IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 63,147

EUGENE HALL,

Petitioner,

v.

BILLY JACK'S, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION FILED BY BILLY JACK'S

KATHLEEN V. McCARTHY, ESQ.
18191 NW 68th Avenue
Hialeah, Florida 33015
Dade: 556-1770
Broward: 763-1309
Florida: 1-800-432-2514

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

STATEMENT OF CASE AND FACTS

The Second District Court of Appeal stated that "there is no evidence to support a finding that BILLY JACK'S knew or should have known that Spillers would attack (Petitioner) without provocation" (Petitioner's Brief, A. 5). The court held that "BILLY JACK'S was not shown to have breached its duty to (Petitioner)" (A. 8). The court affirmed the Final Judgment as to Co-Defendant, Wayne Spillers.

There is no evidence in the record of fights at BILLY JACK'S prior to the night in question. Petitioner does not cite to the record when he makes the bald assertion in his Jurisdictional Brief that there had been prior fights (Petitioner's Brief, pp. 2-3). Petitioner never argued prior fights to the lower courts.

There is no testimony that the bouncers' practice was not to restore order as asserted on pages 2-3 of Petitioner's Brief. The testimony as to bouncers reads:

> "Q I would like to know, if you know, if there were bouncers working that night. You know if there were bouncers?
>
> A Bouncers, whenever a fight breaks out, they run.
>
> Q I would like to know that night, if you know, if there was any employees that were hired as either doormen or bouncers?
>
> A Just George, (McGuire, BILLY JACK'S manager), that I know of. I don't remember really back that far.
>
> Q George broke the fight up?
>
> A George grabbed one."

Respondent's Brief, AA. 13). There is no "copious evidence of...

inadequate security" as Petitioner claims in his Brief on page 4.

Contrary to Petitioner's assertion on page 2 of his Brief that McGuire, the manager of the bar, made no attempt to restore order, there is testimony from two witnesses, as well as from Spillers, that McGuire broke up the fight between Petitioner and Kuz inside the bar (AA. 1, Shirlene Voorhees), (AA. 2, Mike Neiger), (AA. 3, Wayne Spillers).

There is testimony that McGuire got Petitioner and Kuz to leave the bar (Petitioner's Brief A. 20, Mike Neiger), (AA. 4, Wayne Spillers).

Spillers testified that when he went outside to retrieve his cane because he was worried about how long it was taking his girlfriend to do so, "McGuire was holding Kuz...." (AA. 5). Shirlene Voorhees also testified that McGuire restrained Kuz (AA. 8).

BILLY JACK'S takes strong exception, as it did in response to Petitioner's Motion for Rehearing before the Second District Court of Appeal, to the scurrilous, self-serving characterization of Spillers' testimony as "obviously perjured" in Petitioner's Statement of Facts. (Petitioner's Brief, p. 3).

There is no evidence in the Record and Petitioner makes no reference to the Record when he baldly states that before the fracas with Petitioner, Spillers held the pool stick by its thin end and brought the heavy end over his head (Petitioner's Brief, p. 2) See Spillers v. Hall, No. 82-395, No. 82-405, 2d DCA, filed Nov. 17, 1982, slip op. at 7 (A. 7).

Petitioner has created facts which do not exist in the record. He makes arguments in his Jurisdictional Brief that he never raised in the lower courts.

Spillers was in the bar on the night of the incident, because he was interested in purchasing it (AA. 6). He and his mother did purchase the bar four months later (AA. 6).

Spillers had an artificial hip and always used a cane to walk (AA. 7). His girlfriend (AA. 8) and another witness, Tom Urksa, also testified that he always used a cane to walk (AA. 9).

Kuz grabbed Spillers' cane and followed Petitioner and McGuire out the door of the bar, when McGuire broke up Petitioner's fight with Kuz inside the bar (AA. 4). Spillers sent his girlfriend outside to get his cane (AA. 7). When she did not come back into the bar in a reasonable period of time, Spillers became concerned (AA. 10). He took a pool cue to support himself and went outside (AA. 10).

Petitioner was the only person to testify to a friendship between Spillers and Kuz (A. 13). Spillers testified that he and Kuz were not friends (AA. 6).

Spillers had never been involved in any serious fights, except for the two altercations with Petitioner which led to this lawsuit (AA. 11).

ARGUMENT

THE SUPREME COURT MUST REJECT JURISDICTION BECAUSE THERE IS NO SUBSTANTIAL, COMPETENT EVIDENCE THAT BILLY JACK'S KNEW OR SHOULD HAVE KNOWN THAT SPILLERS WOULD HIT PETITIONER WITH A POOL CUE; THEREFORE THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

It is uncontroverted on the record as a whole that Spillers was at the bar on November 9, 1981 because he was interested in buying it. It is also uncontroverted that he and his mother subsequently bought it.

There is no substantial, competent evidence in the record that Spillers had ever before created a disturbance at or near this bar. On the evening of November 9, 1981, there is no evidence that Spillers made threatening remarks to Petitioner, nor is there a suggestion of anticipated violence.

Spillers had an artificial hip and always used a cane to walk. Therefore, when Spillers used a pool cue to support himself, it was not reasonably foreseeable that he would use it to hit Petitioner.

Petitioner was the only person to testify to a "friendship" between Spillers and Kuz. Spillers testified that he and Kuz were not friends. There is no substantial, competent evidence to show that BILLY JACK'S knew of the alleged "friendship" or would have reason to conclude that Spillers would become violent towards Petitioner. Spillers had never been involved in any serious fights, except for the two altercations with Petitioner which led to this lawsuit.

Therefore, this Court must deny jurisdiction in the instant case in accordance with its decision in Miracle v. Kriens, 33 So.2d 644 (Fla. 1948), where the plaintiff failed to prove his case, even accepting all his evidence as credible.

Bell v. Jefferson, 414 So.2d 273 (Fla. 5th DCA 1982) and Worth v. Stahl, 388 So.2d 340 (Fla. 4th DCA 1980) are two other decisions which demonstrate that there is no conflict between the

Second District's decision and the law in Florida.

In Bell, the court held there was no competent or substantial evidence to show that the owner of the bar had any reason to suspect that one patron would attack another with a deadly weapon. In Bell, two patrons had been drinking and playing dice. One slapped the other and the slappee testified that he went to his nearby apartment and brought back his own .22 rifle to the bar where he shot the slappor and beat him with the gun. The facts in Bell are close to those in the instant case. Therefore, the Second District in the instant case was correct in concluding as did the court in Bell that there was no basis for the jury to find that the bar breached its duty to maintain its premises in a reasonably safe condition for the benefit of patrons. Bell at 274.

In Worth, the appellant was in a tavern, left and later returned. He had a discussion with another patron, sat at the bar and then went to the bathroom. When Worth was leaving the bathroom, he was physcially assaulted by the patron, with whom he had the discussion, and four or five other persons.

In Worth, the Fourth District stated:

> "There was simply no proof that (the other patron's) acts were foreseeable.
>
> and
>
> ...the owner of a public place is not liable in damages to one who is injured by the unforeseen violent acts of another."

Id. at 341 (emphasis supplied).

In the instant case, there is no substantial, competent evidence that Spillers' alleged attack on Petitioner with a pool

cue was foreseeable. Therefore, the Second District was correct in concluding that BILLY JACK'S was not liable in damages to Petitioner who was allegedly injured by Spillers' unforeseen violent act.

The instant case is factually miles apart from Allen v. Babrab, Inc., Case No. 61,789, before this Court. Respondent's counsel has read all the briefs and appendices presented to this Court in Allen and there was far more evidence of the attacker's propensities in Allen.

In the instant case, Petitioner puts great emphasis on the fact that Spillers removed a pool cue from the bar. However, it is uncontroverted that Spillers had an artificial hip and had to walk with a cane. Both he and Shirlene Voorhees testified that Kuz had taken his cane to pursue Petitioner in their fight. Therefore, the Second District was in accord with this Court's decision in Miracle when it determined that

> "there is no evidence to support a finding that BILLY JACK'S knew or should have known that Spillers would attack (Petitioner) without provocation."

See Miracle at 647.

After oral argument on October 13, 1982, Respondent informed the Second District that this Court had granted review in Allen and had set the case for oral argument on December 7, 1982 (AA. 12, Notice of Supplemental Authority). Given the vast factual differences between Allen and the instant case, this Court must reject jurisdiction in the instant case.

In the instant case, McGuire broke up the fight inside the bar between Petitioner and Kuz, according to at least three eye witnesses. Both Spillers and Shirlene Voorhees testified that outside, McGuire restrained Kuz from his fight with Petitioner Just as in Miracle, McGuire

> "took every precaution that it was possible for a reasonable person to take in a similar situation"

Id. at 647. Therefore, BILLY JACK'S manager exercised reasonable care to supervise patrons for the purpose of preventing injuries from risks known to him.

The jury's decision that the disputed testimony supported a finding that Spillers assaulted Petitioner was affirmed. The Second District was also correct in concluding that there was no substantial, competent evidence to support a finding that BILLY JACK'S knew or should have known that Spillers might do so. Miracle, Bell, Worth.

Therefore, this Court must reject jurisdiction in the instant case because Petitioner has failed to demonstrate a conflict between the Second District and decisions of this Court or other district courts of appeal.

The following cases cited by Petitioner are easily distinguished because they are totally dissimilar to the instant case both on the facts and the law.

In Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980), this Court reversed the Fourth District's decision which held improper a general jury verdict under circumstances where two alternative theories of liability were presented to the

jury and the evidence was not sufficient to support one of the theories.

In Gibson v. Avis Rent-A-Car Systems, Inc., 386 So.2d 520 (Fla. 1980), the question that should have been resolved by the trier of fact was whether an intervening cause was foreseeable. This Court said that the foreseeability of the last driver in the chain hitting the Plaintiff was a question for the trier of fact, because, if foreseeable, the drunk as original negligent actor might still be held liable.

In Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977), this Court determined that a complaint stated a cause of action pursuant to Florida's Unattended Motor Vehicle Statute, Section 316.097. This Court also reaffirmed its decision in Nicholas v. Miami Burglary Alarm Co., 339 So.2d 175 (Fla. 1976) that an intervening criminal act does not automatically break the chain of causation.

Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973), dealt with the length of time an item of produce remained on the floor of a grocery store, so that Plainitff slipped and fell, thereby injuring herself.

Martin v. Tindell, 98 So.2d 473 (Fla. 1957) and Central Theatres v. Wilkinson, 18 So.2d 755 (Fla. 1944) are so dissimilar on their facts as to support the decision of the Second District.

In Martin, the Defendant/Employer had been told of the dangerous condition at least four times in the six days prior to and including the day of the Plaitiff/Employee's accident. In Central Theatres, the person in charge of the theatre had at least two weeks notice that the boys were shooting air rifles, one of

which eventually caused the plaintiff's injury. He allowed them to come in without paying and to sit in the audience with the air rifles. Other theatre employees knew they had the rifles as well.

In the instant case, there is no evidence of prior fights at BILLY JACK'S nor did Petitioner ever argue prior fights to the lower courts. Moreover, the fight with Petitioner was the first serious one for Spillers. Therefore, unlike Martin and Central Theatres, there is no substantial, competent evidence that BILLY JACK'S knew or could have known that there was a danger to Petitioner from Spillers.

For the same reasons, Petitioner fails to demonstrate conflict with his citation of Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981), where the management of the motor lodge knew of thirty criminal incidents occurring on the premises within the six months prior to the attack.

Accord, Petitioner's citation to Fernandez v. Miami Jai-Lai, Inc., 386 So.2d 4 (Fla. 3d DCA 1980) where the district court merely determined that the allegations in a complaint as to prior violent crimes and inadequately trained security guards stated a cause of action against the Jai-lai fronton.

Petitioner's citation of Sparks v. Ober, 192 So.2d 81 (Fla. 3d DCA 1966) also fails to demonstrate conflict because the district court merely ruled that the allegations of a complaint were sufficient to withstand a motion to dismiss.

Stevens v. Jefferson, 408 So.2d 634 (Fla. 5th DCA 1982) is a per curiam decision without opinion and is not persuasive.

Petitioner has completely failed to show conflict between the instant case and this Court's decisions and decisions of other

District Courts of Appeal. On the contrary, this Court's decision in Miracle, and the decisions of the Fifth and Fourth Districts in Bell and Worth support the propriety of the Second District's decision in the instant case.

CONCLUSION

This Court must reject jurisdiction in the instant case based on the law and the facts discussed herein.

KATHLEEN V. McCARTHY, ESQ.
Counsel for Respondent,
BILLY JACK'S, INC.,
18191 NW 68th Avenue
Hialeah, Florida 33015
Dade: 556-1770
Broward: 763-1309
Florida: 1-800-432-2514
/shh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by regular U.S. mail to D. RUSSELL STAHL, ESQ., Attorney for Petitioner, EUGENE HALL, 1101 E. Jackson Street, Tampa, Florida, 33602, on March 7, 1983.

Kathleen V. McCarthy

KATHLEEN V. McCARTHY, ESQ.