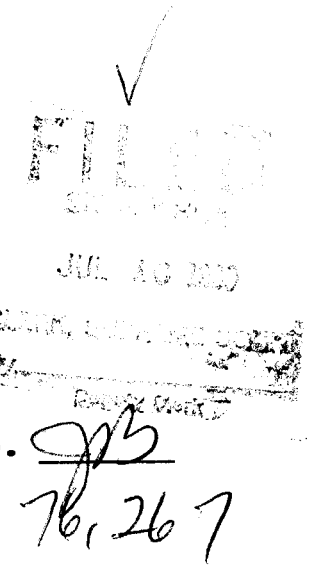
IN THE SUPREME COURT OF FLORIDA



MARY EVELYN ELLIS, individually and as guardian of GILBERT D. ELLIS,

Petitioner,

vs.

Case No. 76,267

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

Respondents.

ON PETITION TO REVIEW THE DECISION OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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ATTORNEYS FOR PETITIONER

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The Case and Facts

This case presents the question whether a vendor of alcohol who knowingly serves alcoholic beverages to a habitual alcohol addict may be held liable for injuries caused by the addict's intoxication when the vendor did not have prior written notice of the customer's addiction.

One evening in March 1988 Gilbert Ellis consumed some twenty alcoholic drinks served to him at a Tampa bar owned by respondent N.G.N. of Tampa, Inc. The other respondent, Norbert G. Nissen, is the director, owner, and manager of N.G.N. of Tampa, Inc. After consuming the drinks, an intoxicated Ellis drove his car in a manner causing it to overturn and crash. He sustained severe injuries, including permanent brain damage. He has since been declared incompetent, and the petitioner is his legal guardian.

The petitioner filed a circuit court action seeking compensatory and punitive damages. Tracking the language of section 768.125, Florida Statutes (1987), her complaint alleged that the respondents served Ellis "knowing that [he] was a person addicted to the use of any or all alcoholic beverages."

The respondents moved to have the complaint dismissed, claiming (1) that section 768.125 does not provide a first-party cause of action for a one-car accident involving an injured adult drinker/driver, and (2) that the complaint failed to allege an essential predicate to their liability, i.e., that the bar had received written notice of Ellis's addiction from his family as contemplated by section 562.50, Florida Statutes (1987).

The complaint was dismissed and then amended to allege basically the same general knowledge, since the petitioner could not allege that the bar had in fact received written notice. The respondents again moved to dismiss on the same grounds. The trial court granted the motion and dismissed the action on the ground that there is no cause of action under section 728.125 for injuries received by an intoxicated adult driver in a one-car accident. The petitioner appealed.

In its decision the Second District Court of Appeal affirmed the dismissal, but not for the reason given by the trial court. In that regard the district court agreed with the petitioner that the habitual drunkard is among the class of persons protected by the statutory scheme; thus, "the fact that the [petitioner's] complaint described a first party cause of action was no reason to dismiss it." (DCA opinion, pp.3, 6)

Nevertheless, the court held, the complaint was properly dismissed because the respondents had not received prior written notice of Ellis's alcohol addiction. In the court's view, such notice is a necessary predicate to a liquor vendor's civil liability for serving a habitual alcohol addict.

> In sum, we hold that commercial providers of liquor to a habitual drunkard must have written notice of the drunkard's addiction before the vendors may be subjected to civil liability for the patron's self-inflicted injuries or injuries to others because of the patron's drunken condition.

(DCA opinion, p.14)

The district court's opinion was filed April 18, 1990. On April 25 the petitioner filed a motion under Fla.R.App.P. 9.330

requesting the court to certify that its decision is in conflict with the decision of another district court of appeal and/or that it passes on a question of great public importance. The court denied the motion on June 5, 1990. (A.16) The petitioner commenced this proceeding by notice filed July 3.

Summary of Argument

The Second District's view that prior written notice is a necessary predicate to the liability of a vendor for serving alcohol to a habitual addict is in direct conflict (1) with the First District's decision to the contrary on the very same question and (2) with the Fifth District's holding that such liability may be predicated on circumstantial evidence that the vendor knew his customer was addicted.

This issue has never been addressed by this Court. Given its potential consequences to every person who resides in Florida or ventures into the state, it is imperative that the conflict be resolved.

Argument

THE SECOND DISTRICT'S VIEW THAT A LIQUOR VENDOR'S LIABILITY FOR SERVING A HABITUAL ADDICT MUST BE PREDICATED ON PRIOR WRITTEN NOTICE OF THE ADDICT'S CONDITION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST AND FIFTH DISTRICT COURTS OF APPEAL.

In its opinion below the district court acknowledged its disagreement with the First District Court of Appeal on the question whether written notice is a necessary predicate to holding a liquor vendor civilly liable for the consequences of serving a person who is habitually addicted to alcohol.

The dispute focuses on the proper relationship, if any, between sections 562.50 and 768.125, Florida Statutes. The former, first enacted in 1945, imposes criminal penalties upon a person who serves intoxicants to a patron after receiving written notice from the patron's family member that he is habitually addicted to alcohol and that his drinking is causing injury to him or to the person giving the notice. The latter is a 1980 civil statute which reads as follows:

> 768.125 Liability for injury or damage resulting from intoxication.--A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

In Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), rev. denied, 511 So.2d 298 (Fla. 1987), Pritchard

filed a complaint alleging he was injured in an accident caused by an intoxicated habitual drunkard who had been served in the defendant's bar. The trial court dismissed the action on the theory that section 562.50 must be read in pari materia with section 728.125, and that the written notice required under the criminal statute is a necessary predicate to civil liability, as well.

The First District rejected the notion that the two statutes are to be read in pari materia, and held that no written notice is required in order to impose civil liability. "Although it appears the legislature may have obtained the 'habitually addicted' language of s.768.125 from s.562.50, it specifically did not also utilize the provision concerning written notice." Pritchard, 499 So.2d at 929.

In its opinion below the Second District expressly "disagree[d] with Pritchard's disposition excusing the need for a written notice as a predicate to the civil liability of the liquor vendor." (DCA opinion, p.6) According to the Second District, the two statutes must indeed be read in pari materia:

> [W]e read them together to conclude that the legislature intended that the vendor's 'knowledge' be obtained in the same manner in both sections, to wit, by written notice.

Thus, the court held, prior written notice is required before a vendor can be held civilly liable as a result of its serving a habitual alcohol addict. (DCA opinion, p.14)

Clearly, then, the two decisions are in conflict as contemplated by Article V, Section 3(b)(3), Florida Constitution,

for each announces a rule of law which conflicts with the rule announced by the other. Such has been described by this Court as one of the principal situations justifying the invocation of its discretionary review jurisdiction. Nielson v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960).1/

The conflict which arose when the decision below was announced in April has now spread. On May 31, five days before the Second District declined to certify this case, the Fifth District decided Sabo v. Shamrock Communications, Inc., ---So.2d---, 15 FLW D1495 (5th DCA No. 89-388).

In that case Sabo was injured in an automobile accident caused by an intoxicated driver named Hoag, who had just left the defendants' Peoples Bar. Sabo sued, alleging that Peoples Bar had knowingly served Hoag sufficient alcoholic drinks to render him intoxicated, with knowledge that he was habitually addicted to the use of alcoholic beverages. The trial judge granted summary judgment in favor of the defendants, and Sabo appealed. One issue in the case was

> whether the knowledge required by section 768.125, Florida Statutes (1983), to establish liability on the part of a bar establishment can be proved by circumstantial evidence[.]

1/ The Nielsen court noted that in this situation "the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal." Indeed, as the district court noted in its opinion, it makes no difference whether the claim is by an innocent third party, as in Pritchard, or by the first party drinker/driver, as here. According to the District Court, the vendor must have received written notice to be held civilly liable in either event. (DCA opinion, p.14)

Sabo, 15 FLW at D1495.

The Fifth District reversed the summary judgment. In so doing, it rejected the defendants' assertion that liability could be predicated only on direct evidence that its bar employees knew that Hoag was habitually addicted to alcohol.

> Peoples argues that because of the slightly different wording used with regard to an adult ("knowingly serves") as opposed to a minor ("willfully and unlawfully sells or furnishes") that a plaintiff such as Sabo must allege and prove direct evidence that the bar employee(s) knew the adult was habitually addicted to alcohol when he or she was served. Presumably this would require that a customer expressly declare he or she is an alcoholic, or the furnishing of such a statement to the bar establishment by the customer's doctor or family. This interpretation does not appear to us as warranted by the language of the statute. See Pritchard v. Jax Liquors, Inc. 499 So.2d 926 (Fla. 1st DCA 1986), rev. denied, 511 So.2d 298 (Fla. 1987).
>
> Further, such an interpretation would lead to so restricted an application as to make that portion of section 768.125 dealing with liability for adult customers virtually meaningless. Clearly it is a rare case in which a person with a habitual drinking problem announces as he or she enters a bar, "I'm an alcoholic." The converse is much more likely: alcoholics deny they have a drinking problem. Statutes should not be given an interpretation that would render them pointless.

Sabo, 15 FLW D1495 (footnotes omitted). Therefore, the court held, the defendants' liability for serving the alcohol addict could rest on circumstantial evidence that they knew of his condition. Obviously, the Fifth District's view is in direct opposition to the Second District's holding that a vendor's knowledge of his customer's addiction must derive from a prior writing expressly notifying him of it.

In response to the petitioner's request that the district court certify its decision, the respondents asserted that the

instant conflict had already been resolved because, they said, this Court's decisions in Dowell v. Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990), and Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), had effectively overruled Pritchard. But those decisions related to the liability vel non of a social host for serving alcohol to a habitual addict or minor, respectively. This Court observed that social hosts have never been liable for serving alcohol, and that s.768.125 did not create a cause of action against a new class of defendants.

Neither Dowell nor Bankston addressed the effect of s.768.125 on the liability of a vendor for serving alcohol to a habitual addict. Indeed, this Court has never dealt with the question.2/ However, with regard to the intent or knowledge required as a predicate to a vendor's liability for serving a minor, this Court has held that the language of s.768.125 controls in those cases arising after its effective date. Armstrong v. Munford, Inc., 451 So.2d 480, 481 (Fla. 1984).

The First, Second, and Fifth districts are in direct disagreement about the meaning and effect of that language, and it is a conflict which begs to be resolved. Every person driving or riding on the highways is a potential victim of an intoxicated alcohol addict. But until the instant conflict is settled, injuries which would be compensable in, say, Jacksonville or

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2/ In fact, notwithstanding that s.562.50 had been in effect for 35 years, prior to enactment of s.768.125 there was not a single reported Florida decision involving a vendor's liability--civil or criminal--for serving an addict.

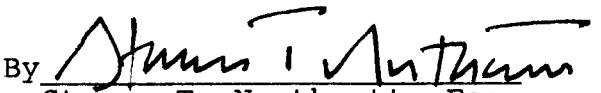
Orlando, will not be actionable in Tampa. In fact, the lengthy common boundary between the Second and Fifth districts permits the possibility that an addict could be served to the point of intoxication in one district and thereafter suffer or inflict injuries in the other. A citizen's right of access to the courts for the redress of his injuries 3/ should not be qualified by the happenstance of geography.

Conclusion

The Second District's decision in the instant case is in direct and irreconcilable conflict with decisions of the First and Fifth District Courts of Appeal on a question which potentially affects every person living in or venturing into this state. For this reason, the petitioner respectfully urges the Court to accept this matter for review so that the conflict may be resolved.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.

By 

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3/ Art. I, s.21, Florida Constitution.

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Certificate of Service

I certify that a true copy of the foregoing has been furnished by U.S. Mail to Scott W. Dutton, Esq., and Frank B. Lieppe, Esq., 1509 W. Swann Avenue, Suite 210, Tampa, FL 33606, this 12th day of July, 1990.

Stevan T. Northcutt, Esq.