BEFORE THE SUPREME COURT OF FLORIDA

PEOPLES RESTAURANT, INC.
etc. et al.,

Petitioners,

v. CASE NO. 76,811

MARY SABO,

Respondent.

_____/

On Appeal from the District Court of Appeal
of the State of Florida, Fifth District

INITIAL BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS' ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Defense Lawyer's Association adopts the statement of the case and facts set forth in the brief of Petitioners, Peoples Restaurant, Inc. and Shamrock Communications, Inc.

Briefly, this case comes before this Court on certified conflict of decisions from the District Court of Appeal, Fifth District, which has certified that its decision directly and expressly conflicts with the District Court of Appeal, Second District's decision in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990). This case involves the interpretation and application of section 768.125, Florida Statutes, Florida's Dram Shop Act, with regard to the liability vel non of the seller of alcoholic beverages for damages caused by an intoxicated person of lawful drinking age.

THE CASE

Summary judgment was entered in favor of Petitioners/ Defendants in the trial court, which judgment denied Ms. Sabo recovery against Petitioners in her personal injury action. She appealed to the district court which reversed the summary judgment and held that the record created material issues of fact as to whether Peoples knowingly served Hoag sufficient alcoholic drinks to render him intoxicated with the knowledge that Hoag was habitually addicted to the use of alcoholic beverages as is required by section 768.125, Florida Statutes. The district court framed the issue on appeal to be 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, and whether the record in this case establishes a jury question as to whether Hoag was habitually addicted to alcohol at the time of the accident. In answering this question in the affirmative, the court expressly treated the proof of knowledge required by section 768.125 for sales to persons of lawful drinking age no differently than the exception created by the legislature for sales to persons who are not of lawful drinking age. The fifth district held that this statute imposed no requirement that a plaintiff such as Sabo allege and prove by direct evidence that the bar employee(s) knew that person of lawful drinking age was habitually addicted to alcohol when he or she was served. The court then reviewed the circumstantial evidence presented and concluded that there was sufficient circumstantial evidence upon which a jury could find that the employees of Peoples knew of Hoag's addiction to alcohol.

THE FACTS

Ms. Sabo sustained injuries in an automobile accident caused by Daniel Hoag who was intoxicated at the time of the accident. On the evening of the accident, Daniel Hoag, a person of lawful drinking age, entered Peoples Restaurant and was served several alcoholic beverages by an employee of the restaurant. (R.33). Ms. Sabo sued People's Restaurant, Inc. and alleged entitlement to damages against Peoples under the provisions of Florida's Dram Shop Act which provides:

> 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.

The facts relating to the circumstantial evidence presented by Ms. Sabo in her attempt to support her claim of knowledge by Peoples Restaurant and in defense of Petitioners' motion for summary judgment in the trial court are thoroughly related to this Court in the Brief on the Merits of Petitioners and do not need repetition here.

SUMMARY OF ARGUMENT

The fifth district in the present case improperly construed the language of the statutes and incorrectly applied the provisions of section 768.125 (originally enacted as part of the beverage law, i.e. section 562.51, Chapter 80-37, Laws of Florida) to the present case, and thus incorrectly reversed the summary judgment which had been properly entered in favor of Petitioners.

This Court should quash the present decision of the district court and adopt the well-reasoned decision of the District Court of Appeal, Second District, in Ellis v. N.G.N. of Tampa, Inc., conflict with which has vested this Court with jurisdiction of the present case. The Ellis decision correctly holds that section 768.125 must be read in conjunction with section 562.50 to determine what proof is required to establish liability on the part of a seller of alcoholic beverages to a person of lawful drinking age. The second district held that section 768.125 read in conjunction with section 562.50 requires that before a commercial provider of liquor may be subjected to civil liability for a patron's injuries to others because of the patron's drunken condition, the provider of liquor to a habitual drunkard must have written notice of the drunkard's addiction.

This Court should adopt the rationale of the second district which gives section 768.125 its correct meaning and should quash the decision of the fifth district and remand with directions to reinstate the summary judgment entered in favor of Petitioners.

Moreover, even were this Court not to find that the notice must be in writing and in accordance with specific notice requirements of section 562.50, this Court should hold that the district court erred in determining that the legislature intended no difference with regard to the standard of proof for liability in the case where alcoholic beverages are sold to a person not of lawful drinking age and where they are sold to a person of lawful drinking age. The language used by the legislature is expressly and intentionally different in speaking to exceptions to the absolute bar of liability for sale to persons not of lawful drinking age and those of lawful drinking age. The sole statutory exception to the absolute bar on liability for the sale of alcoholic beverages to a person of lawful drinking age that is permitted is where the seller knowingly serves a person habitually addicted to alcoholic beverages. There must be actual knowledge of the habitual addiction. Ms. Sabo made no showing in the trial court that Peoples Restaurant had actual knowledge that Hoag was habitually addicted to alcoholic beverages. Instead, Peoples Restaurant met its burden of demonstrating nonexistence of a genuine issues of material fact or law. Thus the Summary Judgment entered in its favor should be reinstated.

Further, the district court failed to recognize the clear distinction made by the legislature itself with regard to liability which may arise from serving alcoholic beverages to persons not of lawful drinking age and from serving persons of lawful drinking age. The district court erroneously determined that the different

language used by the legislature with regard to persons of an unlawful drinking age and with regard to persons of a lawful drinking age was a distinction without a difference. When the legislature drafted this statute and expressly utilized different standards of "willfully and unlawfully sells or furnishes" with regard to persons not of lawful drinking age and "knowingly serves a person habitually addicted," it clearly appears from the face of the statute that it intended a different, more stringent standard when it used the phrase "knowingly serves a person habitually addicted" as a predicate for establishing liability of a seller of alcoholic beverages for injuries or damages caused by or resulting from the intoxication of such a person.

ARGUMENT

THE EXCEPTION IN SECTION 768.125 TO THE ABSOLUTE BAR ON LIABILITY FOR THE SALE OF ALCOHOLIC BEVERAGES WHICH APPLIES TO A PERSON WHO "KNOWINGLY SERVES A PERSON HABITUALLY ADDICTED TO THE USE OF ANY OR ALL ALCOHOLIC BEVERAGES" MUST BE STRICTLY CONSTRUED AND REQUIRES THAT THE SELLER HAVE WRITTEN NOTIFICATION THAT THE PERSON SERVED ALCOHOLIC BEVERAGES IS A PERSON HABITUALLY ADDICTED.

The district court erred in reversing the summary judgment entered in favor of Petitioners. It premised its decision on an erroneous interpretation of section 768.125 which effectually and improperly broadened the scope of the exception to the bar to liability contained in section 768.125, ne section 562.51, see chapter 80-37, and the district court thereby created a new and more expansive standard of liability than contemplated by the legislature when it enacted this law. The district court has erroneously substituted a standard of "should have known" in place of "knew" of the habitual addiction.

The trial court on the other hand correctly entered summary judgment for Petitioners on the basis that there can be no liability on the part of Peoples Restaurant for the sale of alcoholic beverages to an intoxicated client in the absence of actual knowledge by Peoples Restaurant that the purchaser was habitually addicted to alcohol. Ms. Sabo offered no proof of the actual knowledge of Peoples Restaurant or its employees of Hoag's habitual addiction to alcohol as required by the statute as a predicate to liability. Even if the evidence showed that Peoples

served alcohol to an obviously drunk Hoag who upon leaving Peoples drunkenly and negligently injured Ms. Sabo, there would be no civil cause of action against Peoples Restaurant. Lonestar Florida, Inc. v. Cooper, 408 So.2d 758 (Fla. 4th DCA 1982).

There was no cause of action at common law against the dispenser of alcohol for injuries caused to another by the intoxicated recipient, and Florida had not enacted a Dram Shop Act to create one. Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963); Ellis v. N.G.N. of Tampa, Inc.; Lonestar Florida, Inc. v. Cooper.

The Florida Legislature, within two years after ratification of the Twenty-first amendment repealing prohibition, enacted chapter 16774, section 11, Laws of Florida (1935), now section 562.11, making it a crime to sell intoxicants to persons not of lawful drinking age. In 1945, the legislature enacted chapter 22633, Laws of Florida (1945), now section 562.50, making it a crime to dispense alcoholic beverages to a person habitually addicted to the use of any or all intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child, or nearest relative that said person so addicted is an habitual drunkard. This Court in Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984), held that creation of any new cause of action, which did not exist at common law, occurred with the enactment of sections 562.11 and 562.50. That case involved the illegal sale of liquor to a minor and the ensuing damages sustained by a third party injured by the intoxicated minor. This Court expressly held that section 768.125

does not create a cause of action for third persons against dispensers of alcoholic beverages for injuries caused by an intoxicated person. Rather, this Court concluded, section 768.125 limits the broadened liability created by sections 562.11 and 562.50. Id. at 980. This Court pointed to the very enacting title of the act to demonstrate the legislature's clear intent not to create a broader liability than existed but to limit the existing liability of liquor vendors.

Consistent with the decisions of this Court and the clear legislative intent, this court must not permit the fifth district to construe section 768.125 in such a manner as to create a greater liability than existed prior to this statute's enactment. To determine this preexisting liability, this Court must look to section 562.50 and, because this provision is in pari materia with section 768.125, this Court must read those statutes in conjunction with each other in order to establish what Ms. Sabo must prove to establish liability.

Section 562.50 provides:

> **Habitual drunkards; furnishing intoxicants to, after notice.** --Any person who shall sell, give away, dispose of, exchange, or barter any alcoholic beverage, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication, to any person habitually addicted to the use of any or all such intoxicating liquors, after having been given written notice by wife, husband, father, mother, sister, brother, child or nearest relative that said person so addicted is an habitual drunkard and that the use of intoxicating drink or drinks is working an injury to the person using said liquors, or to the person giving said written notice,

> shall be guilty of a misdeameanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 768.125 provides:

> **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.

Section 768.125 was enacted in its present form by the legislature as section 562.51 by Chapter 80-37, Laws of Florida, to directly follow section 562.50, Florida Statutes, both of which were in the chapter entitled "Beverage Law: Enforcement." It is axiomatic that statutes in pari materia must be construed in conjunction with each other. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522 (Fla. 1973). The legislative history of section 768.125, correctly related by the second district in Ellis v. N.G.N. of Tampa, Inc., makes it clear that the legislature intended the provisions of section 562.50 and section 768.125 to be read in conjunction with each other. Furthermore, the recent decisions of this Court support the second district's interpretation of the subject statute and contradict the fifth district's present decision. This Court in Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987) held that by the enactment of

section 768.125, the legislature did not intend to create a new and distinct cause of action because this statute was intended to be a limitation of liability device.

This statute does not speak in terms of "known" or "should have known" which would allow for constructive notice. Contrary to the holding of the fifth district in the present case, the subject enactment, the context in which it was enacted, and its express language reveal that the legislature clearly intended that for there to be liability on the part of the seller of alcoholic beverages to a person of lawful drinking age, the plaintiff in a suit against that seller must allege and prove by direct evidence that there was actual knowledge by the person furnishing the alcoholic beverage that the person to whom it was sold was habitually addicted to alcohol.

Because this Court has explicitly held that section 768.125 limited rather than broadened liability, this Court must then look to the existing law relating to liability to determine how actual knowledge is to be proven. Relying upon and reciting the rationale of the recent decision of this Court, the second district in Ellis correctly opined,

> "As the evolution of the law of liquor vendor liability presently stands in Florida, the liability and causes of action founded on sections 562.11 and 562.50 (initially only criminal liability expanded by case law also to mean civil liability) is constricted by section 768.125."

Ellis, 561 So.2d at 1213. In addition to relying on this Court's prior controlling decisions, the second district buttresses its

holding with regard to the imposition of written notice requirements contained in section 562.50 into section 768.125 with an accurate recitation of the legislative history including comments made by proponents of section 768.125 illuminating the legislature's intent to continue the written notice prerequisite to liability of a vendor. This Court has recently reiterated that legislative intent can be illuminated by consideration of comments made by proponents of a bill of amendment. Magaw v. State, 537 So.2d 564, 566-67 (Fla. 1989). The second district properly concluded:

> Regarding notice as a prerequisite to civil liability, the legislature retained in section 562.51 (i.e., 768.125) the other integral component of section 562.50 (besides the conviction) by requiring that the server of liquor must knowingly serve the habitual drunkard. The legislature was, of course, cognizant of the manner necessary to impart the requisite knowledge in order to impose liability under section 562.50, ie.e., written notice. In 1980, it merely added the next following provision, section 768.125 (ne 562.51), as a limitation to the existing liability which already had a written notice prerequisite. Since these sections directly followed one another in the same chapter, and related to the same subject, we 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, written notice.

Ellis, 561 So. 2d at 1215.

This Court should adopt the following holding of the second district which is supported by controlling decisions of this court and legislative history illuminating the legislature's intent in enacting section 768.125:

> 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 upon 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.
>
> In sum, we hold that the 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.

Ellis, 561 So. 2d at 1215.

This Court should quash the fifth district's decision that a plaintiff such as Ms. Sabo need not allege and prove direct evidence that the bar employee(s) knew the adult was habitually addicted to alcohol when he or she was served but need only show knowledge by circumstantial inferential evidence. The first district's contrary holding in Pritchard v. Jax Liquours, Inc., 499 So.2d 926 (Fla. 1st DCA 1986) cert. denied 511 So.2d 298 (Fla. 1987) should also be disapproved. The Court in this latter decision overlooked and in fact did not discuss the controlling decisions of this Court with regard to the limiting nature of section 768.125 and the already existing civil actions created by sections 562.11 and 562.50. Moreover, the first district did not have the advantage of this Court's controlling decisions in Bankston v. Brennan, 507 So.2d 1385 (Fla. 1987), and Dowell v.

Gracewood Fruit Company, 559 So.2d 217 (Fla. 1990), when it decided Pritchard.

Even were this Court to disagree that the written notice requirement of section 562.50 was necessary to show the requisite knowledge provided for in section 768.125, this Court should nevertheless quash the fifth district's decision. At the very least this statute, which is enacted in derogation of common law and thus must be strictly construed, requires direct evidence of knowledge of the vendor. Inferential knowledge cannot suffice. The district court in permitting inferential circumstantial evidence to suffice as a basis for proving knowledge expands this statute to create a cause of action where one was not intended by the legislature.

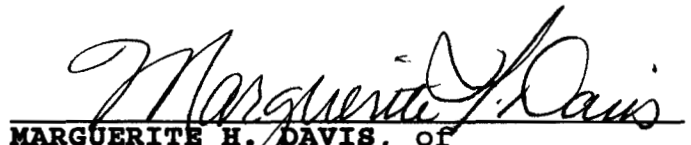
In the present case, Ms. Sabo presented no direct evidence that Peoples Restaurant actually knew that Daniel Hoag was habitually addicted to the use of alcohol. Hoag's own statements demonstrate that lack of knowledge by Peoples Restaurant. The following statements by Hoag clearly show that a total lack of knowledge was present: Hoag stated that he never told anyone at the Restaurant that he was an alcoholic (R. 204-205); Hoag admitted that he had never been diagnosed as an alcoholic prior to the night of the incident (R. 205); Hoag stated that he had never given the Restaurant any written notification that he should not be served alcoholic beverages (R. 212); Hoag stated that no friends or relatives had ever written to the Restaurant requesting that Hoag not be served alcoholic beverages (R. 213); Hoag stated that his

girlfriend at the time of the incident had never written to the Restaurant or orally requested that the Restaurant not serve alcoholic beverages to Hoag (R. 213); and Hoag himself admits that, at the time of the incident, he did not really think he was an alcoholic (R. 214).

This Court should reverse the decision of the district court which has effectively created a cause of action not contemplated by the legislature in its enactment of section 768.125, which statutory provision was intended by the legislature to be a limitation of liability device.

CONCLUSION

This Court should quash the decision of the fifth district and remand with directions to reinstate the summary judgment entered in favor of Petitioners by the trial court.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOHN UPCHURCH, ESQUIRE, Post Office Box 191, Daytona Beach, FL 32015; ROBERT J. JACK, ESQUIRE, Post Office Box 531086, Orlando, FL 32853 and DANIEL LEE HOAG, No. 104692, Baker Correctional Institute, Post Office Box 500, Oulstee, FL 32072, AVA F. TUNSTALL, ESQUIRE, Dean Ringers, Morgan & Lawton, Post Office Box 2928, Orlando, FL 32802, this 19th day of November, 1990.

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