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IN THE SUPREME COURT
STATE OF FLORIDA

EUGENE HALL,

Petitioner,

vs.

BILLY JACK'S, INC.,

Respondent.

CASE NO. 63,147

PETITIONER'S REPLY BRIEF

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CITATION OF AUTHORITIES

ARGUMENT

Respondent argues that the Petitioner's Statement of Facts is entirely lacking in support in the record and that the cases cited by Petitioner are cited improperly. First, we will discuss the factual issues.

Respondent opens its attack by arguing that there is no evidence that BILLY JACK'S, at the time of the assault on HALL, was a "rough bar". We cited testimony as to two assaults occurring in the bar previous to the assault on HALL by SPILLERS. Respondent's response is that one of the assaults was "unprovoked" and that the two assaults together are insufficient as a matter of law to show that the bar, at the time of the assault, was a "rough bar". This argument of Respondent's disregards the principle that:

> "...it is within the exclusive province of the jury to determine the weight of the evidence and its probative force and to reconcile its contradictions, if possible..." Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973) at 304.

When asked if bouncers were employed at the bar on the night of the assault, a barmaid, employed by BILLY JACK'S at the time, responded, "Bouncers, whenever a fight breaks out, they run." Respondent argues that this reply expresses a general opinion that bouncers run from fights. However, the barmaid was not asked about bouncers in general, but

about the bouncers at BILLY JACK'S. Previously in her deposition, all questions had been directed to BILLY JACK'S and events occurring there. She was a barmaid at BILLY JACK'S and familiar with the bar. We submit that the jury could have reasonably inferred that she was describing fights and bouncers at BILLY JACK'S in her above reply. If this is a reasonable interpretation of her statement, the jury had the right to place that interpretation upon it. Exchange Bank of St. Augustine v. Florida National Bank, 292 So.2d 361 (Fla. 1974).

We submit that the above constitutes competent evidence that BILLY JACK'S had actual or constructive knowledge of the likelihood of disorderly conduct by third persons which might endanger HALL'S safety at the time that he was assaulted by SPILLERS. Stevens v. Jefferson, __ So.2d __ (Fla. June 2, 1983).

Respondent also attacks Petitioner's assertion that evidence exists in the record that SPILLERS' dangerous propensities were foreseeable, actually or constructively, to BILLY JACK'S. The following is a summary of the evidence of foreseeability and Respondent's criticism of same:

Petitioner asserts that SPILLERS and Kuz were friends who had been seen drinking together at the bar. Respondent's criticism of this evidence is that, "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 that he was not a friend of Kuz." (T. 382; Page 9, Respondent's Answer Brief.) We submit that testimony is not incompetent because it is the Plaintiff's testimony. This goes to its probative force. Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla. 1973).

Petitioner asserts that after HALL and Kuz left the bar, SPILLERS took a pool cue from the bar and followed them out the front door. Furthermore, it is asserted that this removal of the pool cue was in violation of the bar's rules. Respondent's criticism of this evidence is that it does not demonstrate that the bar had actual or constructive knowledge that SPILLERS might use the pool cue to get involved in the fight. Respondent argues that the above does not constitute evidence of foreseeability because SPILLERS was using the pool cue as a cane, his cane having been snatched by Kuz, who ran out the front door with it. Respondent totally overlooks the evidence adduced by Petitioner that Kuz did not snatch SPILLERS' cane. Both HALL and Neiger testified that Kuz did not exit the bar with SPILLERS' cane. (T. 86, 98, 376) The Respondent does not address this evidence anywhere in its brief, but simply relies on the irrelevant observation that SPILLERS could not walk without a cane.

Petitioner asserts that after Kuz and HALL left the bar to continue their fight outside, McGuire, the manager, went

outside to watch the fight standing beside SPILLERS and others. "Petitioner", says Respondent, "does not cite to the record when he makes this assertion." (Page 8, Respondent's Answer Brief.) We make this assertion on Page 2 of our brief citing Pages 84-90 of the trial transcript. HALL'S testimony therein is as follows:

"Q. ...by the time you got up (after the fight), were there any people gathered outside?

A. Yes, sir.

Q. Watching the fight?

A. Yes, sir.

Q. And was George McGuire one of them?

A. Yes, sir.

Q. And who was Mr. George McGuire?

A. He was the manager of the bar.

Q. Was he also the bouncer of the bar?

A. I would assume he was the manager, the man in charge."
(T. 87)

Q. Now, when you say that when you got up from the fight, you faced Mr. McGuire, the manager?

A. Yes, sir.

Q. And Kuz?

A. No, Mr. Spillers.

Q. I mean, Mr. Spillers.

A. Yes, sir.

Q. How close were they standing to each other?

A. About side by side.

Q. You mean within inches of each other?

A. Yes, sir. Right side by side." (T.89)

Respondent further criticizes the Petitioner's above assertions by noting that, "Petitioner's own witness, James Giddens, did not place McGuire beside SPILLERS at any point. T. 251-252." (Page 8, Respondent's Answer Brief.) We ask the Court to review Pages 251-252 of the tanscript and submit that an examination of those pages will reveal that in them Giddens is asked about SPILLERS and HALL. He is asked nothing that could reasonably be expected to illicit a response regarding McGuire's location.

Finally, Petitioner asserts that prior to his assault on HALL, SPILLERS assaulted another patron in the bar, one Mike Neiger. Neiger testified for SPILLERS at the trial, but admitted on cross-examination that SPILLERS had assaulted him. We asked him what he had done to provoke the fight:

"Q. What had you done to provoke a fight with Mr. Spillers over his girlfriend?

A. I was talking to her and he told me to quit talking to her.

Q. Did you ask her for a date?

A. No." (T. 357)

Neiger described this incident as "a fight" and said it involved wrestling and shoving. (T. 356-357, 378-379)

Respondent argues in its Reply Brief that this assault did not constitute evidence that SPILLERS had created a disturbance at the bar since it was a justified assault, justified, in Respondent's opinion, by Neiger's attempt to "move in" on SPILLERS' girlfriend. We submit that a jury might reasonably reach a different conclusion.

We submit that the Respondent's criticism of our evidence of foreseeability reviewed above is clearly lacking in merit. Like the Second District Court of Appeal, the Respondent has refused to view the evidence in the light most favorable to the prevailing party.

The Second District Court of Appeal did not reverse the trial judge below on the issue of damages. Nevertheless, Respondent seeks to belittle HALL'S injuries by citing certain testimony of Dr. Inga. It is undisputed that HALL had to give up his job as a welder because of his grand mal seizures, that he had two operations, a plate in his skull, had twenty grand mal seizures at the time of the trial, and, in the opinion of Dr. Inga expressed at trial, might have seizures indefinitely. (This evidence appears on the following pages of the Record: 492, 497, 499, 517, 519, 522.) We submit that the extent of HALL'S damages is a jury question and that the jury's award

was not clearly excessive.

Respondent argues that we raise the issue of whether BILLY JACK'S was a "rough bar" for the first time in this Court. This is not true. An examination of the Petitioner's brief in the Second District Court of Appeal shows that the Respondent makes reference to previous fights below and argues that SPILLERS' assault was foreseeable. (Pages 2, 10, 12 of Appellee's Answer Brief.)

Respondent argues that all cases cited by the Petitioner are done so improperly. For example, Respondent takes issue with our reliance on Montgomery, supra, for the proposition that "it is within the exclusive province of the jury to determine the weight of the evidence and its probative force and to reconcile its contradictions, if possible." (Id. at 304.) Petitioner argues that this case is factually different since it does not involve an assault in a bar.

Petitioner takes issue with our reliance on Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977), for the proposition that foreseeability is a question of fact for the jury. According to Respondent, in that case, the evidence of foreseeability was "clearly evident"; whereas, in the case at bar, the evidence is disputed by the Respondent. Moreover, Respondent continues, "...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." (Page 16 of Respondent's Answer Brief.)

We submit that the legal principles announced in the above cases are general principles of law meant to apply to all factual contexts.

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 25th day of August, 1983, to:

KATHLEEN V. McCARTY, ESQUIRE, 18191 N.W. 68th Avenue, Hialeah, Florida, 33015, Attorney for Respondent.

D. RUSSELL STAHL