IN THE SUPREME COURT
STATE OF FLORIDA

EUGENE HALL, Petitioner, vs. BILLY JACK'S, INC., Respondent.	CASE NO. 63,147

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff/Petitioner, EUGENE HALL, hereafter HALL, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on November 17, 1982. (A.1-8) Motion for Rehearing was denied January 3, 1983. (A. 9)

Petitioner was the original Plaintiff below and Appellee before the District Court of Appeal. The Respondent appealed from a Final Judgment entered by the Circuit Court of the Thirteenth Judidical Circuit on a jury verdict in a negligence case awarding Petitioner compensatory damages in the amount of $240,000.00. The jury found in an interrogatory verdict that Respondent's negligence was a legal cause of HALL'S injuries. (A. 10-11)

The symbol "T" will be used for reference to the Transcript.

Plaintiff/Petitioner HALL was, at the time of his injury, a twenty-nine-year-old man who had worked as a welder at Tampa Dry Dock since 1973. He was standing beside a pool table watching a game at Billy Jack's Lounge on November 9, 1978, when he was unexpectedly assaulted by a one-armed man known only as "Kuz". This occurred near the front door. HALL ducked Kuz's blow and pushed him out the front door where he attempted to subdue Kuz on the front steps. (T. 86)

George McGuire, hereafter McGuire, the bar's manager and only bouncer, went outside with several other patrons

including the assailant, C. WAYNE SPILLERS, hereafter SPILLERS, to watch the fight. When SPILLERS left the bar, he took a pool cue in violation of the bar's rule prohibiting the removal of pool cues from the bar. Kuz and SPILLERS had been friends who were often seen together drinking at the bar. (T. 84-90, T. 354-355)

McGuire and SPILLERS watched the fight standing side by side. McGuire made no attempt to assist HALL or to restore order. At one point before the assault, SPILLERS, while standing beside McGuire, held the pool cue by its thin end and brought the heavy end over his head. (T. 84-90, T. 354-355)

It took HALL less than five minutes to subdue Kuz which he was successful in doing without inflicting serious injury. When he stood up, he saw SPILLERS standing beside McGuire with the pool cue lifted above his head. HALL foresaw the blow and bent down to avoid it, but, nevertheless, caught it on the back of his head. This blow fractured his skull, rendering him disabled and subject to grand mal seizures. (T. 95, 100) McGuire at no time made any effort to prevent SPILLERS from using the pool cue. (T. 84-90, T. 354-355)

Prior to the assault, SPILLERS had assaulted another patron that night in the bar without provocation, one Mike Neiger, hereafter Neiger. This assault involved a verbal exchange, "shoving" and "wrestling" and was described by Neiger as a "fight". (T. 356-357, T. 378-379)

Fights had occurred prior to November 9, 1978, at Billy Jack's Lounge, but it was the bouncers practice not to restore order on such occasions. In the words of SPILLERS' girlfriend, Voorhes, a barmaid who worked at Billy Jack's Lounge at the time, "...when a fight breaks out, the bouncers run." (T. 414-415)

At trial, BILLY JACK'S attempted to rebut the evidence of foreseeability with SPILLERS' obviously perjured testimony that before leaving, Kuz ran to the bar and snatched his cane which required SPILLERS to use a pool cue as a cane when he exited the bar. (T. 385, 388) This testimony was contradicted by SPILLERS' own witness. Neiger, who said that he saw HALL and Kuz leave the bar and that he did not see Kuz carrying a cane or see him detour to snatch SPILLERS' cane. (T. 378) It was also contradicted by HALL who testified that as soon as Kuz took a swing at him, he pushed Kuz outside the bar. (T. 86) HALL was certain that Kuz was not carrying a cane. (A. 28-31) The Second District acknowledged HALL'S testimony in the following passage on page 3 of its opinion:

> "Appellee (Hall) had a few beers and was watching a friend shoot pool when Kuz tried to hit Appellee. Appellee pushed Kuz out the front door and engaged in a fist fight with him on the steps..." (A. 3)

The jury returned a verdict for HALL of compensatory damages in the amount of $240,000.00 which was challenged unsuccessfully by both defendants with Motions for New Trial, Remittitur and Judgment N.O.V. In reversing the Final Judgment

based upon the jury verdict, the Second District Court of Appeal cited the controlling law as that stated in the Fourth District Court of Appeal's decision of Babrab, Inc. v. Allen, 408 So.2d 610 (Fla. 4th DCA 1981), Worth v. Stahl, 388 So.2d 340 (Fla. 4th DCA 1980) and Highlands Insurance Co. v. Gilday, 398 So.2d 834, 835 (Fla. 4th DCA 1981, cert. denied, 411 So.2d 382 (Fla. 1981).

In the face of the copious evidence of foreseeability and inadequate security, the Court held that there was no evidence whatsoever to support the verdict and remanded for entry of final judgment discharging BILLY JACK'S from liability.

ARGUMENT

In James Stevens, Jr. v. Patricia Jefferson, __So.2d___ (Fla., June 2, 1983), this Court held that in order to hold a liquor saloon such as BILLY JACK'S responsible for an assault, the "risk of harm" must be foreseeable. The Court went on to say that "this foreseeability requirement has often been met by proving that the proprietor knew or should have known of the dangerous propensities for a particular patron". (Emphasis supplied.) Prior to exiting the bar, SPILLERS, the assailant, had assaulted one Mike Neiger, apparently, without provocation. Later, Kuz assaulted HALL without provocation at a pool table near the front door. HALL pushed Kuz out the front door and attempted to subdue him on the front steps. When this happened, a number of people in the bar, including the manager, went outside to watch the fight. Kuz and SPILLERS had been seen many times drinking in the bar together from which it could be inferred that they were friends. Both were crippled, Kuz having one arm and SPILLERS having a serious impairment of one hip. After Kuz and HALL left the bar, SPILLERS took a pool cue and followed them outside where he stood beside the bouncer, McGuire, and watched the fight. HALL was successful in subduing Kuz and stood up to see SPILLERS holding a pool stick by its thin end in the air above his head. The bouncer, McGuire, made no effort to assist HALL in subduing Kuz, to

restore order or to disarm SPILLERS who was standing beside him with his cane holding a pool cue which he had removed from the bar in violation of its rules. HALL foresaw the blow and bent down to avoid it but caught the cue on the back of his head.

The above evidence would certainly allow six reasonable men to infer that SPILLERS had dangerous propensities or that SPILLERS might assault someone with the pool cue. Curiously, the Second District Court of Appeal acknowledges much of HALL'S evidence in the following passage of its decision:

> "When appellee stood up and started to walk away, he found himself face to face with SPILLERS and George McGuire, the bar manager. SPILLERS was about to hit appellee with a pool cue. Appellee bent over to avoid being hit on the head, but the cue hit him on the back of the head, severely injuring him. BILLY JACK'S had a policy against the removal of pool cues from the premises."

The Second District Court of Appeal ruled that the above facts do not constitute evidence of foreseeability because of two findings of fact that it makes which are not only contested by HALL'S evidence but are clearly against the overwhelming weight of the evidence. The first finding of fact is that SPILLERS used the pool cue as a cane to exit the bar because Kuz had stolen his cane and run out of the bar with it.

"Moreover," says the Court, "it is clear that SPILLERS was using the pool cue for support in walking and that he

regularly used a cane. Even assuming that he was occasionally able to walk without a cane, McGuire could hardly be expected to predict that SPILLERS would use the pool cue as a weapon when he came out leaning on it as if it were a cane." (Page 7 of the decision.)

SPILLERS' own witness, Neiger, testified on cross-examination that when Kuz exited the bar with HALL, Kuz was not carrying SPILLERS' cane:

> "Q. ...and you also said that you did not see Mr. Kuz detour and take Mr. Spillers' cane and walk out of the bar. You didn't see that?
>
> A. No, I didn't.
>
> Q. What you saw was two men being separated and being escorted to the door by McGuire, I believe?
>
> A. Right." (T. 378)

HALL was quite sure that when he pushed Kuz out the front door, Kuz was not carrying a cane. The Second District Court of Appeal has made a fact determination unfavorable to Plaintiff in the face of disputed evidence which this Court has said it cannot do in Martin v. Tindall, 98 So.2d 473 at 476 (Fla. 1957) and Montgomery v. Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973).

The second unfavorable fact determination made by the Court is that, "SPILLERS did not go outside for at least twenty minutes after McGuire, Kuz and appellee (HALL) had left."

(Page 7 of the decision.) The Court is implying here that the altercation between HALL and Kuz was long over when SPILLERS exited the bar. However, according to SPILLERS' witness, Neiger, when Neiger exited the bar five minutes after HALL and Kuz had left the bar, the assault by SPILLERS on HALL had already taken place.

On page 3 of its decision, the Court describes HALL as standing up from the fight and being assaulted by SPILLERS. If this were consistent with SPILLERS leaving the bar twenty minutes after the fight commenced, and assaulting HALL at that time, it necessarily follows from the Court's findings of fact that the fight lasted twenty minutes, or the duration of seven rounds of a boxing match. This, of course, is inconsistent with HALL'S description of the altercation with Kuz and with Neiger's testimony. It is impossible to reconcile the second and third page of the decision with the third and fourth page of the decision. After making these two unfavorable findings of fact, the Court makes this statement:

> "Contrary to appellee's version of the the facts, there is no evidence to support even an inference that SPILLERS brandished the pool cue menacingly or otherwise threaten appellee before taking the swing at him that produced his injuries." (Page 7 of the decision.)

HALL'S briefs are a part of the record. There is nothing in them that presents this "version of the facts." This was brought to the Second District Court of Appeal's attention in

the Petition for Re-Hearing and Clarification on pages 12 and 13 thereof, but the Court denied this Petition.

This Court in Stevens v. Jefferson held that "specific knowledge of a dangerous individual is not the exclusive method of proving foreseeability. It can be shown by proving that a proprietor knew, or should have known, of a dangerous condition on his premises that was likely to cause harm to a patron." The Court gave as an example of a dangerous condition on the premises, maintaining a rough bar where fights frequently occur.

The record is replete with evidence that BILLY JACK'S was a rough, country bar. Prior to the assault on HALL by SPILLERS, SPILLERS assaulted Neiger, and Kuz assaulted HALL. Shirley Voorhes, a barmaid employed at the bar, though not working on the night of the assault, testified that McGuire was the only bouncer employed that night, and when asked about bouncers, responded, "Bouncers, when a fight breaks out, the bouncers run." Not every bar has a need for security personnel. For example, the cocktail lounge at University Club in Exchange Bank certainly does not need a bouncer; however, BILLY JACK'S lounge was the sort of bar where bouncers must be employed to protect patrons from the danger of assaults. The evidence is clear that McGuire made no effort to restore order or to protect HALL after he was assaulted by Kuz. He

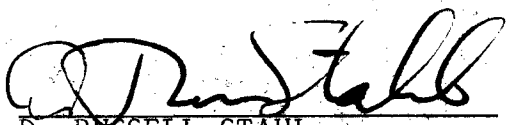
did not "use every reasonable effort to maintain order among his patrons, employees or those who come upon the premises and are likely to produce disorder to the injury or inconvenience of patrons lawfully in his place of business." Miracle v. Kriens, 160 Fla. 48, 33 So.2d 644 (Fla. 1948). He, in fact, enjoyed the fight with the other spectators. We submit that, although the Second District Court of Appeal has held that the determination of foreseeability is a question fact for the jury, it has, in effect, ruled that it retains veto power over such fact determinations. This it cannot do. Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977).

CONCLUSION

Because of the reasons and authorities set forth in this Brief, it is submitted that the decision of the Second District Court of Appeal in this case is erroneous. Petitioner, therefore, requests that this Court enter its order quashing the decision herein sought to be reviewed and remanding the cause for reinstatement of the Final Judgment based upon the jury's verdict in the trial court and granting such other and further relief

as shall seem right and proper to the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 11th day of July, 1983, to:

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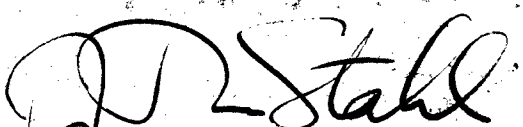

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