IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 63,147

EUGENE HALL,

Petitioner,

vs.

BILLY JACK'S, INC.,

Respondent.

RESPONDENT'S ANSWER BRIEF ON MERITS FILED BY BILLY JACK'S

KATHLEEN V. McCARTHY, ESQ.
Attorney for Respondent
18191 N.W. 68th Avenue
Hialeah, FL 33015
Dade 556-1770
Broward 763-1309
FL 1-800-432-2514
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STATEMENT OF CASE AND FACT

The Second District Court of Appeal held that the evidence failed to show that Respondent, Billy Jack's, Inc., a bar, breached its duty to Petitioner, Eugene Hall, a patron. Spillers v. Hall, 428 So.2d 268 (Fla. 2d DCA 1982). The Second District so held because there was no evidence to support a finding that Billy Jack's knew or should have known that the co-defendant in the trial court, C. Wayne Spillers, would attack Petitioner without provocation. Id. at 270.

There was no testimony in the 471 page trial transcript as to previous fights in the bar as Petitioner contends. Neither this issue nor the issue of inadequate security was ever raised at either the trial or appellate levels. At trial, Shirlene Voorhees' testimony was presented by way of deposition. At her deposition, she was asked:

> "Q I would like to know, if you know, if there were bouncers working that night. You know if there were bouncers?"

(T. 414; AA. 13, Respondent's Brief on Jurisdiction). She replied:

> "A Bouncers, whenever a fight breaks out, they run.

(T. 414; AA. 13).

Voorhees' answer was not responsive to the question. It was not even pinned down to Billy Jack's or demonstrated to describe a condition as it existed at Billy Jack's. It was a random

remark about bouncers in general. In fact, it was never demonstrated that Billy Jack's had need of or had bouncers. This was because there was no issue or evidence as to prior fights, security or the nature of Billy Jack's.

Voorhees worked as a barmaid at Billy Jack's, although she was not working on the night of the altercation in question and was at Billy Jack's as a patron.

Voorhees' testimony as well as that of Mike Neiger and Wayne Spillers establishes that Billy Jack's manager, George McGuire, broke up the fight between Petitioner and Kuz in the bar and got them outside (T. 307; AA. 1, Voorhees), (T. 346; AA. 2, Neiger), (T. 383; AA. 3, Spillers).

Voorhees' entire testimony, from which Petitioner extrapolates goes as follows:

> "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."

(T. 414-15, AA. 13).

The Second District found that there was no evidence that Billy Jack's knew or should have known that Spillers would attack Petitioner without provocation because it is uncontroverted that Spillers walked with a cane in November, 1978 (T. 386) and still had to use a cane to walk at the time of trial (T. 75) to take weight off his right hip (T. 388). Part of the bone was cut out of his right hip joint in 1975 or 1976 and he has a metal or plastic insertion (T. 386).

Spillers was in the bar on November 9, 1978 because he was interested in buying it (T. 382). He and his mother did buy it four months later (T. 382). Spillers was never in any serious fights in his adult life except on the two occasions with Petitioner which formed the gravamen of Petitioner's action in the trial court (T. 402)[1]. Spillers' verbal exchange with Mike Neiger was not an "assault without provocation" as Petitioner contends. There was testimony that Spillers thought that Neiger was trying to move in on Spillers' girlfriend and they engaged in some wrestling and pushing (T. 356-57, 378-79).

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1 Petitioner had another cause of action in this lawsuit against Spillers alone for a fight they had two years after the altercation in question. Petitioner recovered $6,672.84 at the trial level for this later fight. Spillers did not appeal this portion of the Judgment.

There is no evidence that the bar manager, George McGuire, did not make an attempt to assist Hall and restore order. Indeed, Petitioner does not cite to the record when he makes this bald assertion. Spillers and two other witnesses testified that McGuire broke up the fight between Petitioner and Kuz inside the bar and got them to go outside. Voorhees testified that McGuire was restraining Kuz when she went to retrieve Spillers' cane (T. 419). Spillers also testified that McGuire was holding Kuz when he went outside to get his cane because he was worried about how long it was taking Voorhees to do so (T. 388; AA. 5).

There was testimony that Kuz grabbed Spillers' cane and followed Petitioner outside when McGuire broke up the fight between him and Petitioner (T. 307, 385).

Neither Kuz nor McGuire testified and neither was present at trial.

Spillers sent Voorhees, his girlfriend, outside to get his cane after Kuz took it (T. 386). When she did not come back into the bar in a reasonable period of time, Spillers became concerned, took a pool cue to support himself and went outside (T. 387-388). Outside, he saw McGuire holding Kuz and Voorhees retrieving his cane from Kuz (T. 388, 390). Voorhees gave Spillers his cane (T. 388).

Spillers testified that he was still outside the bar when Petitioner jumped in front of him and threatened to hurt him worse that he had ever before been hurt in his life (T. 310,

388). Spillers testified that he feared his leg would be amputated if it were hurt again (T. 390). Since Spillers had the cue as well as his cane (T. 388), when Petitioner was preparing to hit him, Spillers hit Petitioner face to face in the head with the pool cue (T. 391).

Petitioner does not attribute his assertion that McGuire, Spillers and other patrons went outside to watch the fight between Petitioner and Kuz to any evidence on the record. This is because there was no evidence that McGuire, Spillers and others went out to watch Petitioner's fight with Kuz.

Neither is there any evidence in the record that McGuire and Spillers watched the fight standing side by side. Petitioner does not cite to the record when he makes this assertion.

Petitioner's own witness, James Giddens, did not place McGuire besides Spillers at any point (T. 251-52). Both Spillers and Voorhees said McGuire was restraining Kuz.

Giddens specifically testified that Petitioner was not bent over but was standing face to face with Spillers when Spillers hit him with the pool cue (T. 251-52).

Petitioner's doctor testified that Petitioner was not disabled (T. 135). The last time Petitioner went to this doctor he was entirely without symptoms and without evidence of physical impairment or mental deficiency (T. 135).

This doctor did testify that the more often Petitioner drinks the more grand mal seizures he is likely to have (T. 139). Petitioner has been a heavy drinker since he was 16 years old

(T. 70). On direct examination, Petitioner admitted he has abused alcohol for a long time and continues to drink (T. 101). He has had the D. T.'S (T. 194).

Petitioner also testified on direct examination that he did not take the medication prescribed for his seizures (T. 101-02).

Both Spillers and Voorhees testified that Kuz snatched Spillers' cane when McGuire broke up the fight between Kuz and Petitioner inside the bar (T. 307, 385). Neiger said he heard that Kuz grabbed Spillers' cane but did not see him do so (T 359).

Petitioner was the only person to say that Kuz and Spillers were friends and that they had been seen drinking together in the bar. Spillers said he was not a friend of Kuz (T. 382).

There was no testimony at trial that Billy Jack's was a "rough country bar" as Petitioner characterizes it in his Argument at page 9.

Petitioner's characterization of Spillers' testimony as "obviously perjured" (Petitioner's Initial Brief on Merits at page 3) does not belong in a Statement of Facts. Therefore, Respondent moves the Court to strike it from the Statement.

This Court must affirm the decision of the Second District Court of Appeal.

SUMMARY OF ARGUMENT

Petitioner failed to demonstrate conflict between the Second District's decision in the instant case and decisions of this Court and other district courts of appeal.

The foreseeability of Spillers' act was the only issue on which evidence was presented at trial. It was also the only issue on foreseeability argued before the Second District.

Petitioner now realizes that the facts in the record cannot convince this Court that Billy Jack's knew or should have known that Spillers would hit Petitioner with a pool cue. Therefore, Petitioner attempts to use this Court's decision in Stevens v. Jefferson, 8 F.L.W. 183 (Fla. June 3, 1983) to show conflict. However, there is no evidence on the record in the instant case, as there was in Stevens, that Billy Jack's had a history of gunplay and fights and that the owner terminated security services. Petitioner does not even cite to the record when he makes outrageous misrepresentations as to the character of Billy Jack's. Two altercations on the night in question prior to Petitioner's confrontation with Spillers do not demonstrate that Billy Jack's knew or should have known of a dangerous condition on its premises. Stevens.

Petitioner points to conflicts in testimony, some of which he has created himself after the fact. Even these newly created

"facts" fail to support a reversal of the Second District's holding.

The facts in the instant case together with the law applicable thereto support this Court's affirmance of the Second District's decision.

ARGUMENT

THE DISTRICT COURT'S DECISION MUST BE AFFIRMED AS THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS 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.

Petitioner fails to show conflict between the Second District's decision in the instant case and decisions of this Court or other district courts. Petitioner cannot show such conflict 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, at this stage of the appellate process, Petitioner tries to take advantage of this Court's decision in Stevens. However, in Stevens, it was proved:

> that previously there had been numerous shootings and fights in the bar, that the owner had failed to train or equip employees to maintain order, and that no security personnel had been employed when the owner knew or should have known that his patrons were being exposed to risk of harm from fights or shootings by other patrons.

8 F.L.W. at 183.

In the instant case, inadequate security and/or a history of prior fights were never raised at trial or on appeal to the Second District. Petitioner points to two altercations on the night in question which do not demonstrate that Billy Jack's knew or should have known of a dangerous condition on its premises. Stevens.

In Stevens as opposed to the instant case, there was a showing:

> that the bar was a 'rough' place with a history of fights and gunplay and that the owner had terminated all security service and had left the premises in the charge of a female employee who could not maintain order.

Id. at 183-184. This court concluded:

> Under these facts a jury could determine that a foreseeable risk of harm to patrons existed, that a risk was either created or tolerated by Stevens, that he could have remedied the danger but failed to do so, and that because of that failure to perform his duties Jefferson was killed.

Id. at 184.

In the instant case, there is no evidence on the record that the risk to Petitioner was either created or tolerated by Billy Jack's.

There was no testimony at trial nor was any issue raised there or before the Second District that Billy Jack's was a "rough" bar. There was no testimony or issue as to the need for

security at Billy Jack's. Petitioner only pointed to the foreseeable risk of harm from Spillers' having taken the pool cue to lean on after Kuz took his cane. It is undisputed that Spillers walked with a cane because he had an artificial hip. His altercation with Neiger earlier on the night in question was described by Neiger as a "verbal exchange" with some pushing and wrestling because Spillers thought Neiger was trying to make time with Spillers' girl.

It is undisputed that Spillers was in Billy Jack's on the night in question because he was interested in buying it. It is also undisputed that he subsequently did buy it with his mother.

There is disputed testimony as to Billy Jack's manager's handling of the other fight between Petitioner and Kuz. Petitioner says the manager, McGuire, did not break it up inside the bar. Spillers, Voorhees and Neiger all testified that McGuire did break up the fight inside and moved the combatants outside.

Both Spillers and Voorhees testified that McGuire was restraining Kuz at one point outside.

There <u>is no evidence</u> on the record that McGuire deliberately went outside to watch and did nothing to intervene. Neither is there evidence on the record that Spillers and other patrons went outside to watch.

Spillers and Voorhees testified that Kuz grabbed Spillers' cane and followed Petitioner outside when McGuire broke up the fight, grabbed Petitioner and got him outside. Spillers sent

Voorhees to retrieve his cane and when she failed to return within a reasonable period of time he became concerned. Therefore, Spillers took a pool cue to support himself and went outside.

Petitioner disputes the testimony that Kuz grabbed Spillers' cane. McGuire's location is also disputed. Spillers and Voorhees said McGuire was restraining Kuz. Petitioner said McGuire was standing besides Spillers just before their altercation. Petitioner's own witness, Giddens, did not place McGuire next to Spillers.

Such disputed testimony is not sufficient as a matter of law to show that McGuire as Billy Jack's representative knew or should have known that Spillers would hit Petitioner with the pool cue. Stevens.

Spillers testified that Petitioner threatened to hurt him worse than he had ever been hurt before in his life. Spillers was afraid his leg which already had an artificial hip would have to be amputated and used the pool cue to defend himself. Petitioner disputed this and said he turned around from his fight with Kuz to be hit over the head with the pool cue brandished by Spillers.

These disputed facts were enough to go to the jury on the issue of Spillers' liability. However, as to Billy Jack's, there is no showing that it knew or should have known that there was a risk of harm to Petitioner against which it had a duty to protect him.

Neither Martin v. Tindell, 98 So.2d 473 (Fla. 1957) nor Montgomery v. Florida Jitney Jungle Stores, 281 So.2d 302 (Fla. 1973) stands for the proposition claimed by Petitioner, i.e. that appellate courts cannot make factual determinations unfavorable to prevailing parties in the face of disputed evidence. 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 plaintiff/employee's accident. Therefore, this Court concluded:

> We think a jury might well determine from the facts of this case that the defendant was negligent in using the tavern car on the day of plaintiff's accident ....

Martin at 476. Therefore, this Court concluded that the trial court was correct in refusing to grant a directed verdict for defendant. Id.

In the instant case, there is no evidence that Billy Jack's was put on notice as to a dangerous condition in its bar. Therefore, Martin is factually very different from the instant case and is not applicable.

In Montgomery, there was sufficient proof, even if it was circumstantial, that the foreign substance had been on the grocer's floor long enough to charge the owner with constructive notice. Therefore, the question of the grocer's negligence was properly submitted to the jury. Where there are foreign substances or dangerous conditions on the floors of markets, a quarter of an hour is deemed long enough to put an owner on

constructive notice. This principal of law is not applicable to the facts in the instant case.

Miracle v. Kriens, 33 So.2d 644 (Fla. 1948), cited by Petitioner is instructive in the instant case. In Miracle, the plaintiff was injured when an employee of a segregated white bar tried to eject a former black employee. Although there was disputed testimony as to the bar employee's actions, this Court found in favor of the bar.

In the instant case, there is no evidence on the record that McGuire deliberately stood and watched and did nothing. What is disputed by Petitioner on the record is McGuire's actions. Therefore, this Court must affirm the decision of the Second District and find in favor of the bar just as it did in Miracle.

In Vining v. Avis Rent-a-Car Systems, Inc., 354 So.2d 54 (Fla. 1977), the foreseeability of harm was clearly evident. A car was left with the keys in the ignition in a high crime area. This Court stated that the fact it was stolen and subsequently injured the plaintiff placed his case squarely within the aegis of Florida's Unattended Motor Vehicle Statute and his complaint stated a cause of action. There are no such facts present in the instant case and Vining is therefore inapposite.

In the instant case, the Second District correctly relied on

Highlands Insurance Co. v. Gilday, 398 So.2d 834 (Fla. 4th DCA 1981) cert. denied 411 So.2d 382 (Fla. 1981), and Worth v. Stahl, 388 So.2d 340 (Fla. 4th DCA 1980).[2] The Second District emphazised that the owner of a public place is not an insurer of the safety of his patrons, citing Highlands at 835. Spillers at 270. The Second District correctly held that there was no evidence to support a finding that Billy Jack's knew or should have known that Spillers' would attack Petitioner without provocation. Id. at 270.

Relying on Worth, the Second District reiterated:

> "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 270, quoting Worth at 341. 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

2. The Second District also cited Babrab, Inc. v. Allen, 408 So.2d 610 (Fla. 4th DCA 1981). Since the Second District's decision in the instant case, this Court has entertained oral argument in Allen v. Babrab, Inc., Case No. 61,789 (Fla. Oral Argument Dec. 7, 1982).

Counsel for Billy Jack's has read all of the Briefs and Appendices presented to this Court in Allen where there was a great deal of evidence as to the attacker's propensities. Therefore, the instant case is factually miles apart from Allen. However, the great factual dissimilarity could not be discerned from the published opinion at the time the Second District wrote its decision in the instant case.

was leaving the bathroom, he was physically assaulted by the patron, with whom he had the discussion and four or five other persons. The Fourth District stated in Worth:

> "There was simply no proof that (the other patron's) acts were foreseeable."

Id. at 341.

In the instant case, there is no substantial competent evidence that Spillers' 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 injured by Spillers' unforeseen violent act.

The Second District's decision in the instant case is in harmony with that of the Fifth District in Bell v. Jefferson, 414 So.2d 273 (Fla. 5th DCA 1982). 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 outside the bar. One slapped the other and the slappee testified that he walked through the bar, 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.

There is no showing on the record in the instant case that Billy Jack's breached its duty to Petitioner. The facts on the record demonstrate that Billy Jack's maintained the bar in a reasonably safe condition, free from those risks about which it knew or through the exercise of reasonable care should have known. Worth.

The decision in the instant case is in harmony with this Court's decision in Miracle. Just as in Miracle, when all of the facts on the record in the instant case are considered, it appears that McGuire's actions:

> "were entirely commensurate with the degree of care which (Billy Jack's) owed to (its) patron lawfully on the premises."

Miracle at 647.

Petitioner's argument regarding the time that had elapsed before Spiller's went outside is not probative of either conflict or error. Therefore, Respondent is not addressing this time argument.

The decision of the Second District in the instant case harmonizes with the decisions of this Court as well as other district courts of appeal. Therefore, this Court must affirm the Second District's decision.

CONCLUSION

Based on the facts on the record on the instant case and the law applicable thereto, this Court must affirm the decision of Second District.

Respectfully submitted,

Kathleen V. McCarthy

KATHLEEN V. McCARTHY, ESQ.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed to: RUSSELL STAHL, ESQ., Attorney for Appellee, 1101 East Jackson Street, Tampa, FL 33602, on this 5th day of August, 1983.

Kathleen V. McCarthy

KATHLEEN V. McCARTHY, ESQ.
Attorney for Respondent
Billy Jack's, Inc.
18191 N.W. 68th Avenue
Hialeah, FL 33015
Dade 556-1770
Broward 763-1309
FL 1-800-432-2514
ml