0 of 5 reg 2

THE SUPREME COURT OF FLORIDA

PEOPLES RESTAURANT, INC., etc., et al.,

Petitioner,

vs. CASE NO: 76,811

MARY SABO,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

On appeal from the Fifth District Court of Appeal

AVA F. TUNSTALL, ESQUIRE
Fla. Bar No: 0379001
WILLIAM E. LAWTON, ESQUIRE
Fla. Bar No: 0163236
Dean, Ringers, Morgan & Lawton
P.O. Box 2928
Orlando, FL 32802
(407) 422-4310
Attorneys for Respondent

IN THE DISTRICT COURT OF APPEAL OF THE
FIFTH DISTRICT OF FLORIDA

MARY SABO,

Appellant,

vs.

APPEAL NO: 89-00388

SHAMROCK COMMUNICATIONS, INC.,
etc., et al.,

Appellees.

_____/

APPELLANT'S REPLY BRIEF

On appeal from the Circuit Court
of the Ninth Judicial Circuit,
in and for Orange County, Florida

AVA F. TUNSTALL, ESQUIRE
WILLIAM E. LAWTON, ESQUIRE
Dean, Ringers, Morgan & Lawton
P.O. Box 2928
Orlando, FL 32802
(407) 422-4310
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes

Other References

PRELIMINARY STATEMENT

The Respondent, MARY SABO, shall be referred to by proper name or as the Respondent.

The Petitioner, PEOPLES RESTAURANT will be referred to by proper name or as the Petitioner.

References to the Record will be indicated as (R.).

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as outlined by Petitioner.

STATEMENT OF FACTS

Respondent accepts the Statement of Facts as outlined by the Petitioner but would add the following:

Hoag was no stranger to Peoples having frequented the establishment during the previous two years. (R. 36; 175) While Hoag usually went drinking at Peoples every Friday (R. 175), for the seven months prior to the accident he went to Peoples at least twice a week. (R 175)

The bartenders would always serve Hoag doubles (R. 188-189) even after a manager instructed them not to do so. (R. 189) Further, these drinks were lavishly "free-poured" meaning a shot glass measure was not used to limit the amount of alcohol in the drink. (R. 181)

For approximately eighteen years prior to the accident Hoag drank a case of beer a day at work. (R. 136; 169) To compound matters, every night after work Hoag would have a mixed drink or two at home and then head to local bars. (R. 174)

Hoag had no recollection of the time he left Peoples, or how he came to be involved in the accident at approximately 8 p.m. which resulted in severe injuries to Sabo. (R. 192; 195)

Other references to the facts may be made during the argument as needed.

SUMMARY OF ARGUMENT

The Fifth District correctly interpreted F.S. §768.125 as imposing civil liability for damages on a vendor of alchoholic beverages when there is circumstantial evidence the vendor knowingly served a person habitually addicted to alcohol.

District Courts which have examined the degree of proof necessary for establishing a cause of action in the companion situation of selling alcohol to minors have consistently held circumstantial evidence is sufficient. Willis V. Strickland, 436 SO.2d 1011,1012 (Fla. 5th DCA 1983), pet. rev. den. 446 So.2d 99 (Fla. 1984); Gorman v. Albertson's, Inc., 519 So.2d 1119, 1120 (Fla. 2nd DCA 1988); French v. City of West Palm Beach, 513 So.2d 1356, 1358 (Fla. 4th DCA 1987); Burns v. Three of a Kind, 439 So.2d 1004, 1005 (Fla. 5th DCA 1983) Service to minors must be done "willfully" which imparts a requirement of specific intent to do something the law forbids. Black's Law Dictionary, (5th ed. 1979) In contrast, service to those habitually addicted need only be done "knowingly" which requires a mere consciousness. Black's Law Dictionary (5th ed. 1979). The foreseeability of injury is the same and there is no reason circumstantial evidence can be utilized where the proof must be of a "willful" sale to a minor but cannot be used where proof must only be of "knowing" service of alcohol to an adult.

Further, negligence statute §768.125 should not be read in pari materia with criminal statute §562.50 to engraft onto the

former the written requirement of notice from the latter. To begin, the statutes, being enacted more than 45 years apart, are diverse in scope, aim and purpose and should not be read together. Singleton v. Larson, 46 So.2d 456 (Fla. 1950); Pritchard v. Jax Liquors, 499 So.2d 926 (Fla. 1st DCA 1986)

Secondly, had the legislature intended §768.125 to import a more specific and definite meaning, such as requiring written notice, it could easily have chosen words to express any limitation it wished to impose. American Bankers Life Assur. Co of Fla. v. Williams, 212 So.2d 777 (Fla. 1st DCA 1977) The legislature must be presumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Thayer v. State, 335 So.2d 815 (Fla. 1976)

If the statutes are read in pari materia such that written notification is necessary, this interpretation would lead to so restricted an application as to make that portion of §768.125 dealing with liability for adult customers virtually meaningless. The only way to give §768.125 validity is to accord the plain language its plain meaning that knowledge need not be by written notice alone. The interpretation which will sustain validity should be given preference over an interpretation that would destroy the purpose of the statute. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

Lastly, there was ample evidence in the record below regarding Peoples' knowledge of Hoag's addiction to alcohol to have

precluded entry of a summary judgment. The facts, taken as a whole, lead to the logical conclusion that Hoag was habitually addicted to alcohol and that Peoples knew or should have known of the addiction. Where there is even the slightest doubt as to any issue of material fact, a summary judgment may not be entered. Connell v. Sledge, 306 So.2d 194 (Fla. 1st DCA 1975), cert. dis., 336 So.2d 105 (Fla. 1976).

ARGUMENT

I. THE FIFTH DISTRICT CORRECTLY INTERPRETED F.S. §768.125 AS IMPOSING CIVIL LIABIALITY DAMAGES ON A VENDOR OF ALCOHOLIC BEVERAGES WHEN THERE IS CIRCUMSTANTIAL EVIDENCE THE VENDOR KNOWINGLY SERVED A PERSON HABITUALLY ADDICTED TO ALCOHOL.

Florida Statute §768.125 is a negligence statute which provides for a cause of action against a vendor who serves alcoholic beverages to minors or persons who are known to be habitually addicted to the use of alcohol when injury results from the intoxication. In particular it provides:

> **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.

As can be seen from the plain language of the statute, §768.125 deals with two groups: minors and adults habitually addicted to alcohol. To establish liability, a vendor must "willfully and unlawfully" serve a minor or must "knowingly" serve an adult habitually addicted to alcohol. The statute is silent as to the reason, if any, for the different mental states of mind required to impose liability.

A "willful" sale to a minor requires knowledge that the

recipient is not of lawful drinking age. Willis v. Strickland, 436 So.2d 1011,1012 (Fla. 5th DCA 1983) pet. rev. den. sub nom., ABC Liquors, Inc. v. Willis, 446 So.2d 99 (Fla. 1984) However, no Florida court has required that direct evidence is necessary to state a cause of action. Rather, Florida courts consistently have held inculpatory knowledge of the age of a particular person may be proven by circumstantial evidence. Willis, supra at 1012; Gorman v. Albertson's, Inc, 519 So.2d 1119, 1120 (Fla. 2d DCA 1988); French v. City of West Palm Beach, 513 So.2d 1356,1358 (Fla. 4th DCA 1987); Burns v. Three of a Kind, 439 So.2d 1004, 1005 (Fla. 5th DCA 1983)

Likewise, two district courts have held a plaintiff could use circumstantial evidence to prove a vendor knew or should have known the person served was habitually addicted to alcohol to access §768.125. J.H. Pritchard v. Jax Liquors,Inc, 499 So.2d 926 (Fla. 1st DCA 1987), rev. den. 511 So.2d 298 (1987); Sabo v. Shamrock Communications, 566 So.2d 267 (Fla. 5th DCA 1990)

The case of Pritchard is almost identical to the situation in Sabo which is before this court. In Pritchard, Pritchard asserted Jax had served the tortfeasor alcoholic beverages "knowing at said time that the defendant was a person who was habitually addicted to the use of any or all alcoholic beverages." Id., at 927 Further, the complaint alleged that Jax knew or should have known the danger inherent in serving the defendant. Id. Jax filed a Motion to Dismiss arguing the

complaint was deficient as it contained no allegation of written notice. Id. The trial court granted the motion but in a well-reasoned opinion, the First District Court of Appeal reversed and held that an action filed pursuant to F.S. §768.125 need not allege that a server of alcohol has received direct notice. Id. at 928.

It is generally accepted that the legislature is presumed to have known the fair meaning of its chosen language and to have expressed its intent by the use of the words found in the statute. Thayer v. State, 335 So.2d 815,817 (Fla. 1976) A brief examination of the denotation of "willfully" and "knowingly" therefore may be helpful at this juncture.

Black's Law Dictionary 1434,1435 (5th ed. 1979) explains that an act or omission is "willfully" done if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's at 784 defines knowingly as "with knowledge; consciously; intelligently; willfully; intentionally". Furthermore, the phrase "knowingly and willfully" in reference to violation of a statute means consciously and intentionally (Black's at 784) giving support to the proposition that "knowingly" denotes consciousness while "willfully" denotes intent. Clearly then something can be done "knowingly" without a specific purpose to

disobey or disregard the law.

Since "willfully" exacts an intent that is not required under the "knowing" standard there is no purpose comporting with logic and reason to permit circumstantial evidence in cases where specific intent is required but disallowing it in cases where only conciousness is required.

The foreseeability of injury which is apparent when a vendor provides alcohol to a minor is no less apparent when the vendor provides alcohol to one habitually addicted. As the Fifth District Court astutely pointed out in Sabo v. Shamrock, 566 So.2d 267, 268 (Fla. 5th DCA 1990) there is no policy reason for treating the proof of knowledge required by §768.125 for sales to adults differently than for sales to minors.

A vendor cannot escape responsibility for selling alcohol to a minor by neglecting to check an I.D. Likewise, a vendor should not be permitted to escape responsibility for selling alcohol to one habitually addicted by ignoring the hallmarks of addiction.

The signposts of alcoholism, which can be looked to for guidance in ascertaining benchmarks for those habitually addicted to alcohol, include constant relief drinking (Hoag drank every day [R. 136, 169, 174]); gulping drinks (Hoag drank a double every half hour [R. 39]); blackouts (Hoag has no recollection of leaving Peoples or of the accident [R.192, 195]) and aggressive behavior (Hoag became argumentative when he drank [R.185]) 1 Am.Jur. POF, Alcohlism §24, p.590

Lastly, requiring direct evidence would foster willfull blindness on vendors' part. The doctrine of "willfull blindness" or "deliberate ignorance" is well established in Federal criminal law and has been recognized in Florida criminal law in regard to constructive possession of drug cases. Wetzler v. State, 455 So.2d 511 (Fla. 1st DCA 1984) The doctrine recognizes that there are situations where a party's suspicions are aroused but no further inquiry is made because the party wishes to remain in ignorance.

The Fifth District Court below properly determined evidence of constructive knowledge on the part of a vendor was sufficient to withstand a motion for summary judgment on the issue of civil liability under F.S. §768.125.

A. F.S.§768.125 should not be read in pari materia with F.S.§562.50 necessitating written notice of the customer's addiction before civil liability will attach under F.S.§768.125 for selling alcohol to said customer.

Peoples urges this court adopt the reasoning of Ellis v. N.G.N. of Tampa, Inc, 561 So.2d 1209 (Fla. 2d DCA 1990) which conflicts with Sabo v. Shamrock, 566 So.2d 267 (Fla. 5th DCA 1990) and J.H. Pritchard v. Jax Liquors, 499 So.2d 926 (Fla. 1st DCA 1987). Under Ellis, not only would evidence of a vendor's knowledge need to be proven by direct evidence, it must be shown a vendor had written notice of a patron's habitual addiction to alcohol before civil liability for serving alcohol would attach.

The holding in Ellis is grounded in reading F.S. §768.125 in pari materia with the criminal statute §562.50 which states:

> **562.50 Habitual drunkards; furnishing intoxicants to, after notice.**--Any person who shall sell, give away, dispose or, 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 misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083

The statutes, even though they both deal with habitual addicts, should not be read in pari materia because they are diverse in scope, aim and purpose. Singleton v. Larson, 46 So.2d 456 (Fla. 1950); J.H. Pritchard v. Jax Liquors, Inc., 499 So.2d 926, 929 (Fla. 1st DCA 1986).

The statutes, like the areas of law in which they are found, have different purposes and are for the protection of different classes of people. F.S. §562.50 is a criminal statute established in 1935 on the heels of the end of prohibition and was designed to punish vendors for serving alcohol to habitual addicts after receiving written notice of the addiction from a family member. It is designed for the protection of habitual drunkards and their families. J.H. Pritchard v. Jax Liquors, Inc., 499 So.2d 926, 929 (Fla. 1st DCA 1986)

On the other hand, F.S. §768.125 is a civil statute passed 45 years later in 1980 designed to protect not only the habitual

alcoholic from himself, but also to protect third parties injured as a result of the effects of alcohol served by a business establishment. Pritchard, supra, at 929. It was enacted in the midst of a period of growing awareness and concern with the harm inflicted by intoxicated persons, particularly when they attempt to operate automobiles on a public highway. Id.

Although it appears the legislature may have obtained the "habitually addicted" language of F.S. §768.125 from F.S. §562.50 it specifically did not also utilize the provision concerning written notice. Even when a statute is modeled after another statute, a court should hestitate to incorporate the provisions of one into the other. Pritchard, supra, 929.

The Ellis court attempted to seek support for its holding by analyzing legislative intent. To do so properly, though, one must consider a number of factors including the act as a whole, the evil to be corrected, the language of the act, history of its enactment, and the state of the law already in existence bearing on the subject. State v. Webb, 398 So.2d 820,824 (Fla. 1981) Taking these elements into account, the only reading which would give voice to F.S. §768.125 is that written notice is not a requirement to showing a vendor knowingly served someone habitually addicted to alcohol.

Further, when the language of the statute is plain, clear and free of ambiguity, the court is obligated to follow the plain meaning of the statute. Citizens v. Public Service Commission,

425 So.2d 534 (Fla. 1982); Carson v. Miller, 370 So.2d 10 (Fla. 1979) The legislative intent is clear from the content of the statute alone and therefore the court's function is to interpret the act so as to effectuate that intent if it can do so by application of accepted rules of statutory construction. Armstrong v. City of Edgwater, 157 So.2d 422 (Fla. 1963)

Two of the most fundamental rules of statutory construction are that (1) the courts should construe a statute so that the plain intent of the legislature would be given effect and (2) the courts should not construe a statute in such a manner as to reach an absurd conclusion if any other construction is possible. State Department of Public Welfare, et al. v. Bland, 66 So.2d 59 (Fla. 1953)

The law clearly requires that the legislative intent be determined primarily from the language of the statute because a statute is to be taken, construed and applied in the form enacted. The reason for this is that the legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976)

Had the legislature intended the statute to import a more specific and definite meaning, such as requiring written notice, it could easily have chosen words to express any limitation it wished to impose. American Bankers Life Assur. Co. of Fla. v. Williams, 212 So.2d 777,778 (Fla. 1st DCA 1968)

F.S. §768.125 is not ambigious or unclear on its face. Moreover, if there is any uncertainty because of the two statutes the uncertainty should be resolved by an interpretation that best accords with the public benefits. Devin v. City of Hollywood, 351 So.2d 1022,1023 (Fla. 4th DCA 1976) The question then is, what evil was §768.125 designed to correct? If written notification as stated in F.S. §562.50 is the basis for liability under F.S.§768.125 the public benefit would be nil because of the severe restriction on applicability. For example, from whom is the written notice to come? Under the doctrine of expressio unius est exclusio alterius, only those people enumerated in F.S. §562.50 can give the written notice (i.e. spouse, parents, siblings, children or nearest relative). By mentioning the persons who may give written notice, it implies the exclusion of anyone else giving notice. Hoag had no spouse nor is there any record evidence to indicate he had any relative who would have provided the written notice. Therefore, to adopt Peoples' and the Second District Court's position, establishments which serve customers such as Hoag could do so with impunity and without fear of reprisal since there is no one qualified to give the written notice.

Furthermore, where is notice to be sent? Even the Ellis court at 1215 realized the delivery of a written notice to a single establishment will place little impediment in the destructive path of a drunkard since he would only go to a

different bar. To have any effect then, written notice must be sent to each and every bar, lounge, tavern, restaurant, liquor store, convenience store, gas station and supermarket in the state which serves or sells alcoholic beverages. Surely such as absurd result should be avoided. State v. Webb, 398 So.2d 820 (Fla.1981)

As the Fifth District astutely recognized in Sabo, supra, at 268, an interpretation of §768.125 requiring direct evidence of knowledge would lead to so restricted an application as to make that portion of §768.125 dealing with liability for adult customers meaningless. The only interpretation which would give §768.125 a purpose is the one which does not require written notice or direct evidence of knowledge.

Another necessary ingredient in analyzing legislative intent is examining the law already in existence. Prior to the enactment of §768.125 there were two criminal laws in effect dealing with sale of alcohol: §562.11 prohibiting sales of alcohol to minors and §562.50 prohibiting sale to those habitually addicted to alcohol after first receiving written notice of the addiction from a family member. Injured third parties already could bring a civil cause of action for negligence per se upon violation of §562.11 for selling alcohol to minors even though the criminal statute did not address third parties. Migliore v. Crown Liquors, 448 So.2d 978 (Fla.1984) Therefore, F.S. §768.125 was an acknowledgement of the expanded

liability of vendors to injured third parties as well as a limitation on any further expansion.

The Ellis court placed great weight on the history of the enactment, particularly the comments of the House. Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209,1213,1214 (Fla.2d DCA 1990) Such reliance is dubious since there is no such thing as a collective purpose underlining a particular statutory enactment because different legislatures may have different purposes in mind when they vote. Radin, Statutory Interpretation, 43 Harv.L.Rev., 863, 870 (1930) As the United States Supreme Court, speaking through Justice Peckham, noted:

> [I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those that did not speak may not have agreed with those that did; and those who spoke might differ from each other...United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897)

Regardless, the Second District Court in Ellis at 1214 pointed to the comments of Rep. Gustafson during the House debate as lending support to its position that written notice was required under §768.125. To the contrary, the most telling comment of Rep. Gustafson is that the statute, as passed, "provides that if you knowlingly serve a person who is habitually addicted to alcoholic beverages then you will be responsible." Ellis, supra at 1214.

Another reason the two statutes should not be read in pari materia is because to do so would emasculate §768.125 and subvert any logical legislative intent. Construction of a statute which would lead to an absurd result or would render a statute purposeless should be avoided. State v. Webb, 398 So.2d. 820,824 (Fla. 1981); City of St. Petersburg v. Siebold, 48 So.2d 291,294 (Fla. 1950) Stated another way, it should never be presumed that the legislature intended to enact purposeless, and therefore useless, legislation. Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962)

The ultimate absurdity of Peoples' argument can be seen in a situation where an establishment has knowledge of a customer's habitual addiction through experience or verbal notice but has never received written notice. Assume arguendo, that Peoples in fact had constructive knowledge of Hoag's addiction. Without written notice there would never be liability. Peoples could knowingly continue to serve Hoag and others habitually addicted to alcohol with impunity as long as it never received the magic piece of paper which would constitute written notice. This cannot have been the intent of the legislature.

For the foregoing reasons, it is obvious the First and Fifth District Courts reached the only conclusion that accords F.S. §768.125 any effect, i.e., F.S. §768.125 and §562.50 should not be read together such that written notice is required before liabilty will attach under §768.125.

II. THE FIFTH DISTRICT COURT CORRECTLY HELD THERE WAS SUFFICIENT EVIDENCE TO CREATE A JURY QUESTION PRECLUDING ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PEOPLES.

The Fifth District's holding that material issues of fact precluded entry of summary judgment in favor of Peoples was imminently correct. The court accurately concluded there was both sufficient evidence adduced to permit a jury to conclude Hoag was habitually addicted to alcohol and sufficient circumstantial evidence to permit a jury to find Peoples' employees knew of the addiction based on his repeated behavior and appearance.

To support a summary judgment there must be no disputed issue of material fact and it must be shown that no reasonable man, in the exercise of fair and impartial judgment, could find negligence from the facts. Stace v. Watson, 316 F.2d 715 (5th Cir. 1963 interpreting Florida law.) Given the wealth of information on the serving practices of Peoples, a reasonable man indeed could find negligence on the part of the bar.

Peoples in its argument at Point II misapprehended the standard for review of a summary judgment hearing in contending the Fifth District Court violated the rule against pyramiding inferences. The cases cited by Peoples are inapposite. The case sub judice concerns a summary judgment but Voelker v. Combined Insurance Co. of America, 73 So.2d 403, 408 (Fla. 1954) dealt with whether circumstantial evidence in a trial justified a jury verdict. Moreover, the Voelker court recognized the validity of

circumstantial evidence in civil cases and stated at 406, "if the circumstances established by the evidence be susceptible of a reasonable inference or inferences which would authorize recovery and are also capable of an equally reasonable inference, or inferences, contra, a jury question is presented." (Emphasis added) Likewise, Fideli v. Colson, 165 So.2d 795 (Fla. 3d DCA 1964) is easily distinguished because it turned on a single issue of whether a comment was overheard but in the case at bar, there are multidudenous facts which taken as a whole clearly present a jury question.

Peoples contends Sabo improperly stacked evidence to lead to the conclusion Peoples served Hoag knowing he was habitually addicted to alcohol. Peoples' argument in this regard is actually an improper attempt to weigh the evidence rather than viewing the evidence in the light most favorable to Sabo. Florida follows the "slightest doubt" rule in determining the propriety of a summary judgment. Connell v. Sledge, 306 So.2d 194 (Fla. 1st DCA 1975), cert. dis., 336 So.2d 105 (Fla. 1976) That is, if the pleadings, depositions, answers to interrogatories, affidavits or other evidence in the file raise even the slightest doubt as to any issue of material fact, than a summary judgment may not be entered. Id.

Sabo correctly relied on the totality of the circumstances to show there were material questions of fact which should be decided by a jury thus precluding summary judgment. No

reasonable review of the record could lead to the conclusion there was no version of the facts upon which a jury could find in Sabo's favor.

For example, Hoag, in an admission against his own self interest, stated he was habitually addicted to alcohol. (R. 182) Hoag visited Peoples an average of twice a week for the seven months immediatly before the accident. (R. 175) For months prior to that time, he warmed a bar stool there every Friday night. (R. 175) Every time he went to Peoples he got drunk (R. 143,144 & 179, 182)

He got to know the Peoples' evening bartenders well. (R. 177) They frequently talked to him at the bar and started pouring his favorite drink, a White Russian, as soon as he came through the door. (R. 177) Typically Hoag would drink a double every half hour. (R. 39) These drinks were "free-poured" meaning the bartenders did not bother to measure the alcohol content. (R. 181) Morever, the bartenders continued to serve Hoag double White Russians even though Peoples' "Happy Hour" policy did not include such specialty drinks (R. 178,179) and in spite of the manager having instructed them not to do so. (R. 145, 146 & 188)

Peoples' bartender, Diane Ringlund, who served him the ill-fated night, had seen Hoag intoxicated on previous occasions. (R.40) She had seen him drink as many as fifteen drinks at one sitting. (R.43) Upon learning of the accident she was surprised

one had happened then because she would have picked "a million other nights" when an accident could have occurred. (R.53,54)

Peoples' contention that since Hoag did not let his fondness for alcohol interfere with his employment he was not habitually addicted to alcohol is specious. About 80% of all alcholics (who undoubtedly are habitually addicted to alcohol) are employable and often have exceptional skills. 1 Am.Jur. POF, Alcoholism, §15, p.583,583.

Undoubtedly a reasonable man could view the above facts and those previosly listed in the Statement of Facts and logically conclude Peoples served Hoag knowing he was habitually addicted to alcohol.

In conclusion, to prevail in a summary judgment Peoples must have shouldered its burden of showing the non-existence of a material fact so conclusively as to overcome all possible inferences which must have been drawn in Sabo's favor. Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Wills v. Sears, Roebuck & Company, 351 So.2d 29 (Fla. 1977) The Fifth District Court properly determined the burden was not met and correctly reversed the summary judgment for Peoples.

CONCLUSION

The opinion of the Fifth District in the instant case should be affirmed and the opinion of the Second District in Ellis should be disapproved. There is no reason to read F.S. §768.125 and §562.50 in pari materia to require written notice before a vendor faces civil liability for knowingly serving one habitually addicted to alcoholic beverages. To so read the statutes together eviscerates §768.125 and renders it so limited as to be purposeless.

Circumstantial evidence is sufficient to impute knowledge of age and likewise should be sufficient to impart knowledge an adult is habitually addicted. The record below is more than sufficient to create a question of fact regarding Peoples' knowledge of Hoag's addiction such as to preclude summary judgment.

Wherefore it is requested that the summary judgment in favor of Peoples be REVERSED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 10 day of December, 1990 to John Upchurch, Esquire, P.O. Box 191, Daytona Beach, FL 32015; Robert J. Jack, Esquire, P.O. Box 531086, Orlando, FL 32853; Daniel Lee Hoag, No. 104692, Baker Correctional Institute, P.O. Box 500, Oulstee, FL 32072 and to Marguerite H. Davis, Esquire, 215 S. Monroe Street, Ste. 400, Tallahassee, FL 32301.

Ava Tunstall

AVA F. TUNSTALL, ESQUIRE
WILLIAM E. LAWTON, ESQUIRE
Dean, Ringers, Morgan & Lawton
P.O. Box 2928
Orlando, FL 32802
(407) 422-4310
Attorneys for Appellant