))).

206. *See* Camalier v. Jeffries, 460 S.E.2d 133, 138 (N.C. 1995) ("[A social host] may be held liable [under] common-law negligence if he [or she] (1) served alcohol to a person (2) when he [or she] knew or should have known the person was intoxicated and (3) when he [or she] knew the person would be driving afterwards.").

207. *See* OR. REV. STAT. § 471.565(2) (2015) ("A . . . social host is not liable for damages caused by intoxicated . . . guests unless the plaintiff proves by clear and convincing evidence that . . . [t]he . . . social host . . . provided alcohol[] . . . to the . . . guest while the . . . guest was visibly intoxicated . . . [and] [t]he plaintiff did not substantially contribute to the intoxication of the . . . guest . . . .").

208. Kelly v. Gwinnell, 476 A.2d 1219, 1226 (N.J. 1984) (footnote omitted); *see also id.* at 1230 ("Our ruling . . . will not cause a deluge of lawsuits or spawn an abundance of fraudulent and frivolous claims. Not only do we limit our holding to the situation in which a host directly serves a guest, but we impose liability solely for injuries resulting from the guest's drunken driving"). The court held that where a social host provides alcoholic beverages to a guest and "continues to do so even beyond the point at which the host knows the guest is [visibly] intoxicated, and does this knowing that the guest will shortly thereafter be [driving], that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving." *Id.* at 1230.

gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important."[209] In response to those critics, the *Kelly* court exclaimed "that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those . . . values."[210]

2. The Expansion of Commercial Host Liability

There are, of course, differences between a commercial host selling alcohol for consumption on its premises and the serving of alcohol to visitors in one's home.[211] "Balancing these differences, courts have found it easier to impose a duty of care on [a commercial host] than on [a] social host."[212] For example, when a commercial host serves alcohol to a customer, the commercial host has closer control in monitoring the customer's alcohol intake than is possible at the residence of a social host.[213] Moreover, a commercial host generally has greater experience in identifying someone who is intoxicated than a social host.[214] Also, a commercial host "would be better able to 'shut off' consumption [of alcohol] without the embarrassment that a social host would suffer."[215] For those same reasons, several state legislatures have expanded liability by enacting statutes that prohibit a commercial host from selling alcoholic beverages to a person who is intoxicated, including the following: Alabama,[216] Colorado,[217] Connecticut,[218] Georgia,[219] Idaho,[220] Kentucky,[221]

209. *Id.* at 1224.

210. *Id.* ("[G]iven society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded . . . as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.").

211. McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 143–44 (Mass. 1986).

212. *Id.* at 144 ("The threat of tort liability may serve the public purpose of offsetting the commercial [host's] financial incentive to encourage drinking.").

213. *See id.*

214. *Id.*

215. *Id.*

216. *See* ALA. CODE § 6-5-71(a) (LexisNexis 2016) ("[A] person who shall be injured . . . by any intoxicated person . . . shall have a right of action against any person who shall, by selling . . . or otherwise disposing of to another, *contrary to the provisions of law*, any liquors or beverages, cause the intoxication of such person for all damages . . . sustained . . . ." (emphasis added)); *see also* Attalla Golf & Country Club, Inc. v. Harris, 601 So. 2d 965, 968 (Ala. 1992) ("It is well settled in Alabama that a sale to a visibly intoxicated person is 'contrary to the provisions of law.'" (citations omitted)).

217. *See* COLO. REV. STAT. § 12-47-801(3)(a)(I) (2016) (stating that a commercial host is not liable unless the commercial host "willfully" and "knowingly" sells or serves alcoholic beverages to a person who is "visibly intoxicated.").

Maine,[222] Massachusetts,[223] Missouri,[224] Montana,[225] New Jersey,[226] New Mexico,[227] Oregon,[228] and Texas.[229]

VI. THE PROPOSAL

This trend toward imposing liability on social and commercial hosts is no doubt a response to the greater concern of society pertaining to the evils

218. *See* CONN. GEN. STAT. § 30-102 (2015) ("If any person . . . sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured . . . .").

219. *See* GA. CODE ANN. § 51-1-40(b) (2016) (stating that a commercial host is not liable unless the commercial host "knowingly" sells or serves intoxicating beverages "to a person who is in a state of noticeable intoxication.").

220. *See* IDAHO CODE § 23-808(3)(b) (2016) (stating that a person who suffers injuries may bring a cause of action against a commercial host that sells or furnishes alcoholic beverages to a person who is "obviously intoxicated.").

221. *See* KY. REV. STAT. ANN. § 413.241(2) (LexisNexis 2016) (stating that a commercial host is not liable "unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.").

222. *See* ME. REV. STAT. ANN. tit. 28-a, § 2506(2) (2015) ("A [commercial host] who negligently serves liquor to a visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor.").

223. *See* MASS. GEN. LAWS ANN. ch. 138, § 69 (West 2016) ("No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person."); *see also* Bennett v. Eagle Brook Country Store, Inc., 557 N.E.2d 1166, 1168 (Mass. 1990) ("While a violation of [chapter] 138, [section] 69, carries criminal penalties, the statute does not . . . grant an independent ground for civil liability. Any liability on the defendant's part in such a situation must be grounded in the common law of negligence . . . . [A] violation of . . . [section] 69 is only 'some evidence' of . . . negligence . . . ." (citations omitted)).

224. *See* MO. REV. STAT. § 537.053(2) (2016) ("[A] cause of action may be brought by . . . any person who has suffered personal injury or death against any [commercial host] when it is proven by clear and convincing evidence that the [commercial host] . . . knowingly served intoxicating liquor to a visibly intoxicated person.").

225. *See* MONT. CODE ANN. § 27-1-710(3)(b) (2015) (providing a cause of action against a commercial host that furnishes alcohol to a person who is "visibility intoxicated.").

226. *See* N.J. STAT. ANN. § 2A:22A-5(b) (West 2016) (providing that a commercial host is "negligent" only when the commercial host serves a "visibly intoxicated person.").

227. *See* N.M. STAT. ANN. § 41-11-1(a)(2) (West 2016) (imposing liability on a commercial host that sells or serves alcohol to a person who is intoxicated).

228. *See* OR. REV. STAT. ANN. § 471.565(2)(a) (West 2016) ("A [commercial host] . . . is not liable for damages caused by intoxicated patrons . . . unless the plaintiff proves by clear and convincing evidence that . . . [t]he [commercial host] . . . provided alcoholic beverages to the patron . . . while the patron . . . was visibly intoxicated . . . .").

229. *See* TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) (West 2015) ("Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action . . . upon proof that . . . at the time the provision occurred it was apparent to the [commercial host] that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated . . . .").

of drunk driving.[230] Yet, "[i]n an era [where] . . . severe legislation is being enacted to cut down on the evil of drunk driving, it is amazing that [s]ection 768.125, Florida Statutes . . . was ever adopted."[231] "[T]he law of torts, which in many aspects measures one's duty by what is reasonable conduct [under] the circumstances, should [start] . . . respond[ing] to society's increasing concern [regarding drunk driving]."[232] As such, the Florida Legislature should respond to this ongoing dilemma by passing legislation prohibiting both social and commercial hosts from providing alcoholic beverages to a person, of legal drinking age, who is *visibly intoxicated*.[233] "[T]he imposition of [such] a duty is both consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society."[234]

This Comment proposes, to the Florida Legislature, the following amendment to Florida's Dram Shop Act, which incorporates additional subsections and, therefore, extends liability to both social and commercial hosts that provide alcoholic beverages to *visibly intoxicated persons*:

> (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 sells or furnishes alcoholic beverages may become liable for injury or damage caused by or resulting from the

230. *See* Moran v. Foodmaker, Inc., 594 A.2d 587, 589 (Md. Ct. Spec. App. 1991) ("In more recent years . . . dram shop legislation has enjoyed a renaissance. . . . [I]t appears that this trend will continue, this time sparked not by a conviction that liquor is immoral, but rather by public pressures to deter drunken driving and to compensate the victims of those accidents . . . ." (internal quotation marks omitted) (quoting Julius F. Lang, Jr. & John J. McGrath, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1125 (1983–84))); *see also* Kelly v. Gwinnell, 476 A.2d 1219, 1229 (N.J. 1984) ("If we but step back . . . we will see a phenomenon not of merriment but of cruelty, causing misery to innocent people, tolerated for years despite our knowledge that without fail, out of our extraordinarily high number of deaths caused by automobiles, nearly half have regularly been attributable to drunken driving.").

231. MacArthur v. Travelers Ins. Co., 400 So. 2d 20, 20 (Fla. Dist. Ct. App. 1981) (Letts, J., concurring specially) (per curiam).

232. McGuiggan v. New England Tel. & Tel. Co., 496 N.E. 2d 141, 146 (Mass. 1986).

233. *See* Ferreira v. Strack, 652 A.2d 965, 970 (R.I. 1995) ("The [l]egislature must set out the duties and responsibilities of various segments of our society within these social situations, and the courts must stringently enforce those duties and responsibilities."); *see also* Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987) ("While creating . . . a cause of action [against a social host] may be socially desirable . . . the legislature is best equipped to resolve the competing considerations implicated by such a cause of action."); *MacArthur*, 400 So. 2d at 20 (Beranek, J., dissenting) ("I believe there should be a civil cause of action based upon injuries arising from the commercial sale of liquor to an obviously intoxicated person who is known to be driving a car.").

234. *Kelly*, 476 A.2d at 1222.

> intoxication of such person if the person who sells or furnishes the alcoholic beverages:
>
> (a) willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age;
>
> (b) knowingly serves a person habitually addicted to the use of any or all alcoholic beverages; or
>
> (c) knowingly serves a visibly intoxicated person.[235]
>
> (2) A person who sustains injury or damage caused by or resulting from the negligent furnishing of alcoholic beverages by a social host to a person of lawful drinking age may recover damages from a social host only if:
>
> (a) The social host willfully and knowingly furnished alcoholic beverages to a person who was visibly intoxicated in the social host's presence; and
>
> (b) The social host furnished alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and
>
> (c) The injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.[236]

This proposal has been designed to protect the rights of persons who suffer a loss as a result of the negligent serving, or furnishing, of intoxicating beverages to visibly intoxicated persons by a social or commercial host, while at the same time providing a balanced and reasonable procedure for allocating responsibility for such losses.[237]

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235. *See* FLA. STAT. § 768.125 (2016). The language of subsections (1)(a)–(b), of the proposed amendment, is identical to the text of section 768.125, Florida Statutes. *See id.* However, this Comment proposes subsection (1)(c) as an additional subsection. *See id.*

236. *See* N.J. STAT. ANN. § 2A:15-5.6 (West 2016). As it relates to the proposed subsection (2) to section 768.125, Florida Statutes, this Comment adopts most of the statutory language of section 2A:15-5.6, New Jersey Statutes Annotated. *See id.* However, this Comment tailors some of its terms to conform with the statutory language of section 768.125, Florida Statutes. *See id.*; § 768.125.

237. *See Kelly*, 476 A.2d at 1229 ("[T]he adjustments in social behavior . . . the burden put on the host to . . . oversee the serving of liquor, [and] the burden on the guests . . . must be measured against the misery, death, and destruction caused by the drunken driver."); *see, e.g.*, Mazzacano v. Estate of Kinnerman, 962 A.2d 1103, 1113 (N.J. 2009) (explaining that a commercial host has a "compelling economic interest" in monitoring the intake of alcohol when there is a statutory scheme providing for the imposition of liability on a commercial host that serves a "visibility intoxicated" person).

VII. CONCLUSION

"Because of the great reliance on automobiles, the higher population density in today's society, and the critical importance of highway safety, all citizens must share the responsibility to assure public safety."[238] "Although [drivers] continue to be primarily responsible for navigating our highways in a safe manner, Florida's system of comparative negligence ensures that the fault of all who may have acted negligently will be taken into account in determining responsibility for a particular injury."[239]

"The application of [section 768.125, Florida Statutes,] in today's automotive society is unrealistic, inconsistent with [Florida's] tort [system,] and is a complete anachronism within today's society[;] the automobile is a [relentless] reminder of a changed[,] and changing[,] America."[240] "It has made a tremendous impact on every segment of society, including the field of jurisprudence. In the 'horse and buggy' days the common law may not have been significantly affected by the sale of liquor to an intoxicated person."[241] However, in today's America, cars are made of steel and can travel at vast speeds, which makes cars lethal weapons in the hands of a drunk.[242]

In Florida, the frequency of accidents involving drunk drivers has continued for too long. As a result, there have been too many instances where both the victims of drunk driving and their families are left uncompensated. The time has come for the Florida Legislature to provide future victims, and their families, with the proper redress by amending Florida's Anti-Dram Shop Liability Act.

238. Williams v. Davis, 974 So. 2d 1052, 1063 (Fla. 2007).

239. *Id.*; *see, e.g.*, FLA. STAT. § 768.81 (2016) (explaining the concept of "comparative negligence" under Florida law).

240. Brigance v. Velvet Dove Rest., Inc., 725 P.2d 300, 304 (Okla. 1986).

241. *Id.*

242. *See id.*

ST. THOMAS LAW REVIEW

VOLUME 29 ISSUE 2

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Citation. All references to materials included in the *St. Thomas Law Review* conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015), published by the Harvard Law Review Association.

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