Chapter 6: Parties to Crime and Vicarious Liability

Chapter Overview:

Under the common law, parties involved in the commission of a crime were divided into four categories: principles in the first degree, principles in the second degree, accessories before the fact, and accessories after the fact. Today, however, most states have done away with these categories and replaced them with a simplified set of two categories, accomplices and accessories, though the language used may vary by state. Accomplices are generally anyone involved before or during the commission of a crime, and accessories include anyone who aids an offender after the crime.

It does not require a great deal of involvement for one to be considered an accomplice. Generally anyone who is viewed to have aided and abetted or otherwise encouraged the commission of a crime can be held liable for the crime itself. An accomplice's role in criminal activity does not have to be found to have been necessary for the commission of the crime in order for that person to be held liable. The operative element of accomplice liability is the intent, which includes two parts. First the accomplice must intend to provide assistance. Additionally, though, the accomplice is also required to have intended the primary party to commit the particular crime being charged.

Accessories to a crime provide assistance to the perpetrator after the crime has been committed, such as by helping them escape prosecution. The charge of accessory typically requires that a felony have been carried out, that the accessory have knowledge of the felony and that the individual they are aiding has committed that felony, that the accessory take affirmative action in aiding the perpetrator and not merely an act of omission in failure to aid prosecution, and that the accessory have the criminal intent to hinder legal action against the perpetrator of the felony.

In some cases where a crime has been committed, prosecutors may hold accountable persons other than those who directly committed the crime. This is called vicarious liability and it can be extended to parents of a minor offender, employer of an offender who committed a crime while acting in their capacity as an employee, and owners of automobiles that an offender is driving. A special category of vicarious liability is known as corporate liability, by which a corporate entity can be held liable for the acts of its employees. Vicarious liability is typically also applied to the owner of a vehicle that receives a parking ticket, whether the owner is the person who carried out the illegal parking or not.

Some states have laws extended various liability to the parents of youthful offenders, called parental responsibility laws. Individuals others than parents may also be subject to vicarious liability for the acts of a minor when drinking is involved. If the drinking of minors leads to accident or injury, an adult providing alcohol to said minors could be held accountable. In this supplemental chapter you will read Florida statutes and case laws that will show you how Florida defines and treats the various parties to a crime.

I. Parties to a Crime:

Section Introduction: Many people may be involved in the commission of a crime and they may be subject to varying degrees to criminal liability. The following statutes show how Florida defines the various actors in a crime.

Florida Statute, section, 777.011 - Principal in first degree

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

Florida Statute, section, 777.03 - Accessory after the fact

(1) (a) Any person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed a felony or been accessory thereto before the fact, with intent that the offender avoids or escapes detection, arrest, trial or punishment, is an accessory after the fact.

(b) Any person, regardless of the relation to the offender, who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed the offense of child abuse, neglect of a child, aggravated child abuse, aggravated manslaughter of a child under 18 years of age, or murder of a child under 18 years of age, or had been accessory thereto before the fact, with the intent that the offender avoids or escapes detection, arrest, trial, or punishment, is an accessory after the fact unless the court finds that the person is a victim of domestic violence.

(2) (a) If the felony offense committed is a capital felony, the offense of accessory after the fact is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the felony offense committed is a life felony or a felony of the first degree, the offense of accessory after the fact is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If the felony offense committed is a felony of the second degree or a felony of the third degree ranked in level 3, 4, 5, 6, 7, 8, 9, or 10 under s. 921.0022 or s. 921.0023, the offense of accessory after the fact is a felony

of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) If the felony offense committed is a felony of the third degree ranked in level 1 or level 2 under s. 921.0022 or s. 921.0023, the offense of accessory after the fact is a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Except as otherwise provided in s. 921.0022, for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, the offense of accessory after the fact is ranked two levels below the ranking under s. 921.0022 or s. 921.0023 of the felony offense committed.

II. Accomplice Liability:

Section Introduction: If an individual assists the perpetrator of a crime with the dual intentions both to providing the assistance and that the party receiving assistance commit the crime in question, then that individual can be held liable as an accomplice. Consider the following Florida case which draws a defendant's liability into question.

G.C. v. *State,* 407 So.2d 639 (1981)

Procedural History: Juvenile appealed from the adjudication of delinquency by the Circuit Court, Dade County, Adele Segall Faske, J. The District Court of Appeal, Ferguson, J., held that evidence that juvenile knew that another person was going to burglarize apartment, and that juvenile followed that person to scene of crime and watched as other person removed windows from apartment was insufficient to prove that juvenile aided and abetted in attempted burglary.

Issue(s): Is mere presence and knowledge that a crime is being committed equivalent to participation in the event?

Facts: G.C., a juvenile, was adjudicated delinquent as an aider and abettor to attempted burglary. Accepting all of the evidence in a light most favorable to the state at best there is proof that (1) G.C. knew that Delgado was going to burglarize an apartment, (2) G.C. followed Delgado to the scene of the crime, (3) G.C. stood back at least fifteen feet and watched Delgado remove jalousie glasses from the window of the apartment.

Holding: Reversed with instructions to discharge.

Opinion: 640 FERGUSON, Judge.

The evidence before the court is less than that necessary to prove that G.C. aided and abetted in the attempted burglary. In order for one person to be guilty of a crime

physically committed by another under Section 777.011, Florida Statutes (1979), it is necessary that he not only have a conscious intent that the criminal act shall be done, but further requires that pursuant to that intent he do some act or say some word which was intended to and which did incite cause, encourage, assist or induce another person to actually commit the crime. [*Ryals v. State*, 112 Fla. 4, 150 So. 132 (1933); J.L.B. v. State, 396 So.2d 761 (Fla. 3d DCA 1981); *R.W.G. v. State*, 395 So.2d 1279 (Fla. 2d DCA 1981); *Chaudoin v. State*, 362 So.2d 398 (Fla. 2d DCA 1978)]

The state implores that the necessary elements of intent and act may be inferred - because G.C. knew that Delgado was going to commit a crime and was present during Delgado's attempt, it is established beyond and to the exclusion of any reasonable doubt that G.C. was a "lookout". Where two or more inferences must be drawn from the direct evidence, then pyramided to prove the offense, the evidence lacks the conclusive nature necessary to support a conviction. [*Gustine v. State*, 86 Fla. 24, 97 So. 207 (1923)] Presence at the scene, without more, is not sufficient to establish either intent to participate or act of participation. [*J.L.B. v. State*, supra; *J.H. v. State*, 370 So.2d 1219 (Fla. 3d DCA 1979)] Mere knowledge that an offense is being committed is not equivalent to participation with criminal intent. [See, e.g., *United States v. Martin*, 533 F.2d 268 (5th Cir. 1976)] Knowledge that a crime is going to be committed and presence at the scene, without more, is generally insufficient to establish aiding and abetting. [See, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919, 925 (1949); *Baker v. United States*, 395 F.2d 368 (8th Cir. 1968); *Ramirez v. United States*, 363 F.2d 33 (9th Cir. 1966)]

III. Accessory After the Fact:

Section Introduction: Accessories to a crime are individuals who aid the perpetrators after the commission of the initial crime. Accessories can be held criminally accountable for their actions, such as in the following Florida case.

***Brown* v. *State*, 672 So.2d 861 (1996)**

Procedural History: Defendant was convicted in the Circuit Court, Dade County, Bernard S. Shapiro and Frederick N. Barad, JJ., pursuant to his guilty plea, of being accessory after the fact to second-degree murder. Defendant appealed denial. The District Court of Appeal, Green, J., held that: (1) family immunity statute did not provide immunity to defendant, and (2) successful prosecution of principal for second-degree murder was not condition precedent to prosecution of defendant as accessory after the fact to second-degree murder.

Issue(s): Is the relationship of cousin one of the exceptions to being an accessory after the fact? Is it necessary to first convict the principal before sustaining a conviction for an accessory after the fact?

Facts: On October 2, 1994, Brown accompanied his first cousin John Marshall to a grocery store. Prior to their entering the store, Marshall became embroiled in a physical altercation with the victim, another male. At some point during their dispute, Marshall hit the victim in the head with a wooden two-by-four board. Brown then drove Marshall away from the scene. The victim later died. Marshall was subsequently charged with second degree murder and Brown was charged with being an accessory after the fact by virtue of his act of driving Marshall away from the scene. Prior to their trial, Brown moved to dismiss the accessory charge and as grounds therefore asserted that the statute under which he was charged, section 777.03, granted him immunity from prosecution; further, he argued that he could not be prosecuted for accessory after the fact prior to his cousin's conviction for the underlying second degree murder charge. The trial court denied the motion and Brown entered a plea to the charge subject to his right to appeal the denial of his motion. Marshall proceeded to trial and was ultimately acquitted of the second degree murder charge.

Holding: Affirmed.

Opinion: GREEN, Judge.

Darryl Lamont Brown was charged with being an accessory after the fact to second degree murder in violation of section 777.03, Florida Statutes (1993). He entered a plea to the charge and reserved his right to appeal the trial court's denial of his sworn motion to dismiss. For reasons which follow, we affirm the lower court's denial of his motion.

On this appeal, Brown first asserts that his motion to dismiss should have been granted because he is shielded from prosecution as an accessory to his cousin's charge by the immunity given to family members in section 777.03. We disagree. This section provides in pertinent part that:

> Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory therefore before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree.... [§ 777.03, Fla.Stat. (1993)]

The immunity provision of the statute by its plain language makes no reference to cousins. It is a firmly established principle of statutory construction that the mention of one thing in a statute implies the exclusion of another or "expressio unius est exclusio alterius." [*Thayer v. State*, 335 So.2d 815, 817 (Fla.1976); *Tillman v. Smith*, 533 So.2d 928, 929 (Fla. 5th DCA 1988)] The terms "consanguinity" and "affinity" have correctly been construed to mean by "blood" and "marriage" respectively. [*State v. C.H.*, 421 So.2d 62, 63-64 (Fla. 4th DCA 1982)] The modifying phrase "by consanguinity or affinity" expanded the statute's immunity provision only to include "in-laws" and "step-relatives." [Id. at 64] While we acknowledge that it is certainly possible for a cousin to

simultaneously be a step-relative of the principal offender and thereby receive immunity under this statute, the legislature has declined to extend immunity to persons such as Brown whose sole familial relationship to the principal offender is that of cousin. Thus since the legislature has not seen fit for whatever reason to date to grant immunity in section 777.03 to cousins, we are not at liberty to do the same in this case:

> [O]ur duty [is] to give effect to legislative enactments despite any personal opinions as to their wisdom or efficacy. No principle is more firmly embedded in our constitutional system of separation of powers and checks and balances. [*State v. C.H.*, 421 So.2d at 65-66 (quoting *Moore v. State*, 343 So.2d 601, 603-04 (Fla.1977)]

We next consider Brown's remaining argument that he may not be prosecuted for the crime of accessory after the fact without his cousin's conviction for the underlying second degree murder charge. With such an argument, Brown is apparently arguing that the underlying felony and accessory charges are inextricably intertwined such that a conviction of the former is a condition precedent for a conviction of the latter. Put another way, Brown suggests that the State is collaterally estopped from prosecuting him as an accessory after the fact where the principal has been acquitted of the underlying felony. We again disagree.

In support of his argument, Brown cites *Hysler v. State*, [136 Fla. 563, 187 So. 261 (1939)] and *State ex rel. Maudlin v. Hardie*, [114 Fla. 374, 154 So. 183 (1934)], both of which recite the rule at common law that the conviction and punishment of the principal must precede or at the very least, accompany the conviction of the accessory. Brown's reliance upon these cases is misplaced. First of all, neither of these cases factually involved an accessory after the fact. But more importantly, the common law rule espoused in these decisions was rendered obsolete in 1957 with the enactment of section 776.011, Florida Statutes (1957), later renumbered section 777.011, which eliminated any distinction between accessories before the fact and principals in the first and second degree. [See ch. 57-310, Laws of Fla.; *Potts v. State*, 430 So.2d 900, 902 (Fla.1982)] As a result, "principals in the first and second degree and accessories before the fact were treated equally and all were made principals in the first degree." [*Potts*, 430 So.2d at 902; see also *Blackburn v. State*, 314 So.2d 634, 637 (Fla. 4th DCA 1975) ("Thus the terms 'principal in the second degree' and 'accessory before the fact' appear to have passed into the judicial history of the State of Florida."), cert. denied, 334 So.2d 603 (Fla.), cert. denied, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d 142 (1976)]

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

The crime of accessory after the fact, on the other hand, has remained a separate offense in Florida. [See *Staten v. State*, 519 So.2d 622 (Fla.1988) (holding a defendant cannot be

convicted and sentenced both as a principal and an accessory after the fact to the same criminal offense)] The *Staten* court further observed that the accessory after the fact is not a party to the underlying crime but is an actor in a separate and independent crime, obstruction of justice. [519 So.2d at 626] As such, the accessory after the fact is guilty only of a third degree felony regardless of the gravity of the underlying substantive offense committed. [Id.]

Prior to a conviction for accessory after the fact, the State must, of course, prove beyond a reasonable doubt that the underlying felony was indeed committed. [See *Staten v. State*, 519 So.2d at 625 (quoting *People v. Prado*, 67 Cal.App.3d 267, 273, 136 Cal.Rptr. 521, 524 (1977)] Contrary to Brown's contention, the guilt or innocence of the accessory after the fact is not contingent upon whether the alleged principal to the underlying felony is convicted. Rather, the accessory's guilt or innocence rests upon whether the underlying felony was committed and whether the accessory thereafter rendered aid to protect the principal or facilitate the principal's escape. [Id. at 625-26.] [Cf. *Potts v. State*, 430 So.2d at 902 ("In order to convict the aider-abettor it is not necessary to show that the principal perpetrator was convicted of the same crime, nor is it even necessary to show that he was convicted at all.")] Indeed, an acquittal of the principal establishes only the absence of the principal's legal liability for the underlying felony. It does not negate the existence of the underlying felony itself. In obvious recognition of this fact as well as the fact that an acquittal may be the result of any number of factors, our supreme court in another factual context has squarely rejected the collateral estoppel argument advanced by *Brown* for criminal cases.

This Court has recently held that a defendant tried separately from his co-conspirators is not entitled to raise the conviction of a co-conspirator for a lesser offense as a bar to his own conviction for a greater offense. [*Potts v. State*, 430 So.2d at 901-03.] In so holding we recognized that different evidence may be admissible against different defendants and that "jury pardon" may result in conviction for a lesser offense though the facts proved at trial would support a conviction for a greater offense. [*Eaton v. State*, 438 So.2d 822, 823 (Fla.1983)]

We accordingly conclude therefore that the successful prosecution of the principal to the underlying felony was not a condition precedent to the prosecution of the accessory after the fact nor did the principal's ultimate acquittal collaterally estop the State from prosecuting the accessory if the State could prove beyond a reasonable doubt (1) the commission of the underlying felony beyond a reasonable doubt and (2) that, with the requisite intent, the alleged accessory rendered assistance to protect the principal perpetrator or facilitated the principal's escape. Because Brown entered a plea to the charge, we carefully reviewed the record to determine whether the State's proffered factual basis for the plea was sufficient, if proven at trial, to make a prima facie showing of the accessory charge. We found that it was.

Critical Thinking Question(s): Why would the State exclude relatives based on consanguinity and affinity from culpability as accessories after the fact? What if the

cousin in this case grew up in the same household as the perpetrator? On what other grounds might the appellant seek relief in the instant case?

IV. Vicarious Liability:

Section Introduction: In some circumstances an individual may be held liable for actions that they did not commit based on their relationship to the perpetrator. One such relationship includes that of an individual who hires another to commit a crime. Consider the consequences of such liability in the following case.

Omelus v. *State*, 584 So.2d 563 (1991)

Procedural History: Defendant, who contracted with third person to murder victim, was convicted of first-degree murder and sentenced to death after jury trial in the Circuit Court, Brevard County, John D. Moxley, J. Defendant appealed. The Supreme Court held that: (1) prosecutor's allusion to another murder committed by defendant was harmless error; (2) heinous, atrocious, or cruel aggravating factor could not be applied vicariously to defendant; and (3) application of heinous, atrocious, or cruel aggravating factor vicariously constituted reversible error.

Issue(s): Was the defendant vicariously liable for the manner in which the murder occurred when he contracted his accomplice/agent to kill with no specifications as to how and was not present?

Facts: The facts of this case are as follows. On October 31, 1986, John Henry Jones reported that he had found a body approximately 210 feet east of the railroad tracks in an overgrown area behind the ABC Lounge in Cocoa. The sheriff's deputy who responded found the body of a black male, later determined to be Willie Mitchell. Mitchell apparently had been assaulted roughly twenty feet from where the body was lying. Blood was on the body, which was lying face down amid shrubs and high weeds, and multiple stab wounds were visible on the neck and thorax area. An autopsy performed the next morning revealed that Mitchell died from multiple stab wounds, primarily in the chest and neck area, front and back. There were at least nineteen wounds consistent with having been inflicted with a single-edged knife, and several wounds had been inflicted after death. Mitchell also had defensive wounds on his hands and wrists. A toxicology report revealed the presence of cocaine and marijuana in Mitchell's blood.

Gerald Crayton, who was facing charges for possession and sale of cocaine, had a taped conversation with John Henry Jones that implicated Jones in the murder of Mitchell. Jones was subsequently taken into custody and pleaded guilty to the murder of Mitchell under an agreement that he would receive a life sentence and would testify truthfully at the trial of Ulrick Omelus. Jones testified at trial that Omelus had hired him to kill Mitchell; that originally they had met when Omelus brought some cocaine to a house which Jones was remodeling; that the second time they met, Omelus asked Jones if he

knew anyone who could help him collect on some cocaine debts owed to him; that Jones later told Omelus that he would take the job; and that, at their next meeting, Omelus told Jones that he wanted him to murder someone so Omelus could collect the benefits of a life insurance policy.

Jones also testified that on the last Friday of August, 1986, Jones and Omelus went to West Cocoa to see Gerald Crayton to obtain a weapon (a gun) and that Jones and Omelus later discussed the murder of Willie Mitchell, though Mitchell was not mentioned by name. On October 30, 1986, Jones and Omelus picked up Mitchell in Omelus's car. When they stopped at a convenience store, Omelus told Jones that Mitchell was the man whom Jones was to kill. After leaving the convenience store, the three men stopped so Omelus could buy some cocaine, which he gave to Jones and Mitchell, and Omelus then dropped them off at Jones's nephew's house. Jones and Mitchell spent the day smoking and selling cocaine. Jones saw Crayton during the day and asked him for a weapon, but Crayton did not have one. Jones later obtained a knife from another individual. Around 2:00 or 3:00 a.m. on October 31, Jones bought more cocaine. Mitchell then wanted to go home, and, while they were walking by the railroad tracks, Jones killed Mitchell by stabbing him.

Wayne Hagerman, an insurance salesman, testified that Omelus had recently assisted a man claiming to be Mitchell to obtain a life insurance policy. Hagerman had previously sold an insurance policy to Omelus and to others whom Omelus had brought to him. On November 5, five days after Mitchell's murder, Omelus told Hagerman that Mitchell had died from wounds he received in a knife fight. Hagerman became suspicious and called the police. In addition to the testimony of Hagerman and Jones, the state presented the testimony of the man at whose house the three men had stopped to buy cocaine, as well as the testimony of Crayton, the man who had originally informed on Jones. The defense presented no witnesses during the guilt phase, and the jury found Omelus guilty as charged.

At the penalty phase hearing, the state presented one witness, the medical examiner. The defense presented testimony, including Omelus's own testimony, concerning Omelus's impoverished background in Haiti, his immigration to the United States, his charity toward others, his religiosity, and his relationship with his son. The state, in its argument to the jury, stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon the last factor, that the murder was especially heinous, atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote.

The trial judge subsequently imposed the death penalty, finding two aggravating circumstances: (1) that the murder was committed for pecuniary gain and (2) that it was committed in a cold, calculated, and premeditated manner. The trial judge found as a mitigating circumstance the fact that John Henry Jones, who actually committed the

murder, received a life sentence. We note that the trial judge did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

Holding: Conviction affirmed; death sentence vacated; case remanded for resentencing.

Opinion: PER CURIAM.

Ulrick Omelus appeals his first-degree murder conviction and the trial judge's imposition of a death sentence in accordance with the jury's recommendation. For the reasons expressed in this opinion, we affirm Omelus's conviction. We find, however, that we must vacate his death sentence and remand for a new sentencing hearing before a new jury because of the presentation of an improper aggravating factor to the jury during the penalty phase.

Omelus raises four issues concerning the guilt phase of his trial. He contends that (1) the trial court abused its discretion in denying his motion for mistrial due to the prosecutor's improper comments and question; (2) the trial court erred in denying his motion for acquittal based upon the state's failure to present a prima facie case of the precise offense charged in the indictment; (3) the trial court erred in restricting his cross-examination of state witnesses; and (4) the jury was improperly exposed to evidence during deliberations that was not introduced into evidence in open court. Claims (2) and (3) are without merit and require no discussion. With regard to claim (4), Omelus presumes that the jury saw certain evidence that was included in the record on appeal. However, there is nothing in this record to show that the jury saw any excluded evidence, so that claim is without merit.

The first claim, that improper Williams rule evidence was presented to the jury by the prosecutor's making an allegedly improper comment during his opening statement and by his asking an allegedly improper question of one witness, requires discussion. During the opening statement, the prosecutor stated:

> Now, during the time that intervened, he and the Defendant became a little closer friends and at one point, for instance, they spent some time together trying to find a murder weapon. They went to see a fellow named Gerald Crayton. That name sounds familiar, I'm sure. And they managed, the two of them together, to obtain a gun from Mr. Crayton. They purchased a gun from Mr. Crayton. Mr. Jones will tell you that that gun, unfortunately, due to his situation as a drug addict himself, he eventually sold it off to someone else for some money and by the time they got around to doing this murder he could no longer get that gun. On another occasion, he and the Defendant went down to Wabasso together, he took him down there. And the Defendant put him up in a motel for the night. In fact - I'm sorry, it's not another occasion, it's an extension of the day when they got the gun, that same day; after they bought the gun the Defendant took him down to Wabasso to show him the man he wanted killed. And while they were down there - .

At that point, defense counsel moved for a mistrial on the grounds that the prosecutor's allusion to another murder constituted *Williams* rule evidence which had previously been declared irrelevant and highly prejudicial. The trial judge had, in fact, previously granted a motion in limine concerning evidence of another murder, requiring that it be proffered to the court before being presented to the jury. However, the trial judge denied the motion for mistrial, finding that the jury would be unable to figure out, based on this statement, that another murder was committed and finding that the statement was "neutral at this point."

Later in the trial, the prosecutor questioned John Henry Jones as follows:

> Q. Let me ask you this, at the time he was talking about this, about the insurance, did he tell you what the victim's name was then?
> A. No, they didn't know, he did not mention his name.
> Q. Okay, but at any rate, at this point now the conversations have turned to committing a murder?
> A. Yes.
> Q. Did you agree to do that?
> A. Yes, I did.
> Q. And at that time he did not specify who the victim was going to be.
> A. No.
> Q. Did he give you any indication whether he intended for you to do one murder or whether he was thinking of others?
> A. He mentioned -
> [Defense Counsel]: Judge, I'll object.
> THE COURT: Sustained.
> [Defense Counsel]: May we approach the bench?
> THE COURT: Yes.

Defense counsel again moved for a mistrial on the same grounds. The trial judge denied the motion and granted defense counsel's request for a curative instruction. The state maintains that the prosecutor merely intended to establish the relationship between Jones and Omelus, which is relevant and admissible. We find no reversible error. Viewed in the context of the evidence presented, the jury, in our view, would not have known that there was a second murder unless they had prior knowledge and could distinguish minor factual variations in the two murders. Clearly, the error, if any, was harmless beyond a reasonable doubt. [See *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986)]

Omelus raises five claims concerning the penalty phase of his trial. We need address only his claim that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. We must agree with Omelus that the trial court erred in instructing the jury that it could consider this factor in determining its recommendation. Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence

to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously. We note that the trial judge correctly omitted this aggravating factor from his sentencing order in finding that the death penalty would be appropriate.

We have reviewed the record in this case to determine whether this error was harmless beyond a reasonable doubt. We note that the state in the penalty phase presented the medical examiner as its only witness. In arguing to the jury that the heinous, atrocious, or cruel aggravating circumstance applied, the state discussed the medical examiner's testimony and asserted that Mitchell was stabbed nineteen times and slashed twenty-three times, a total of forty-two wounds on the body; that he lived for a period of time after this; that he knew he was going to be killed and he tried to defend himself and received cuts on his hands, wrists. Pled for his life, experienced excruciating pain from these wounds and the agony of drowning in his own blood.

The prosecutor concluded his argument on this aggravating circumstance by stating that the hand that held that knife, that knife that stabbed, slashed and mutilated Willie Mitchell, left him still alive bleeding to death strangling and choking on his own blood, that hand was controlled in all respects by this Defendant. This Defendant knew John Henry Jones' character. He conspired with him knowing that John Henry Jones was Ulrick Omelus' private monster waiting to be unleased.

The defense, in its argument, took issue with the state's assertions, particularly concerning the application of the heinous, atrocious, or cruel aggravating factor. Defense counsel argued that Omelus did not intend for Jones to inflict a high degree of pain on Mitchell, did not know that Jones was going to use a knife, and, in fact, thought that Jones would use a gun. In addition, defense counsel argued that a number of nonstatutory mitigating factors applied, and he stressed that the following two mitigating factors applied: "Mr. Omelus didn't kill anybody, he was merely an accomplice. The crime was captained by somebody else. And the second one is John Henry Jones, the guy who did the killing got life." As previously stated, the jury recommended death by an eight-to-four vote.

Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances. Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the

death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in *DiGuilio*.

For the reasons expressed, we affirm Omelus's conviction for first-degree murder, vacate the death sentence, and remand for a new sentencing proceeding before a new jury.

Concur/Dissent: GRIMES, Judge.

If a person contracts for another to commit murder and the murder is committed in a heinous, atrocious, or cruel manner, I do not see why the aggravating factor of heinous, atrocious, or cruel cannot be imposed against that person. The one who instigated the evil act should suffer the consequences wrought by his agent. In any event, because this was a contract killing involving minimal mitigating circumstances, I believe the instruction on heinous, atrocious, or cruel constituted harmless error. [See Haliburton v. State, 561 So.2d 248 (Fla.1990), petition for cert. filed (U.S. June 20, 1990) (No. 90-5512)] I concur in the judgment of guilt but dissent as to the necessity of resentencing.

Critical Thinking Question(s): Should a person that hires another person to kill someone be culpable for the manner in which the murder is carried out? What if s/he knows the co-defendant has a propensity for violence? What if s/he specifies the way the murder should be executed but the co-defendant uses different and more gruesome methods?

V. Corporate Liability:

Section Introduction: As the law views corporations as distinct entities in and of themselves, it is possible for a corporation to be held criminally accountable for the actions of its employees. Consider the following case in which such liability is questioned.

***Ellis* v. *State*, 586 So.2d 1042 (1991)**

Procedural History: Guardian of an habitual drunkard who consumed about 20 drinks at a bar and was involved in a car crash resulting in permanent brain damage brought suit against bar owner and owner's principal. The Circuit Court, Hillsborough County, Morison Buck, J., dismissed complaint, and guardian appealed. The District Court of Appeal, 561 So.2d 1209, affirmed. On petition for review, the Supreme Court, Overton, J., held that written notice required to establish criminal offense of sale of alcohol to habitual drunkard was not a requisite to proving a claim against an alcoholic beverage vendor for alleged negligent sale of alcohol to an habitual drunkard.

Issue(s): Should the vendor of alcoholic beverages be held to answer on the issue of liability for serving to a habitual alcoholic and his consequent death?

Facts: This case concerns the liability of a vendor of alcoholic beverages for sales to a habitual drunkard. It commenced when Mary Evelyn Ellis filed a complaint alleging that her son, Gilbert Ellis, an alleged habitual drunkard, consumed approximately twenty alcoholic drinks served to him at a bar owned by the respondent N.G.N. of Tampa, Inc. (N.G.N.), and operated by the respondent Norbert G. Nissen. The complaint alleged that, after consuming the drinks, an intoxicated Gilbert Ellis drove his car in a manner that caused it to overturn and crash; that he sustained severe injuries, including permanent brain damage; that he has since been declared incompetent, and his mother, the complainant and petitioner, Mary Evelyn Ellis, is his legal guardian. The complaint against N.G.N. and Nissen seeks compensatory and punitive damages on the grounds that N.G.N. and Nissen served Gilbert Ellis "knowing that [he] was a person addicted to the use of any or all alcoholic beverages." The complaint also alleged that the provisions of section 768.125, Florida Statutes (1987), authorized this cause of action.

N.G.N. and Nissen moved to dismiss the complaint on the grounds that: (1) section 768.125 does not provide a first-party cause of action for a one-car accident involving an injured adult drinker/driver; and (2) even if there was a cause of action, the complaint did not allege that the bar had received written notice from the habitual drunkard's family as required by section 562.50, Florida Statutes (1987). The trial court granted the motion to dismiss, finding under the first grounds that there is no cause of action against a vendor of intoxicants under section 768.125.

The district court of appeal, while agreeing that the cause of action must be dismissed, made that determination on different grounds. The district court explained that a class of persons to be protected under section 768.125 includes the habitual drunkard himself, as well as those he consequently injures. However, the court concluded that the complaint was properly dismissed because prior written notice of Ellis's alcohol addiction had not been provided, as required by section 562.50. In reaching this conclusion, the district court of appeal determined that sections 562.50 and 768.125 must be read in pari materia because they deal with the same subject matter, i.e., the unlawful dispensing of alcohol and the consequences thereof, and because the legislative history of section 768.125 reflects that the legislature intended that the two statutes be read together. The district court also concluded that the written notice requirement under section 562.50 is a prerequisite to recovery.

Holding: Decision of District Court quashed and cause remanded.

Opinion: OVERTON, Justice.

This cause is before the Court on petition to review *Ellis v. N.G.N. of Tampa, Inc.*, [561 So.2d 1209 (Fla. 2d DCA 1990)], in which the Second District Court of Appeal held that no claim could be brought against an alcoholic beverage vendor for the alleged negligent sale of alcohol to a habitual drunkard, where there was no showing of a criminal violation. We find conflict with *Sabo v. Shamrock Communications, Inc.*, [566 So.2d 267 (Fla. 5th DCA 1990)], and *Pritchard v. Jax Liquors, Inc.*, [499 So.2d 926 (Fla. 1st

DCA 1986), review denied, 511 So.2d 298 (Fla.1987)]. We have jurisdiction under article V, section 3(b)(3), of the Florida Constitution and quash the decision of the district court. We find that a cause of action exists under these circumstances for a vendor's sale of alcoholic beverages to a person habitually addicted to alcohol.

To resolve this issue, it is first necessary to review the legal history of the duty placed on a vendor of alcoholic beverages. Prior to 1959, the common law established that a commercial vendor of alcoholic beverages could not be liable for the negligent sale of those beverages when either the purchaser or third persons were injured as a result of their consumption. This common law principle was based on the 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, consequently, there could be no valid claim against a vendor for damages.

A change in this common law principle first occurred in 1959 when the Supreme Court of New Jersey, in *Rappaport v. Nichols*, [31 N.J. 188, 156 A.2d 1 (1959)], modified this consumption-sale distinction in the common law and, in the words of one commentator, "took upon itself to fill a judicially-perceived vacuum of restraint on commercial vendors of alcoholic beverages." [Gerry M. Rinden, Judicial Prohibition? Erosion of the Common Law Rule of Non-liability for Those Who Dispense Alcohol. 34 Drake L.Rev. 937, 938 (1984-85)] In Rappaport, a tavern owner sold alcoholic beverages to a minor under circumstances in which the vendor knew the purchaser to be a minor. After consuming the alcohol, the minor became intoxicated and killed a third party while driving an automobile. In holding the vendor liable to the deceased's estate, the Supreme Court of New Jersey held:

> [W]e are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care. [156 A.2d at 10]

Similarly, the Seventh Circuit Court of Appeals, in *Waynick v. Chicago's Last Department Store*, [269 F.2d 322 (7th Cir.1959), cert. denied, 362 U.S. 903, 80 S.Ct. 611, 4 L.Ed.2d 554 (1960)], also eliminated the consumption-sale distinction by placing a duty on vendors of alcoholic beverages where the situation was not controlled by legislation. In *Waynick*, a driver's intoxication in Illinois and subsequent accident in Michigan resulted in injury to the complaining third party. Because the Illinois dram shop act was not applicable in Michigan and the Michigan dram shop act was not applicable in Illinois, the federal court fashioned the following duty of care for alcoholic beverage vendors, stating:

> [I]n 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 tavern keepers 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 tavern keepers are liable in tort for damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former. [269 F.2d at 326]

It should also be recognized that, after the repeal of prohibition, many jurisdictions enacted laws prohibiting the sale of intoxicants to minors and habitual drunkards. This state prohibited the sale of intoxicants to minors in 1935. Ch. 16774, Laws of Fla. (1935). In 1963, four years after *Rappaport* and *Waynick*, this Court addressed the issue of vendor responsibility and liability in *Davis v. Shiappacossee*, [155 So.2d 365 (Fla.1963)]. The facts in *Davis* indicate that, after purchasing a case of beer and a half pint of whiskey, several minors went to a drive-in theater and then drove to a park. During this period of time, they drank the whiskey and several cans of the beer. Six hours after the purchase of the alcohol, the minor driver, while driving at fifty-five miles an hour, lost control of the car, struck an oak tree, and was killed. An action was then brought by the parents against the vendor. The trial court dismissed the action and the district court of appeal affirmed, holding the consumption of alcohol as the principal 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." [*Davis v. Shiappacossee*, 145 So.2d 758, 760 (Fla. 2d DCA 1962), quashed, 155 So.2d 365 (Fla.1963)].
In our Davis decision, this Court, under those circumstances, rejected this conclusion while observing that, "generally, in the absence of statute, a seller of liquor is not responsible for injury to the person who drinks it." [155 So.2d at 367] The Court stated:

> [T]hey were seated in a dangerous instrumentality when the transaction occurred; in a dangerous instrumentality they departed under the drivership of a 16-year old. It seems to us that these cogent circumstances could and should convert the word "possible" in the rule to "probable"; that the very atmosphere surrounding the sale should make foreseeable to any person, such as Farmer, with the intelligence to represent the respondent and treat with his customers, that trouble for someone was in the offing. [Id.]

The Court in Davis concluded that such a sale of alcoholic beverages was a violation of a previously enacted statute prohibiting the sale to minors and, consequently, it was negligence per se. Our holding put this state in the forefront of those jurisdictions that modified the original common law rule to allow some negligence claims against vendors of alcoholic beverages on the basis that a sale could be the proximate cause of an injury. This trend is now substantial. [*See Morris v. Farley Enters., Inc.*, 661 P.2d 167 (Alaska 1983); *Largo Corp. v. Crespin*, 727 P.2d 1098 (Colo.1986); *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980); *Lewis v. State*, 256 N.W.2d 181 (Iowa 1977); *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky.1987); *Thrasher v. Leggett*, 373 So.2d 494 (La.1979); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 453 N.E.2d 430 (1983); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Munford, Inc. v. Peterson*, 368 So.2d 213 (Miss.1979); *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965)]

Subsequent to *Davis*, the Second District Court of Appeal, in *Prevatt v. McClennan*, [201 So.2d 780 (Fla. 2d DCA 1967)], applied our *Davis* decision in considering another situation where a vendor illegally sold alcoholic beverages to a minor. In that case, the minor became intoxicated while in the vendor's establishment, drew a pistol, and shot a patron of the tavern. The patron sued the owner of the tavern, and the district court affirmed a personal injury judgment. The district court held that the violation of the statute forbidding the sale of liquor to a minor constituted negligence per se. In doing so, the district court noted that "[t]he very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making." [Id. at 781] The court emphasized the differences between the sale and consumption, noting that "[t]he proximate cause of the injury is the sale rather than the consumption." [Id.]

As these cases emphasize, a major change had occurred in the legal principles governing an alcohol vendor's liability. Under the original doctrine, the vendor was absolved of liability because consumption of the alcohol was considered to be the cause of the conduct and the resulting damages, for which the vendor had no control. After *Rappaport*, *Waynick*, *Davis*, and *Prevatt*, the critical fact was not consumption but whether, under the circumstances, it was foreseeable that injury or damage would occur after a sale, particularly when sales were made to persons who lacked the ability to make a responsible decision in the consumption of alcohol.

As a result of this judicial trend to extend liability towards vendors of alcoholic beverages, the legislature enacted section 562.51, now section 768.125, Florida Statutes (1989). That statute was enacted as chapter 80- 37, Laws of Florida, and its title read as follows: "An act relating to the Beverage Law; creating s. 562.51, Florida Statutes [codified as s. 768.125], providing that a person selling or furnishing alcoholic beverages to another person is not thereby liable for injury or damage caused by or resulting from the intoxication of such other person; providing exceptions; providing an effective date." The substantive provision, now section 768.125, Florida Statutes (1989), 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.

The statute effectively codified the original common law rule absolving vendors from liability for sales but provided exceptions for sales to those who were not of a lawful drinking age or to a person habitually addicted to alcoholic beverage use.

In 1984, in *Migliore v. Crown Liquors, Inc.*, [448 So.2d 978 (Fla.1984)], we addressed the effect of the enactment of section 768.125. In *Migliore*, a minor, who had been

provided intoxicating liquors by a vendor, injured the plaintiff in an automobile accident. We expressly agreed with "the holding and rationale" of the *Prevatt* decision, and stated that "[p]roviding alcoholic beverages to minors involves the obvious foreseeable risk of the minor's intoxication and injury to himself or a third person." [448 So.2d at 980] However, this Court expressly rejected the claim that section 768.125 created a cause of action for third persons against dispensers of intoxicating beverages for injuries caused by minors. We held that "section 768.125 is a limitation on the liability of vendors of intoxicating beverages," and that "the legislative intent that this statute limit the existing liability of liquor vendors is clear from its enacting title." [Id. at 980-81] This Court faced similar issues in *Armstrong v. Munford, Inc.*, [451 So.2d 480 (Fla.1984)], and *Forlaw v. Fitzer*, [456 So.2d 432 (Fla.1984)]. In those cases, we reaffirmed our holding *in Migliore* that the statute constituted a limitation on the existing liability of vendors.

In *Bankston v. Brennan*, [507 So.2d 1385 (Fla.1987)], we considered a social host's liability for injuries to a third person caused by an intoxicated minor who had been served alcoholic beverages by the host. We rejected liability for the social host. In answering a certified question, we expressly found that section 768.125 does not create a cause of action against a social host. We explained that "vendor liability had been broadened by judicial decisions and that the legislative response to that trend was to limit that liability." [Id. at 1386-87] We stated that it would be 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." [Id. at 138].

We further noted that when 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." [Id. (quoting Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So.2d 644, 646 (Fla.1986) As succinctly explained in Justice Barkett's concurring opinion, "[s]ince the legislature has acted to limit the liability of vendors ... we cannot find social hosts more liable than the legislature has determined vendors should be." [507 So.2d at 1388 (Barkett, J., concurring)]

In summary, the above case law has established that, although limited by the provisions of section 768.125, there is a cause of action against a vendor 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 vendor'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. The remaining question is how the cause of action may proceed under the restrictions of section 768.125.

First, in order to understand its purpose, it is necessary to examine section 768.125 in its entirety. 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 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." [§ 768.125, Fla.Stat. (1987)] 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." [Id.] It is important to note the distinction in the operative language of these two provisions.

In applying the exceptions in section 768.125, a court must consider its terms as well as the provisions of the criminal statute dealing with the sale of alcohol. There are two separate criminal offenses for a sale to a minor and a sale to an alcoholic. Regarding sales to a minor, section 768.125 uses the terms willfully and unlawfully. The criminal offense for sales to minors is set forth in section 562.11(1)(a), Florida Statutes (1987), which reads, in pertinent part, as follows: "It is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or to permit a person under 21 years of age to consume such beverages on the licensed premises." We find that the legislature's use, in section 768.125, of the term unlawfully requires that the plaintiff must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action. Once these elements have been proven, the plaintiff has established negligence per se. [See Davis]

The criminal offense for sales to habitual drunkards is contained in section 562.50, Florida Statutes (1987), the pertinent part of which 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 an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice, shall be guilty of a misdemeanor of the second degree....

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. We therefore conclude that, under the habitual drunkard exception to section 768.125, a plaintiff need show only that the vendor knowingly sold alcoholic beverages to a person who is a habitual drunkard.

The next question we must resolve is what constitutes "knowledge" in order for a vendor's conduct to be found negligent. The respondents argue that section 768.125 must be read in pari materia with the criminal statute, section 562.50, to require written notification of the vendor before recovery under section 768.125 is permissible. We recognize that section 768.125 was initially enacted by chapter 80-37, Laws of Florida, as section 562.51, immediately following the criminal provision pertaining to habitual drunkards in section 562.50. We find, however, that the distinction between the utilization of the words "willful and unlawful" for minors and the word "knowingly" for habitual drunkards is critical to this issue and was purposefully done by the legislature.

As originally introduced, section 768.125 required establishment of the elements of the criminal offense in section 562.50 in order for there to be liability in a civil action. 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 vendor knowingly serve a habitual drunkard. [Fla.H.R.Jour. 216, 224-25 (Reg.Sess.1980)] Given the legislative history of section 768.125, and the use of the term knowingly rather than unlawfully in the statute, we hold that written notice as required to establish the criminal offense in section 562.50 is not a requisite to proving knowingly as a predicate to a negligence claim for an injury resulting from a vendor's knowingly serving alcoholic beverages to a habitual drunkard. We find the cause of action in this circumstance only requires evidence that the vendor had knowledge that the individual the vendor served was a habitual drunkard.

Serving an individual multiple drinks on one occasion would be insufficient, in and of itself, to establish that the vendor knowingly served a habitual drunkard alcoholic beverages. 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 vendor knew that the person was a habitual drunkard. We agree with the Fifth District Court of Appeal in *Sabo v. Shamrock Communications, Inc.*, [566 So.2d 267 (Fla. 5th DCA 1990), approved sub nom. *Peoples Restaurant v. Sabo*, No. 76,811, 1991 WL 183083 (Fla. Sept. 19, 1991)], that this element can properly be established by circumstantial evidence. The claim being established under this exception is ordinary negligence, not negligence per se. To establish negligence per se, the plaintiff would have to establish each of the elements of the criminal offense, as contained in section 562.50, including the requirement of written notice.

Accordingly, we quash the decision of the district court and direct that this cause be remanded for further proceedings in accordance with the principles set forth in this opinion.

Critical Thinking Question(s): The Court merely quashed the motion granting dismissal and remanded this case. Do you think that the vendor will be held liable for providing the drinks to the decedent? Should vendors be liable for individuals that get in traffic accidents that harm persons or property? How about for facilitating a DUI offense?

VI. Traffic Tickets and Vicarious Liability:

Section Introduction: Vicarious liability can sometimes also be extended to the owner of a vehicle in which another individual obtains a traffic ticket. The following Florida statute expresses this concept with regard to parking violations.

Florida Statute, section 316.1967 - Liability for payment of parking ticket violations and other parking violations

(1) The owner of a vehicle is responsible and liable for payment of any parking ticket violation unless the owner can furnish evidence, when required by this subsection, that the vehicle was, at the time of the parking violation, in the care, custody, or control of another person. In such instances, the owner of the vehicle is required, within a reasonable time after notification of the parking violation, to furnish to the appropriate law enforcement authorities an affidavit setting forth the name, address, and driver's license number of the person who leased, rented, or otherwise had the care, custody, or control of the vehicle. The affidavit submitted under this subsection is admissible in a proceeding charging a parking ticket violation and raises the rebuttable presumption that the person identified in the affidavit is responsible for payment of the parking ticket violation. The owner of a vehicle is not responsible for a parking ticket violation if the vehicle involved was, at the time, stolen or in the care, custody, or control of some person who did not have permission of the owner to use the vehicle. The owner of a leased vehicle is not responsible for a parking ticket violation and is not required to submit an affidavit or the other evidence specified in this section, if the vehicle is registered in the name of the person who leased the vehicle.

(2) Any person who is issued a county or municipal parking ticket by a parking enforcement specialist or officer is deemed to be charged with a noncriminal violation and shall comply with the directions on the ticket. If payment is not received or a response to the ticket is not made within the time period specified thereon, the county court or its traffic violations bureau shall notify the registered owner of the vehicle that was cited, or the registered lessee when the cited vehicle is registered in the name of the person who leased the vehicle, by mail to the address given on the motor vehicle registration, of the ticket. Mailing the notice to this address constitutes notification. Upon notification, the registered owner or registered lessee shall comply with the court's directive.

(3) Any person who fails to satisfy the court's directive waives his or her right to pay the applicable civil penalty.

(4) Any person who elects to appear before a designated official to present evidence waives his or her right to pay the civil penalty provisions of the ticket. The official, after a hearing, shall make a determination as to whether a parking violation has been committed and may impose a civil penalty not to exceed $100 or the fine amount designated by county ordinance, plus court costs. Any person

who fails to pay the civil penalty within the time allowed by the court is deemed to have been convicted of a parking ticket violation, and the court shall take appropriate measures to enforce collection of the fine.

(5) Any provision of subsections (2), (3), and (4) to the contrary notwithstanding, chapter 318 does not apply to violations of county parking ordinances and municipal parking ordinances.

(6) Any county or municipality may provide by ordinance that the clerk of the court or the traffic violations bureau shall supply the department with a magnetically encoded computer tape reel or cartridge or send by other electronic means data which is machine readable by the installed computer system at the department, listing persons who have three or more outstanding parking violations, including violations of s. 316.1955. Each county shall provide by ordinance that the clerk of the court or the traffic violations bureau shall supply the department with a magnetically encoded computer tape reel or cartridge or send by other electronic means data that is machine readable by the installed computer system at the department, listing persons who have any outstanding violations of s. 316.1955 or any similar local ordinance that regulates parking in spaces designated for use by persons who have disabilities. The department shall mark the appropriate registration records of persons who are so reported. Section 320.03(8) applies to each person whose name appears on the list.

VII. Parents and Vicarious Liability:

Section Introduction: Parents may sometimes be held accountable for the actions committed by their children, such as in this Florida case. Consider to what degree parents should be liable for their children's behavior while you read this example.

Fisher v. *State*, 840 So.2d 325 (2003)

Procedural History: After child was adjudicated liable for burning down house, and mother has ordered to pay restitution, State brought contempt proceedings when mother failed to make restitution. The Circuit Court, Lake County, William G. Law, J., ordered mother held in contempt, despite mother's assertion that restitution order violated her right to due process. Mother appealed. The District Court of Appeal, Sharp, W., J., held that trial court was precluded from imposing restitution on mother without making statutorily required finding that mother did not make diligent and good faith effort to prevent juvenile from engaging in delinquent acts.

Issue(s): Should a parent be held liable to pay restitution for damages that result from a child's criminal acts?

Facts: These orders were rendered in connection with a juvenile delinquency proceeding involving Fisher's daughter, T.F. T.F., age thirteen, was charged with burglary and arson, after she and two other girls broke into a vacant house and set it on fire. The house burned to the ground. T.F. and Fisher both signed an affidavit of indigency and a public defender was appointed for T.F.

On August 19, 1999, T.F. pled no contest, was adjudicated delinquent and placed in a Level 4 program. Fisher, as well as the public defender, were present. The amended order rendered after the delinquency hearing and sentencing states: "Restitution, parents responsible also, reserved right to restitution hearing to determine amount." This was the first notice or statement by the judge or the state that Fisher was to be held personally liable for restitution.

The restitution hearing was held on January 28, 2000. An employee of the Lake County Property Appraiser's Office testified the house was owned by Jeffrey and Belinda Richardson and in 1999, it had a total assessed value of $30,461 (land valued at $19,800 and the house at $10,661). Other witnesses testified it would cost $5,200 to demolish the house and $95,160 to replace it. Belinda Richardson testified her father lived in the house until he died in December 1996, and after that time the house was vacant. However, she testified the house contained antique furniture and other contents she valued at $25,000.

Fisher testified she was familiar with the house. It had been abandoned, some of the downstairs windows lacked window panes, and rats, racoons or snakes could be in the house. Additional testimony was apparently taken from Fisher that she is a single parent and earns $45,000 a year. Fisher told the judge that with her income of $17.00 per hour, she could not afford to pay restitution for the house.

On February 1, 2000, the judge entered an order requiring Fisher to pay restitution in the amount of $25,861 ($5,200 for demolition, $10,000 for the contents of the house, and $10,661 for the house structure). He directed Fisher to pay $250 per month. Fisher questioned the propriety of the restitution order at a February 22, 2001 hearing, and the court minutes reflect "the mother is ordered to pay." On February 26, 2001, Fisher wrote a letter to the judge disputing the amounts used to calculate restitution. She had information the property was in a dilapidated state and had been the subject of notices of code violations. She also disputed anyone would have left valuable antiques in a house in such condition. The judge treated the letter as a motion for rehearing and summarily denied it.

On May 15, 2001, a different judge issued an order directing Fisher to show cause why she should not be held in contempt for failure to pay restitution. A contempt hearing was held. Fisher apparently had paid $1,485 but then stopped making payments. She testified she is a registered nurse, earning $21 an hour. She rents her home and has legal custody of two grandchildren, ages three and four. She had $2,000 in a savings account. The judge held her in contempt and sentenced her to thirty days in jail with a purge

provision of $500. She spent a month in jail. In August 2001, Fisher retained private counsel.

The state again petitioned for a rule to show cause why Fisher should not be held in contempt for failure to pay restitution. A hearing ensued before the second judge on November 1, 2001. At that hearing, Fisher's defense counsel filed a motion to vacate the restitution order, arguing it was void ab initio because Fisher had not been properly noticed that she could be held personally liable for restitution in her daughter's case, and the court failed to make a finding (or take any testimony which would support such a finding) that Fisher had failed to make diligent and good faith efforts to prevent T.F. from engaging in delinquent acts, pursuant to section 985.231(9), Florida Statutes. The judge denied relief on the ground that "parental diligence" was a defense Fisher had to establish and that this was not an element the state had to prove in order for the court to impose an order of restitution on a parent for the acts of a delinquent child.

The court then took evidence concerning Fisher's ability to pay the restitution amount. It found she had the ability to pay $250 per month as set forth in the prior order. On December 21, 2001, the court rendered an order holding Fisher in contempt and sentenced her to six months in jail, with a purge provision of $250. In another order rendered on the same date, it denied Fisher's motion to vacate the original restitution order. She appeals from both orders in this proceeding.

Holding: Reversed.

Opinion: SHARP, W., J.

Fisher appeals from an order holding her in contempt for failure to make restitution payments and from an order denying her motion to vacate the restitution order which was the basis for the contempt order. We reverse both orders.

We conclude that the court improperly imposed restitution on Fisher without making the findings required by section 985.231. This statute provides:

> (1)(a) The court that has jurisdiction of an adjudicated delinquent child may, by an order stating the facts upon which a determination of a sanction and rehabilitative program was made at the disposition hearing:
>
> * * *
>
> 5. Require the child and, if the court finds it appropriate, the child's parent or guardian together with the child, to render community service in a public service program.
>
> 6. As part of the probation program to be implemented by the Department of Juvenile Justice, or, in the case of a committed child, as part of the community-based sanctions ordered by the court at the disposition hearing or before the child's release from commitment, order the child to make restitution in money, through a promissory note cosigned by the child's parent or guardian, or in kind for any damage or loss caused by the child's offense in a reasonable amount or manner to be determined by the court....

> A finding by the court, after a hearing, that the parent or guardian has made diligent and good faith efforts to prevent the child from engaging in delinquent acts absolves the parent or guardian of liability for restitution under this subparagraph.
> 7. Order the child and, if the court finds it appropriate, the child's parent or guardian together with the child, to participate in a community work project, either as an alternative to monetary restitution or as part of the rehabilitative or probation program.
> * * *
> 9. In addition to the sanctions imposed on the child, order the parent or guardian of the child to perform community service if the court finds that the parent or guardian did not make a diligent and good faith effort to prevent the child from engaging in delinquent acts. The court may also order the parent or guardian to make restitution in money or in kind for any damage or loss caused by the child's offense. The court shall determine a reasonable amount or manner of restitution, and payment shall be made to the clerk of the circuit court as provided in subparagraph 6.

Restitution was imposed on Fisher pursuant to subsection (9) quoted above, since it was not being ordered in connection with a probation program or a community based sanction but rather as part of the sanctions initially imposed on T.F. The language in subsection (6) is different than in subsection (9), lending itself somewhat to the judge's interpretation, that it is a defense a parent must establish to escape from sanctions, although we do not address that issue in this case.

Subsection (9) requires the court to find that the parent or guardian did not make a diligent and good faith effort to prevent the child from engaging in delinquent acts before ordering a parent or guardian to perform community services. As we held in *B.M. v. State*, [744 So.2d 505 (Fla. 5th DCA 1999)], although the next sentence in subsection (9) permitting the court to impose restitution on a parent or guardian does not expressly require a similar finding, such a required finding is implied from the structure of the statute. [Accord *J.C.R. v. State*, 785 So.2d 550 (Fla. 4th DCA 2001)] Holding a parent vicariously liable for a child's harmful or delinquent acts is a departure from the common law, and statutes imposing such liability should be construed narrowly.

In this case, no finding was made that Fisher failed to make a diligent and good faith effort to prevent T.F. from engaging in the delinquent act involved in this case or any other. Nor was any evidence presented concerning Fisher's parenting efforts. In *B.M.*, we noted there were procedural problems with how and when such a hearing should be held pursuant to section 985.231, and whether a parent or guardian would be entitled to state representation at such a hearing. We simply remanded to the trial court to conduct a hearing.

Since that time, the juvenile rules have been amended to remedy our procedural due process concerns when the state seeks restitution or other sanctions against parents or guardians of delinquent children. [See Fla. R. Juv. P. 8.040, 8.030, 8.031] Effective

January 1, 2001, the rules provide that the state must file and serve a petition on the parents or guardians in cases where restitution or other sanctions are sought against them. The petition must set forth facts to establish the appropriateness of imposing sanctions on them, and service must occur 72 hours before the hearing concerning imposition of the sanctions.

The state argues that even if a "diligence and good faith hearing" was not held in this case and the statute required it, Fisher should have raised that issue in a direct appeal and that since she did not do so she has waived this defect. Thus the validity of the restitution order has become the law of the case. Normally what the state argues would be true, if the judgment being collaterally attacked was not void. [See *Cesaire v. State*, 811 So.2d 816 (Fla. 4th DCA 2002)(person cannot be compelled to obey a void order); *Synchron, Inc. v. Kogan*, 757 So.2d 564 (Fla. 2d DCA 2000) (disobedience of a void order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties, is not "contempt"); *In re Elrod*, 455 So.2d 1325 (Fla. 4th DCA 1984)(a court does not have contempt powers to enforce violations of its orders if they are rendered without jurisdiction over the subject matter or the parties or transcend its power or authority)]

Fisher argues that the restitution order is void because the court did not acquire personal jurisdiction over her. She was never served with process in her daughter's case nor was there any pleading directed at her to put her on notice she could be held personally liable for a restitution order in her daughter's delinquency case. However, a party can make a voluntary appearance and submit to the jurisdiction of a court even where the party is not served with process. [*Manufacturers National Bank of Detroit v. Moons*, 659 So.2d 474 (Fla. 4th DCA 1995); *McKelvey v. McKelvey*, 323 So.2d 651 (Fla. 3d DCA 1976); § 985.219(1), Fla. Stat.] Fisher appeared numerous times before the court and even challenged the merits of the restitution order. Thus she may have submitted herself to the jurisdiction of the court. [See *Hall v. State, Department of Health and Rehabilitative Services*, 487 So.2d 1147 (Fla. 1st DCA 1986)] However, there is another fatal defect in these proceedings - lack of notice - and thus it follows, lack of due process. [See *Wolf v. Department of Health and Rehabilitative Services*, 588 So.2d 335 (Fla. 5th DCA 1991)] Fisher was not a party to her daughter' juvenile proceeding. She appeared only in her capacity as a concerned parent and possible witness. There were no pleadings or allegations which could have put her on notice that the state would seek restitution against her personally, prior to the August 19, 1999 hearing, which resulted in the restitution order imposed against her. Nor was she put on notice that sanctions, including contempt, could be imposed against her personally for failure to pay restitution. A contrary ruling from us would create an "Alice in Wonderland" situation in which witnesses or friends and supporters of a defendant could be held personally liable for the defendant's misdeeds merely because they sat in the courtroom during the trial.

The dissent complains Fisher posed no objection to the August 19, 1999 order or to the subsequent hearing on the amount of restitution to be imposed. Had Fisher been properly noticed that she was potentially going to be held liable for restitution in this case, she could have come to the hearing with her own counsel, cross-examined witnesses, and

presented her own evidence. She was clearly ill prepared to defend against the merits of the imposition of restitution sanctions, based on section 985.231(9) and the propriety of the amounts being sought. After the August 19, 1999 hearing, it was all down-hill for Fisher. She was never given a chance to dispute the validity of the imposition of sanctions against her, only the amount of restitution ordered, which was summarily denied.

Because the restitution order was rendered without due process, it is void as to Fisher. [See *S.B.L. v. State*, 737 So.2d 1131 (Fla. 1st DCA 1999)] A void judgment may be attacked at any time because the judgment creates no binding obligation on the parties, is legally ineffective and is a nullity. [*Greisel v. Gregg*, 733 So.2d 1119 (Fla. 5th DCA 1999)] The order finding Fisher in contempt for not complying with the restitution order is also void since it was based on the void restitution order. We reverse both orders involved in this appeal. Our ruling in this case is without prejudice to the right of the state to seek to reimpose restitution sanctions against Fisher, should that be appropriate under the new juvenile rules, which now govern such cases.

Dissent: COBB, Senior Judge.

On August 19, 1999, a disposition hearing was held in a juvenile delinquency case wherein the minor daughter of Felicia Fisher was charged with burglary of a structure and arson. As a result of that hearing, which was attended by Fisher, an order was entered on September 19, 1999, providing for post-commitment community control whereby the parents of the juvenile would also be responsible for restitution for destruction of the burned house and its contents. The amount of restitution was to be set at a subsequent hearing. Fisher posed no objection to this order or to the setting of a subsequent hearing. The hearing in regard to the amount to be set for the house which had been burned was held on January 28, 2000. Again, Fisher was present at the hearing. Various witnesses were called to establish the value of the house and its contents. Fisher herself testified that the house was abandoned and in horrible condition, but she did not contend that she was not liable nor that she had not been notified that joint liability had been imposed against her. Her testimony at this hearing was directed to the value of the destroyed house and the extent of her liability to pay for it.

In orders filed February 1, 2000 and February 14, 2000, the trial court found that Fisher should pay the sum of $25,861.00 to the Richardsons, the owners of the house. Based on Fisher's testimony that she earned $45,000.00 per year, the court set monthly payments at $250.00. These orders were not appealed. A year later, Fisher sent a letter to the court contending the amount of restitution was unreasonable. Again, she failed to raise any challenge to her liability for restitution owed to the Richardsons and, in fact, said she was not trying to avoid paying restitution.

Now, several years later, Fisher argues on appeal that the trial court lacked authority to enter a restitution order against her because it did not make a finding of lack of parental diligence. She cites to *B.M. v. State*, [744 So.2d 505 (Fla. 5th DCA 1999)] in support of her argument. In *B.M.*, however, the lack of such finding was raised on direct appeal, and

that did not happen here. Fisher has never requested a hearing on the issue of her obligation; she has only protested the amount and her ability to pay, and even then she did not appeal those issues. The issue of liability was waived years ago.

It is clear from the language of section 985.231, Florida Statutes, that the legislature intends to hold minors and their parents responsible for the monetary damage done to other people. The statutes specifically give the trial court the authority to hold a parent financially responsible for the act of a child. Clearly, the restitution order is not void as contended by the majority. As pointed out in the State's brief:

> (I)n the original disposition order, the trial court specifically held that the Appellant was going to be liable for restitution. Notice regarding the restitution hearing was sent to Appellant's address. Appellant attended both hearings along with her juvenile daughter and her daughter's attorney. Appellant addressed the trial court at length as to the fact that she did not feel that she could afford to pay the restitution and that she disagreed with the victim's valuation of the destroyed property. The trial court heard evidence on both of these issues and ruled in the victim's favor. At both the contempt hearings, the trial court inquired as to Appellant's income and expenses and made explicit findings of fact that she could afford to pay.

[Compare with *Wolf v. HRS*, 588 So.2d 335 (Fla. 5th DCA 1991) (parents not given notice, opportunity to defend claim, or present evidence at hearing)] Appellant has been given sufficient notice and numerous meaningful opportunities to be heard. She has not been denied due process. It is very clear that the September 19, 1999 order, which was sent to Fisher, gave actual notice of her potential liability. The February 14, 2000, restitution order gave this liability finality. Fisher did not appeal from the restitution order and, in fact, expressly stated to the court that she was not trying to avoid paying restitution. I would affirm the order of contempt and the order denying her motion to vacate the restitution order.

Critical Thinking Question(s):

- Do you think parents should be held liable for the criminal actions of their children?
- How are they to control their children’s every acts?
- Should an older sibling that is “in charge” of younger siblings be held responsible as well?
- While society needs to find some way to “get parents more involved,” do you think that the State is moving in a good direction with such policies?