d/A 3-7-91 D47 w/app.

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 76,267

MARY EVELYN ELLIS, individually and as guardian of Gilbert D. Ellis, incompetent,

Petitioner,

v.

N.G.N. OF TAMPA, INC., and NORBERT G. NISSEN,

Respondents.

FILED
SID J. WHITE
JAN 2 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF PETITIONER

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PREFACE

This brief is submitted on behalf of the Academy of Florida Trial Lawyers, appearing as Amicus Curiae supporting the position of the Plaintiff/Petitioner, MARY EVELYN ELLIS, individually and as guardian of Gilbert D. Ellis, incompetent. In this brief, the parties will be referred to either by name or as Petitioner and Respondent. Any emphasis appearing in this brief is that of the writer unless otherwise indicated. Reference to the Appendix to this brief will be by A.1-9.

STATEMENT OF THE CASE AND FACTS

The Academy does not have a complete copy of the Record on Appeal, and thus assumes the correctness of the facts as set forth in the Petitioner's brief.

SUMMARY OF ARGUMENT

The Second District's decision in the present case, Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990), erroneously interpreted Section 768.125, Fla.Stats., which imposes civil liability upon a liquor vendor who "knowingly serves a person habitually addicted" to alcohol. The Second District inserted in Section 768.125 a provision not included by the Legislature, which would require that the "knowledge" element of that statute could be met only by means of a written notice furnished by a relative of the alcoholic in question. That interpretation contradicts both the plain language of the statute and the Legislature's deliberate amendment of the bill to eliminate language which would have required that written notice be furnished.

The Academy urges this Court to disapprove the Ellis court's interpretation and to approve the conflicting decision of the Fifth District in Sabo v. Shamrock Communications, Inc., 566 So.2d 267 (Fla. 5th DCA 1990), holding that a liquor vendor's knowledge of its patron's alcoholism may be proved in the same manner as any other fact, without the necessity of a written notice having previously been furnished by a family member. The Legislature recognized that criminal sanctions alone were not providing an effective deterrent, and deliberately adopted language in Section 768.125 to provide a civil remedy without the onerous requirement of a previous conviction or the furnishing of the written notice required only in the criminal statute.

ARGUMENT

THE SECOND DISTRICT ERRED IN HOLDING THAT WRITTEN NOTICE IS A PREREQUISITE UNDER SECTION 768.125, FLORIDA STATUTES, FOR IMPOSING LIABILITY UPON A VENDOR WHO KNOWINGLY FURNISHES ALCOHOL TO A PERSON HABITUALLY ADDICTED THERETO.

The Academy of Florida Trial Lawyers, as Amicus Curiae, supports the argument of Petitioner in its entirety. It is the Academy's position that the Legislature, in enacting Section 768.125, intended that liquor vendors who knowingly serve alcohol to habitual addicts be held responsible for the damages caused thereby, without the added (and unstated) requirement, inserted by the Second District, that written notice have first been furnished to the liquor establishment.

This case, together with the companion proceeding presently pending in Peoples Restaurant, Inc. v. Sabo, Case No.: 76,811, presents to this Court its first opportunity to interpret Section 768.125's applicability to a tavern's liability for serving liquor to a known alcoholic. Previous decisions by this Court involving this statute have been decided in the context of unlawfully serving minor patrons. The distinction is crucial and, once clearly understood, reveals that the Second District's decision cannot stand.

The Second District has held in the present case that Section 768.125 can be construed solely as a limitation upon pre-existing liability, citing this Court's decision in Migliore v. Crown Liquors of Broward, 448 So.2d 978 (Fla. 1984), and the more recent decisions dealing with the nonliability of social hosts, Dowell v. Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990) and

Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987). The Second District appears to have assumed from these decisions that this Court would extend the same interpretation to cases involving a commercial vendor who serves a known alcoholic. However, this Court has not yet addressed this aspect of Section 768.125, Fla.Stats., and it is the Academy's belief that a proper view of the legislative history and purpose of this statute will compel the conclusion that the Legislature intentionally omitted any written notice requirement in imposing civil liability.

In Migliore, this Court interpreted Section 768.125 as establishing limits upon the expanding civil liability of liquor establishments for the serving of underage drinkers. That conclusion was supported in large part by the fact that when the Legislature enacted Section 768.125, it did so against a backdrop of cases expanding liability for serving underage drinkers, such as Prevatt v. McClennan, 201 So.2d 780 (Fla. 2d DCA 1967), and that the Legislature was presumed to be acquainted with those judicial decisions in enacting this legislation. Migliore, supra at 980-981.

That rationale cannot, however, be used to support the claim that the Legislature intended to similarly limit a vendor's liability for serving a known alcoholic. This is so for two reasons: first, at the time the legislation was passed there were no reported decisions establishing liability in such situations; and second, the legislative history reveals a deliberate intent by the Legislature to provide a more effective deterrent to taverns serving alcoholics by eliminating the requirement of written notice.

As the Second District pointed out in the present case, the original version of this bill presented to the House provided that liability would be imposed only if the liquor vendor were convicted of a violation of Section 562.50, Fla.Stats. Ellis, supra at 1213. An amendment thereto was offered by Representative Gustafson to relax the requirements for imposing liability by eliminating the prerequisite of a criminal conviction. As Representative Gustafson pointed out, the statute with the amendment "...simply provides that if you knowingly serve a person who is habitually addicted to alcoholic beverages, then you will be responsible." During the floor debate, Representative Gustafson argued that the conviction requirement was too onerous because the criminal statute's requirement of a written notice made it very unlikely that a conviction could be obtained. The amendment was passed and incorporated into the statute.

Considered in its entirety (A.1-2), it is evident from the debate that this amendment was intended to liberalize the provisions of the act as it applied to liability for serving habitual drunkards, in an attempt to meet the objections of those who opposed a "reverse dram shop act" in the first place. Indeed, Representative Richmond, who introduced the bill, explained that the original version of the reverse dram shop bill which had been vetoed by the Governor the previous year had specifically required that written notice be given. Representative Richmond then pointed out that the language in the new bill, with the amendment offered by Representative Gustafson,

should overcome the objections of the Governor and others who had been opposed to the earlier version of the reverse dram shop act.

Although the Second District in the present case reviewed this same colloquy and reached the opposite conclusion, its reasoning cannot withstand analysis. The court opined that what was troubling the Legislature was the requirement of a previous conviction and not the requirement of notice per se. That conclusion does not logically follow, however, since a conviction could not be obtained without written notice, and thus the two requirements are inextricably intertwined. Eliminating only the conviction requirement while retaining the written notice requirement would have accomplished nothing, and would have rendered the amendment meaningless. As this Court pointed out in Johnson v. Feder, 485 So.2d 409 (Fla. 1986), the Court must assume that the Legislature acts purposefully and that its statutory provisions are intended to have some useful effect. Id. at 411.

Section 768.125, Fla.Stats., clearly contains no requirement that the vendor's knowledge be obtained solely in the form of a written notice by the alcoholic's family. This Court has previously held that it may not add words to a statute not placed there by the Legislature. Chaffee v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974). The plain meaning of statutory language is the first consideration in determining legislative intent, and this Court has consistently refused to depart from that plain meaning even where the Court is convinced that the Legislature intended something not expressed therein.

St. Petersburg Bank and Trust Company v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982).

We suggest that the Second District in Ellis has violated that provision of statutory construction by assuming that the Legislature intended to include a written notice requirement. The fallacy of such an assumption is underscored by the fact that (1) the Legislature expressly refused to require a criminal conviction as a prerequisite to the imposition of liability, precisely because the underlying requirement of written notice was practically impossible to obtain; and (2) the Legislature deliberately omitted the written notice requirement contained in the previous year's bill because it was unacceptable to the Governor and to others.

The Ellis court justified its interpretation of the statute by relying upon the rule that statutes which relate to the same or a closely related subject should be regarded as in pari materia and should be construed together, citing Ferguson v. State, 377 So.2d 709 (Fla. 1979). That rule of statutory construction, however, does not require or permit the wholesale importation of the language of one statute into that of another, as the Second District did here; rather, it is the purpose of that rule to illuminate the meaning of a statute by viewing the legislative treatment of the problem as a whole, so that all statutes relating to the same subject matter may be given effect, if this can be done by any fair and reasonable construction. Ferguson, supra at 711. Here, there is no contradiction or anomaly between the Legislature's decision in 1945 to require written notice as a prerequisite to conviction under Section

562.50, Fla.Stats., and its decision in 1980 to impose civil liability where the vendor's knowledge is established by some other form of evidence. The plain language of the statute should be given its ordinary meaning, namely that a vendor who knows that the person he is serving is an alcoholic may become liable as a result.

As further support for its view that the written notice requirements of Section 562.50 were incorporated sub silentio into Section 768.125, the Second District relied upon this Court's holdings in Dowell, Bankston and Migliore that Section 768.125 "does not create any new cause of action but is merely a limitation on existing liability." Ellis, supra at 1212. The Second District evidently concluded that in light of those decisions it was constrained to treat Section 768.125 as nothing more than a restatement of existing law as it related to habitual drunkards, and could not "...make easier the way in which the existing liability under Section 562.50 would attach." Id. at 1215.1/

However, none of those three decisions compels that result since they did not involve the serving of liquor to known alcoholics. In Migliore, this Court correctly observed that Section 768.125 did not create a new cause of action as to minors, since the common law interpretation of the applicable criminal statute, Section 562.11, Fla.Stats., had already established such a cause of action. Prevatt, supra. In Dowell

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1/ The Second District stated that the Legislature added Section 768.125 as a "limitation to the existing liability which already had a written notice prerequisite," Ellis at 1215, but the court failed to state what that "limitation" consisted of.

and Bankston, this Court refused to interpret Section 768.125 as imposing liability upon social hosts, because it could discern no legislative intent to do so and (unlike the alcohol addict situation) such a cause of action had "heretofore been unrecognized by statute or judicial decree." Bankston, supra at 1387.

The judicial restraint which this Court expressed in Bankston by its deference to the legislative branch should now be exercised by giving effect to the Legislature's unambiguous wishes as expressed in Section 768.125. It must be kept in mind that unlike Bankston, the Court in the present case is not called upon to speculate as to whether the Legislature intended to create a "new cause of action." New or old, the statute specifically provides that "a person...who knowingly serves a person habitually addicted...may become liable for injury or damage..." The only issue is whether the Legislature intended to mandate a specific method of proving the "knowingly" element. We submit that the Second District has failed to follow this Court's example in Bankston, and has instead usurped the legislative role by adding a written notice requirement which was never intended or expressed by the Legislature.

The Legislature is, of course, charged with striking a balance between the interests of the liquor industry and the need to safeguard the wellbeing of its citizens by imposing both civil liability and criminal penalties where it deems them appropriate. In acting to limit the damage caused by drunks on our roads and elsewhere, the Legislature has created clear exceptions to the

common law rule of nonliability. Where a vendor knowingly serves an alcohol addict, the Legislature intended that civil liability be imposed -- regardless of how the vendor came by his knowledge that the patron was addicted to alcohol.

Both the Fifth District in Sabo, supra and the First District in Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), rev. den. 511 So.2d 298 (Fla. 1987), have interpreted Section 768.125 as permitting the "knowledge" requirement of the statute to be proven in some manner other than by the written notice required for conviction under the criminal statute. Although Pritchard was decided after Migliore, this Court apparently recognized that Pritchard did not conflict with Migliore (which dealt with only serving alcohol to minors), since it declined to review Pritchard. We submit that the result reached by the Fifth District in Sabo and the First District in Pritchard was the correct one.

Even the Ellis court recognized that with the written notice requirement, the statute "will place little impediment in the destructive path of the drunkard," Id. at 1215, but concluded nonetheless that the liquor server could not be civilly or criminally liable unless it had received that notice. It is the Academy's view, however, that the Legislature was fully aware of the problem and acted intentionally to ease the requirement for imposition of liability upon a commercial vendor who serves liquor to a known alcoholic. Both the language of the statute itself and the legislative history support this conclusion. Unless set aside by this Court, however, the Second District's decision will render Section 768.125 utterly useless as a tool

for preventing liquor vendors from selling liquor to those patrons who they know cannot "just say 'No'" to yet another drink. Accordingly, we urge this Court to quash the decision below and to hold that written notice is not a precondition to a liquor vendor's liability in such cases.

CONCLUSION

For the reasons set forth above and in the Petitioner's brief, the Academy urges the Court to quash the Second District's decision in the present case to the extent that it requires written notice as a prerequisite to imposition of liability under Section 768.125, Florida Statutes.

Respectfully submitted,

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