IN THE SUPREME COURT
STATE OF FLORIDA

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

APPLICATION FOR DISCRETIONARY REVIEW TO
THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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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 Judicial 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 "A" will be used for reference to the Appendix to this Brief.

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-arm man named 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. (A. 14)

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 stick in violation of the bar's rule prohibiting the removal of pool sticks from the bar. Kuz and SPILLERS had been friends who were often seen together drinking at the bar. (A. 12-17)

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 stick by its thin end and brought the heavy end over his head.

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 stick 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. McGuire at no time made any effort to prevent SPILLERS from using the pool stick. (A. 12-19)

Prior to the assault, SPILLERS had assaulted another patron tht 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". (A. 20-23)

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." (A.24-25)

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 stick as a cane when he exited the bar. (A. 26-27) 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. It was also contradicted by HALL who testified that as soon as Kuz took a swing at him, he pushed Kuz outside the bar. (A. 14) 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

I

THE PRESENT DECISION IS IN DIRECT CONFLICT WITH THOSE CASES HOLDING THAT THE PROPRIETOR OF A BAR IS BOUND TO USE EVERY REASONABLE EFFORT TO PROTECT PATRONS FROM INJURY FROM FELLOW PATRONS.

Under the facts cited in the Second District's decision, the bouncer, McGuire, watched HALL attempting to subdue an assailant on the front steps without making any effort to assist HALL, to restore order, or to prevent an assault by a man standing beside him with a cane who was holding a pool stick. This man had removed the pool stick from the bar in violation of its rules and in the context of a fight going on outside. He was known at the bar to be a friend of the assailant, Kuz. These facts all appear in the decision and place the Second District in clear conflict with this Court's decision in Miracle v. Kriens, 33 So.2d 644 (Fla. 1948). There this Court held that:

> "...the proprietor of a liquor saloon... certainly is bound to use every reasonable effort to maintain order and discipline among his patrons..." 33 So.2d 674.

Conflict is equally clear with this Court's decision in Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980) where this Court in reversing the Fourth District Court of Appeal upon a similar factual situation, found that a jury could have properly decided that the bar proprietor "was

negligent in failing to exercise reasonable care to provide for the safety of petitioners as invitees upon the premises."

The Second District Court of Appeal has alined itself with the Fourth District Court of Appeal's decision in Babrab, Inc. v. Allen, 408 So.2d 610 (Fla. 4th DCA 1981). We have reviewed the Plaintiff/Petitioner's Jurisdictional Brief in Babrab, and discovered that the Plaintiff in that case introduced evidence of previous fights at the bar. In its decision in Babrab, the Fourth District Court of Appeal makes no mention of these fights. Similarly, the Plaintiff/Petitioner introduced evidence at trial that previous fights had occurred at the bar. Assuming the existence of this evidence, the Second District Court of Appeal in this decision is in clear conflict with the Fifth District Court of Appeal's decision in James Stevens, Jr. v. Patricia Jefferson, 408 So.2d 634 (Fla. 5th DCA 1982), Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981) and Fernandez v. Miami Jai-Alai, Inc., 386 So.2d 4 (Fla. 3d DCA 1980).

In Orlando Executive Park, Inc. v. P.D.R., the Fifth District Court of Appeal held that the question of whether a motel had provided adequate security was for the jury where there was evidence of previous criminal activity on the premises but no knowledge of specific risk. Subsequently, the Fifth District Court of Appeal in Stevens v. Jefferson, 408 So.2d 634 issued a per curiam decision noting conflict with Warner v. Florida Jai-Alai, 222 So.2d 777 (Fla. 4th DCA 1969) cert.

discharged, 235 So.2d 294 (Fla. 1970).

Where as here, the bar knew, or should have known, of the likelihood of fights, a jury question exists under the Fifth District Court of Appeal's decisions as to whether the bar had a duty to provide bouncers willing to take steps to protect patrons and restore order. Under the Fourth District Court of Appeal's decisions, the duty only arises when an assailant creates a specific risk which is foreseeable to the bar.

II

THE PRESENT DECISION IS IN DIRECT CONFLICT WITH THOSE CASES HOLDING THAT THE FORESEEABILITY OF A CRIMINAL ASSAULT BY ONE PATRON UPON ANOTHER WITH RESULTING INJURIES IS A FACT QUESTION FOR THE JURY.

In Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977), this Court held on page 56:

> "If reasonable men might differ, the determination of foreseeability should rest with the jury."

In the instant case, the Second District Court of Appeal acknowledged facts from which reasonable men might determine foreseeability and disregarded facts which showed foreseeability under the Fourth District Court of Appeal's guidelines; chiefly, the testimony that SPILLERS had assaulted another patron at the bar prior to his assault on HALL thus creating a specific risk. Six members of a jury and the Honorable Circuit Court Judge differed with the conclusion of the Second District Court

of Appeal. The issue of foreseeability was properly for jury determination, and in retrying it, the Second District Court of Appeal has placed itself in conflict with this Court's decision in Gibson v. Avis Rent-A-Car, 386 So.2d 520 (Fla. 1980) and with the Third District Court of Appeal's decision of Sparks v. Ober, 192 So.2d 81 (Fla. 3d DCA 1966). The latter case holds that the issue of foreseeability in the context of an assault in a bar is for the jury.

III

BY MAKING FACT DETERMINATIONS IN THE FACE OF CONFLICTING EVIDENCE, HAS THE SECOND DISTRICT COURT OF APPEAL PLACED ITSELF IN CONFLICT WITH DECISIONS OF THE FLORIDA SUPREME COURT?

In its decision, the Second District Court of Appeal recites evidence offered by Plaintiff and conflicting evidence offered by Defendants, then makes fact determinations in favor of Defendants, most importantly the determination that SPILLERS used the pool cue as a cane to exit the bar and did not do so for twenty minutes after the fight outside commenced.

The Court also ignores the inference that the assault was foreseeable to McGuire which is fairly deducible from its own recital of the facts. According to pages 3 (A. 3) and 4 (A. 4) of its decision, at the time of the assault, SPILLERS was standing next to McGuire with a pool stick and cane. The Court acknowledges on page 3 that:

> "When appellee stood up and turned 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 in 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."

A jury might infer from the above facts alone that if the assault was foreseeable to HALL, who bent to avoid it, it was equally foreseeable to McGuire, who was negligent in not pushing SPILLERS away or grabbing the cue—especially in view of the fact that SPILLERS had removed the cue in the context of a fight and in violation of the bar's rules.

In making fact determinations unfavorable to Plaintiff, the Second District Court of Appeal has placed itself in conflict with this Court's decision in Martin v. Tindell, 98 So.2d 473 at 476 (Fla. 1957) and Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973).

CONCLUSION

Because of the reasons and authorities set forth in this Brief, it is submitted that the decision in the present case is erroneous and that the conflicting decisions of Miracle v. Kriens, 33 So.2d 644 (Fla. 1948), Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980), Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977), Fernandez v. Miami Jai-Alai, Inc., 386 So.2d 4 (Fla. 3d DCA 1980), Orlando

Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981), Stevens v. Jefferson, 408 So.2d 634 (Fla. 5th DCA 1982), Martin v. Tindell, 98 So.2d 473 at 476 (Fla. 1957) and Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973) are correct and should be approved by this Court as the controlling law of this State.

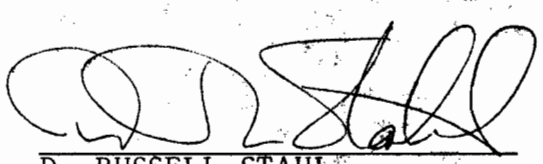
Petitioner, therefore, requests this Court to grant discretionary review and to enter its Order quashing the decision herein sought to be reviewed, approving the conflicting decisions and remanding the cause for reinstatement of the Final Judgment based upon the jury's verdict in the trial court and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

D. RUSSELL STAHL
Attorney for Plaintiff/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 4th day of February, 1983, to KATHLEEN V. McCARTY, ESQUIRE, 18191 N.W. 68th Avenue, Hialeah, Florida, 33015.



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