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.

_____/

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

Scott W. Dutton, Esq.
Florida Bar No. 486019
SANTOS & DUTTON, P.A.
1509 W. Swann Ave., Suite 210
Tampa, Florida 33606
(813) 254-9922

ATTORNEYS FOR RESPONDENTS

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The Case and Facts

Respondent hereby supplements The Case and Facts as set forth by Petitioner so that this Court will consider certain matters omitted by Petitioner in her recitation of the case and facts.

Petitioner points out in her Brief on Jurisdiction that she filed a Circuit Court action "tracking the language of §768.125, Fla. Stat. (1987)... ." (Petitioner's Brief on Appeal, Pg. 1) The Respondents then moved to have the Complaint dismissed claiming, inter alia, that §768.125 does not create a cause of action, but rather limits other legal predicates found elsewhere in the Florida Statutes (§562.50, Florida Statutes (1987)). In response to the motion, the trial court dismissed the action on the ground that "there is no cause of action under §768.125 for injuries recovered by an intoxicated adult driver in a one-car accident." (Petitioner's Brief on Jurisdiction, Pg. 2). The Petitioner then appealed the dismissal.

In its decision, the Second District Court of Appeal affirmed the dismissal, and held:

> Our Supreme Court has specifically held that Section 768.125 does not create any new cause of action but is merely a limitation on existing liability. Dowell v. Gracewood Fruit Co., 74,404 (Fla. Mar. 29, 1990); Bankston, 507 So.2d 1387; Migliore, 448 So.2d 980.

(DCA Opinion, Pg. 7) (emphasis in the original).

In its decision, the Second District Court of Appeal went on to explain that it had held similarly in the past in the case of Puglia v. Drinks on the Beach, Inc., 457 So.2d 519 (Fla. 2d DCA 1984). In Puglia, the plaintiff brought a 2-count complaint: Count I was based on Section 562.11 and Count II on Section 768.125. The trial court in Puglia entered a judgment on the pleadings in favor of the defendant on Count II, which was affirmed by the District Court. In explaining why it was correct in affirming the judgment on the pleadings in Puglia, and again why it was affirming the trial court in the instant case, Chief Judge Campbell explained:

> The reason we did not allow the count based on §768.125 to stand was that there was no separate cause of action which could be stated under that section, citing Migliore and Armstrong. The instant case merely presents an occasion to revisit this issue in the context of an habitual drunkard instead of in the context of an illegally served minor.

(DCA Opinion, Pg. 8)

After having stated the foregoing, the District Court went on to discuss the only other statute which addresses liquor liability for service to an habitual drunkard, Section 562.50, Florida Statutes (1987). In that the Second District acknowledged and accepted the constant theme and reiteration by the Supreme Court that Section 768.125 does not create a cause of action, but rather limits other

existing causes of action, the Court explained on Page 14 of its decision its rationale, affirming the dismissal:

> Since Section 768.125 is a limiting provision and does not create any cause of action, it could not broaden, or make easier, the way in which the existing liability under Section 562.50 would attach. It would, indeed, be anomalous for us to allow, after and in spite of the legislatively mandated limitation on liability, such a loophole through which plaintiffs could sue to impose liability upon a vendor without written notice where such suit could not proceed before the 1980 limitation was in place.

(DCA Opinion, Pg. 14)

Summary of Argument

The Second District's opinion that Section 768.125 does not create a cause of action follows and comports with the express ruling of the Supreme Court as set forth in five separate opinions. Since Section 768.125 does not create a cause of action, but rather limits other existing predicates, the only remaining predicate is Section 562.50 which requires written notice. Consequently, the Second District's view that prior written notice is a necessary predicate to liability of a vendor for serving alcohol to an alleged habitual addict has been effectively ruled upon by this Court in its numerous opinions addressing the role of Section 768.125.

Argument

THE SECOND DISTRICT'S VIEW THAT §768.125 DOES NOT CREATE A CAUSE OF ACTION FOLLOWS FROM FIVE SUPREME COURT DECISIONS WHICH HAVE EFFECTIVELY OVERRULED ALL OTHER DISTRICT COURT OPINIONS TO THE CONTRARY.

In its opinion, the Second District expressly pointed out that the First District Court of Appeal in Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), review denied, 511 So.2d 298 (Fla. 1987), has been effectively overruled by the Florida Supreme Court on numerous occasions. In explaining why Pritchard should not be followed, the Second District Court explained that since Pritchard, the Supreme Court, on two occasions, has reiterated its prior ruling that section 768.125 does not create any new cause of action, but is merely a limitation on existing liability. (DCA Opinion, Pg. 7, citing Dowell v. Greenwood Fruit Co., 559 So.2d 217 (Fla. 1990), and Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987)). In other words, if the First District Court of Appeal had had the benefit of Dowell and Bankston when it decided Pritchard, then out of necessity they would not have been able to conclude, as they did, that section 768.125 "creates a new right in members of the general public." (DCA Opinion, Pg. 7, citing Pritchard at 929). Close scrutiny of Pritchard proves that the Second District is correct.

As stated in Petitioner's Brief on Jurisdiction, in Pritchard the trial court found that Section 562.50, which

requires written notice of habitual addiction, must be read in pari materia with section 768.125. Since the plaintiff in Pritchard did not allege written notice, the trial court granted the defendant's motion to dismiss. On appeal Pritchard contended that it was not necessary that section 562.50 and section 768.125 be read and construed in pari materia and that the trial court erred in making such a requirement. In reversing the trial court, the First District held:

> Section 768.125 is a negligence statute which provides for a cause of action against a person who serves alcoholic beverages to minors, or to persons who are known to the server to be habitually addicted to the use of alcohol.

499 So.2d 928

Apparently, therefore, the First District did not grasp or appreciate the fact that prior to its decision the Florida Supreme Court had already ruled at least twice that this Section did not create such a cause of action, but rather was a limitation on other "already existing" causes of action which, of necessity, were in existence prior to the enactment of section 768.125. See, Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978, 980-981 (Fla. 1984), and Armstrong v. Munford, 451 So.2d 480, 481 (Fla. 1984).

In addition to the foregoing, the Pritchard court went on in its opinion to point out further misunderstandings as to section 768.125. For example, the Pritchard court ruled

that section 768.125 "is not a penal statute", but is in derogation of the common law and creates a new right in the members of the general public. 499 So.2d at 929. This statement by the First District is quite interesting for two reasons.

The first reason is that when passed, section 768.125 was passed as a penal statute (§562.51), and was transferred over into the negligence section by a Joint Legislative Management Committee. Since this committee has no power to make laws, it should have been significant to the First District that the statute which they were addressing was enacted and originally numbered as a penal statute.

The second misunderstanding comes in the First District's statement that section 768.125 creates a "new right". Contrary to this statement, it is well established that section 768.125 creates no right at all, but rather serves as a limitation on the already existing liability of vendors of intoxicating beverages.

Before leaving the discussion of Pritchard, one other misunderstanding of the Pritchard rationale should be discussed. That is, in its decision, the Pritchard court ruled that section 562.50 should not be read in pari materia with section 768.125 because the two statutes were passed at different times. In response to this, however, it should be noted that in order to create liability for service to a minor one must read section 562.11 and section 768.125

together. Certainly it would seem strange that it is well accepted to read in pari materia sections 562.11 and 768.125, but not read sections 562.50 and 768.125 together. The thought of not reading the latter two sections together, like the former, is incongruous.

Since Pritchard the Florida Supreme Court has tacitly, or effectively, overruled the First District's opinion twice.

In Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), the Florida Supreme Court reiterated for the third or fourth time that Section 768.125 does not create a cause of action. According to the Supreme Court in Bankston, section 768.125 constitutes a limitation on the already existing liability of vendors. 507 So.2d at 1386 (citing Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978, 981 (Fla. 1984), and Armstrong v. Munford, 451 So.2d 480, 481 (Fla. 1984)). Accord, Forlaw v. Fitzer, 456 So.2d 432, 433 (Fla. 1984). In sum and substance, the Bankston court therefore held that since section 768.125 does not create a cause of action, but rather limits other existing causes of action, it could not be used to create social host liability for service of alcohol to a minor.

Later, in Dowell v. Gracewood Fruit Co., 559 So.2d 217 (Fla. 1990), the Supreme Court again had the opportunity to determine whether Section 768.125 creates a cause of action. This time the issue before the Court was whether the statute created a cause of action for social host liability for

service of alcohol to a known alcoholic. In following its decision in Migliore, Armstrong, and Bankston, the Supreme Court again, for the fourth or fifth time, held that section 768.125 flatly does not create a cause of action. According to the Dowell court in quoting from Bankston:

> It would therefore be anomalous and illogical to assume that a statute enacted to limit pre-existing vendor liability would simultaneously create an entirely new and distinct cause of action against a social host, a cause of action previously unrecognized by the common law, and which has heretofore been unrecognized by statutory or judicial decree.

559 So.2d 218 (citing Bankston at 1387) (emphasis added).

What is critical about both Bankston and Dowell, irrespective of the fact that they were principally addressed to social host liability, is the Florida High Court's ruling on the role of section 768.125. In both cases decided since Pritchard, the Court pointed out that section 768.125 was enacted "to limit pre-existing vendor liability." Assuming the Court accepts this language from these two opinions, then it is clear that Pritchard was tacitly, and effectively, overruled in that Pritchard turned upon the theory or idea that section 768.125 created a cause of action.

SABO V. SHAMROCK COMMUNICATIONS, INC., DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S OPINION SO AS TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION.

In Article V, Section 3(b)(3) of the Florida Constitution, it provides:

> (b) JURISDICTION. - The Supreme Court:
> ...
>
> (3) may review any decision of a District Court of Appeal ... that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.

Art. V, §3(b)(3), Fla. Const.

According to the Florida Constitution, in order to trigger the discretionary subject-matter jurisdiction of the Supreme Court under Article V, the Petitioners' must assert or point out how the Fifth District's decision in Sabo v. Shamrock Communications, Inc., _____ So.2d _____, 15 FLW D1495 (5th DCA No. 89-388), expressly and directly conflicts with the instant case. To establish whether the conflict exists, one must look within the four corners of the opinions themselves. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decisions rest, and the other decisions conflict.

A good litmus test for the conflict would be whether a decision on one of the districts' opinions, either an affirmance or reversal, effects the alleged conflicting decision in another district. If this were the test in the instant case, the answer would be "yes" that resolution of Ellis v. N.G.N. will effect Sabo, but the resolution of Sabo will not effect Ellis.

Conclusion

The issue which the Petitioners ask this Court to resolve is one which has already been answered many times over. This court has already ruled over and over again that section 768.125 does not create a cause of action. Since the Court has announced this rule twice since the decision in Pritchard, Pritchard has been tacitly and effectively overruled.

Since the Second District's opinion, the Fifth District decided Sabo. Nowhere in Sabo does the Fifth District address the issue of whether section 768.125 creates a cause of action; nor does it address whether or not the only remaining legal predicate is found in section 562.50. The only issue which Sabo addressed is the evidence sufficient to prove a vendor's knowledge of one's habitual addiction to alcohol. Thus, in short, Sabo does not expressly and directly conflict with the instant case.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 1 day of August, 1990, to: Stevan T. Northcutt, Esq., Levine, Hirsch, Segall & Northcutt, Ashley Tower, Suite 1600, Post Office Box 3429, Tampa, Florida 33601-3429; and Thomas S. Martino, Esq., Martino, Price & Weldon, P.A., 1729 East 7th Avenue, Tampa, Florida 33605.

SANTOS & DUTTON, P.A.
1509 W. Swann Ave., Suite 210
Tampa, Florida 33606
(813) 254-9922
Attorneys for Respondents

SCOTT W. DUTTON, ESQ.
Florida Bar No. 486019