BEFORE THE SUPREME COURT OF FLORIDA

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PEOPLE'S RESTAURANT, INC., etc., et al.,

Petitioners,

v. CASE NO: 76,811

MARY SABO,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER, PEOPLE'S RESTAURANT, INC.

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PRELIMINARY STATEMENT

The petitioner, PEOPLE'S RESTAURANT, INC., shall be referred to by proper name or as the "Petitioner." The respondent, MARY SABO, will be referred to by proper name or as the "Respondent." References to the record will be indicated as (R.____).

STATEMENT OF THE CASE

This case was certified by the Fifth District Court of Appeal as expressly and directly conflicting with the decision of the Second District in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990). Both courts interpreted Section 768.125, Florida Statutes (1983), as to the knowledge required before commercial providers of liquor may be subjected to civil liability for a patron's self-inflicted injuries or injuries to others caused by the patron's drunken condition. The Second District in Ellis held that the statute required the vendor to be notified in writing of an habitual drunkard's addiction. The Fifth District in the instant case held that the knowledge required by the statute could be proved by circumstantial evidence.

This case was appealed to the Fifth District by Respondent. (R.291) The Respondent had filed an Amended Complaint against Petitioner, alleging that Daniel Lee Hoag was an habitual drunkard, that Petitioner served alcoholic beverages to Hoag knowing that he was an habitual drunkard, that Hoag became intoxicated, and that Respondent suffered damages as a result of Hoag's intoxicated condition. (R.104-23) Respondent was a passenger in a vehicle involved in an accident with a vehicle operated by Hoag on November 13, 1983. (R.109)

Petitioner moved for summary judgment in its favor. (R.231-33) Petitioner argued there were no disputed facts relating to whether or not People's Restaurant or any of its employees had knowledge that Daniel Hoag was habitually addicted to alcohol at the time of this incident. (R.4) Conceding that knowledge of habitual addiction was the primary issue in the case and that knowledge of intoxication was not an element for which a liquor vendor could be held civilly liable for damages under Section 768.125, Respondent argued that knowledge of Hoag's alleged habitual drunkenness could be inferred from circumstantial evidence. (R.14-15; 17)

Respondent argued that the following facts constituted sufficient evidence to create a jury issue as to whether People's had knowledge of Hoag's alleged addiction:

1. Attendance at Petitioner's bar a minimum of twice a week;

2. The number of drinks, allegedly doubles, Hoag consumed;

3. Hoag's obvious intoxication at the bar on at least two prior occasions;

4. Common knowledge that persons addicted to alcohol can consume alcohol at a higher rate and still function; and

5. Hoag's consumption of fifteen drinks at one prior sitting when the bartender did not feel he was intoxicated. (R.21-22) Respondent argued that the question of habitual

addiction would arise with anyone who drank to excess and to the point of intoxication. (R.23)

The trial court entered summary judgment in favor of Petitioner. (R.290) Finding material issues of fact as to whether Petitioner knowingly served Hoag sufficient alcoholic drinks to render him intoxicated, with the knowledge that Hoag was habitually addicted to the use of alcoholic beverages, the Fifth District reversed the summary judgment. On September 13, 1990, the district court granted Petitioner's motion for certification to this court. Petitioner filed its Notice to Invoke Discretionary Jurisdiction on October 12, 1990.

STATEMENT OF FACTS

Daniel Lee Hoag had been going to People's Restaurant for a year and a half to two years prior to November 4, 1983. (R.140) He went to People's no less than thirty times and probably more prior to that date. (R.140, 178) He testified he went there two or three times a week in the six or seven months immediately prior to the accident. (R.141, 217-18)

Hoag always went to the bar with the intention of getting "buzzed up." (R.179) He usually accomplished his mission. (R.179) In his opinion he probably got drunk each time he went to People's. (R.153, 179-80)

Hoag got to know the two female bartenders at People's. (R.141, 176) He always sat at the bar and talked to them. (R.177) The bartenders knew him well as a customer but did not know him personally. (R.177-78) The bartenders knew Hoag well enough to start fixing his drink when he came in. (R.141, 177)

As Hoag sat at the bar, the bartender would have a good view of his movements. (R.206) The bartender would stand within four feet of him and would be close enough to see whether his eyes were glassy or bloodshot. (R.208) The bartender would also be in a position to judge his speech. (R.208) When Hoag left the bar to go to the lavatory, the

bartender would be in a position to observe him as he walked. (R.208-09) He had no knowledge of ever slipping or falling over tables or chairs while at People's. (R.209)

Hoag always tried to make it for happy hour. (R.142, 179) Happy hour at People's was from 4:00 to 7:00 P.M. (R.262) During happy hour the bar would serve double the customary amount of liquor in a drink. (R.262)

In Hoag's opinion, the employees at People's should have known when he reached the point of being drunk. (R.143-44) After he had a few drinks at the bar, he would become talkative and begin laughing and giggling. (R.183) He would become an authority on any subject. (R.183)

Hoag did not know whether he ever had any difficulty walking at People's. (R.198) He did not remember ever slurring his words. (R.201) He did not recall the bartender ever telling him she could not understand him. (R.202) In the six months before the accident, he was always able to physically walk out of People's Restaurant. (R.215)

Hoag had no recollection that People's had ever cut him off when he reached the point of being intoxicated. (R.144-45, 180) If he had been told to leave, there was always another bar that would serve him. (R.222) He was rarely refused service at any place where he drank. (R.220-22)

Hoag's favorite drink was a white Russian. (R.139) He testified that Diane Ringlund, one of the bartenders at People's, told him sometime prior to November 4, 1983, that the management would no longer give him two-for-one white Russians during happy hour because of the expense involved. (R.146-47) A White Russian contains two different types of liquor. (R.142-43) Diane also told him not to worry because she would "take care of" Hoag. (R.147, 189) Hoag watched her free pour his drinks and felt he was getting his money's worth. (R.147)

Diane Ringlund worked as a bartender at People's from 1981 or 1982 until July, 1984. (R.33) Her supervisor testified that Ringlund was the single best bartender who ever worked for him. (R.259) Other bartenders were nowhere near as responsible as Ringlund in making sure that her customers were not intoxicated when she knew they would be driving after leaving the bar. (R.258)

Ringlund knew Dan Hoag the entire time she worked at People's. (R.36) He was one of her regular customers. (R.36) Hoag initially came in every Friday night. (R.36-38) For around the first four months of 1983, Hoag also came in one or two other nights a week because his friend Mark was dating one of the cocktail waitresses. (R.37) After the first four months, Mark moved to Michigan and Hoag came in less frequently. (R.38) His visits tapered off to once a month. (R.38)

Ringlund did not know if Hoag drank anywhere else but People's. (R.11) When he came to People's, he always drank white Russians. (R.39) A white Russian as mixed by Ringlund contained one and a half ounces of liquor, consisting of an ounce of vodka and half an ounce of Kahlua, and milk. (R.39) If Hoag was at People's for two hours, he would consume maybe four drinks. (R.39) It would take him about a half hour to finish a drink because he talked a lot. (R.39)

Ringlund saw Hoag intoxicated only two times. (R.40) Both times his friend Mark tried to get Hoag to drink by chiding him that he did not drink very much. (R.40) On both occasions when Ringlund felt Hoag was intoxicated, she refused to serve him and made sure that he had a ride home. (R.40)

On one occasion when he became intoxicated, Ringlund knew Hoag had been drinking before he and Mark arrived. (R.41) She did not let him have very much since it seemed like he had already had enough. (R.41) Hoag and Mark became upset because Ringlund told them she did not want to serve them anymore. (R.41-42)

On the other occasion when Ringlund felt Hoag was intoxicated, he had come from work. She knew that most construction workers sometimes drank beer at work. (R.42) Although Ringlund did not know whether Hoag had already been drinking, she felt that he had not been drinking that night before he came to People's. (R.42)

Hoag became drunk after about six or seven drinks that night. (R.43) Ringlund had seen him drink more than that before. (R.43) The most she had ever seen him drink was maybe fifteen drinks. (R.43) Hoag could always handle his liquor well. (R.43)

Ringlund worked as a bartender for ten years off and on. (R.43) After she came to know her customers, she could tell whether they were handling their liquor or not. (R.43) She did not consider Hoag to be a regular user of alcohol. (R.44)

The only time Ringlund ever saw Hoag drink a lot was when he was with Mark. (R.44) After Mark left Florida, Hoag cut back on his drinking. (R.44) He would have only one or two drinks. (R.44) Ringlund did not believe he was an alcoholic. (R.44)

On the day of the accident, Hoag followed his normal routine. (R.148, 186) He testified he had at least twelve beers and probably up to a case of beer during the day. (R.155-56, 186) Since it was payday, he left thirty or forty minutes early to go home and shower and get to the bank to cash his check. (R.148-49, 186) He consumed more alcohol, probably two or three beers, while he was getting ready and driving to the bank. (R.156, 187)

After cashing his check, Hoag went to People's Restaurant. (R.150) He arrived at People's at 5:00 or shortly thereafter. (R.46, 150, 188) The bar tab indicated he drank five white

Russians at People's. (R.(82), 150, 156, 190) Although he felt he had consumed more than five drinks, he had no knowledge of the exact number of drinks he had. (R.150, 212)

Pam Peeper met Hoag at the bar around 7:00 P.M. on November 4, 1983. (R.72) Hoag and Peeper had been dating for five or six years at the time. (R.199) When Peeper arrived, she could not tell whether Hoag was drunk or sober. (R.72) She stayed with him thirty minutes at the most before leaving. (R.73)

Peeper knew that Hoag was drinking that night. (R.73) Although she really did not notice how much he drank, she believed he probably had two white Russians. (R.74) She did not remember him ordering as she was too much involved in an argument they started almost immediately after she arrived. (R.73, 76)

Peeper testified that it was difficult for her to know if Hoag had had too much to drink. (R.77) No matter how much he drank, he never slurred his words or walked funny. (R.78) Even knowing him as she did, Peeper could not always tell if Hoag was drunk or had too much to drink. (R.78)

Peeper could not say whether Hoag had ever become intoxicated at People's. (R.80) She and Hoag went to places other than People's. (R.80) Although Peeper had seen Hoag intoxicated before, she did not know whether it was at People's. (R.80) According to Peeper, Hoag was a very moderate drinker. (R.80)

When they left the bar on the evening of November 4, 1983, Peeper thought that Hoag had had too much to drink. (R.85) She could not say that was true from the time she had arrived at People's. (R.85) It was dark, and she could not see the expressions on his face. (R.85)

Peeper watched Hoag back his truck out of the parking space, and he did not appear to have any difficulty. (R.94-95) She saw him on the road and did not notice anything out of the ordinary. (R.95) He did not appear to her to be drunk that day. (R.7)

Ringlund came to work at around 4:00 on the day of the accident. (R.46) That was the first time she had seen Hoag for a month or longer. (R.47) To her knowledge and in her opinion, he had not been drinking earlier before he came to People's. (R.47-48)

Ringlund talked with Hoag for a while. (R.47) She served him his usual drink. (R.48) He left around 7:00 with his girlfriend. (R.49)

Hoag looked fine to Ringlund when he left. (R.49) Although the bartenders at People's had the right to shut off customers who had been drinking to the point where their sobriety was questionable, it did not occur to Ringlund to refuse to serve Hoag that night. (R.50) He was eating hors d'oeuvres and did not seem to be a problem. (R.50-51) She felt he was 100 percent fine when he left the bar. (R.52)

When she learned about the accident, she was amazed because she would have picked "a million other nights" for Hoag to have an accident. (R.53) She honestly felt he was not drunk. (R.54)

When his deposition was taken on January 18, 1988, Hoag testified there was no doubt that he was habitually addicted to the use of alcohol in 1983. (R.182) That opinion was based on the fact that he drank a case of beer and a fifth of liquor a day and had been drinking everyday for twenty years. (R.213) He did not consider himself to be an alcoholic before joining Alcoholics Anonymous at Baker Correctional Institute in November, 1986. (R.214) He just felt that drinking was his way of life. (R.214) He was never diagnosed as an alcoholic. (R.205)

Hoag did not know whether he would have been able to voluntarily resist consuming alcohol in November, 1983. (R.225) In the previous ten years, he never wanted to stop drinking. (R.225) Since he never wanted to stop, he never made an effort to stop. (R.226)

Hoag's drinking did not interfere with his employment as a drywall mechanic. His job included framing, hanging, finishing, and spraying drywall and some interior construction. (R.164) He worked six days a week, nine hours every day. (R.134) He arose each day between 5:00 and 5:15 A.M. and was always on the job by 6:20 A.M. (R.135, 167) He usually worked until 4:30 or 5:00 P.M., except on Fridays when

he would leave early to get to the bank before it closed. (R.135, 167)

Although he drank at work, he did his job as well as anyone. (R.173) He did not slur his words or have difficulty walking at work even after drinking twelve to eighteen beers. (R.204) In the six months prior to the accident, none of his co-workers or supervisors ever commented that he appeared to be intoxicated and a danger on the job site. (R.206)

Hoag described himself as a loner and a quiet person except when he was drinking hard liquor. (R.183) He could drink beer all day long and handle it. (R.183, 185) Although another person would probably know he had been drinking, that person would not be able to tell if he had had two or twenty drinks. (R.185) Hoag never took the chance of getting cut off by telling the bartenders or the manager at People's that he was feeling a little buzz or a little drunk. (R.184) He would stay there until he was drunk and then leave on his own. (R.184)

Hoag did not ask the employees at People's if they knew he was an alcoholic. (R.182) He never told anyone at People's Restaurant that he was an alcoholic. (R.204) Neither Hoag nor any member of his family ever put anything in writing requesting People's not to serve him alcoholic beverages. (R.212-13) To his knowledge, Pam Peeper never requested People's, either orally or in writing, not to serve him. (R.213)

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

SUMMARY OF ARGUMENT

I.

THE FIFTH DISTRICT ERRED IN INTERPRETING SECTION 768.125, FLORIDA STATUTES, AS IMPOSING CIVIL LIABILITY FOR DAMAGES ON A VENDOR OF ALCOHOLIC BEVERAGES WHEN THERE IS ONLY CIRCUMSTANTIAL EVIDENCE THAT THE VENDOR KNOWINGLY SERVED ALCOHOL TO A PERSON HABITUALLY ADDICTED TO ALCOHOL.

The issue in this case is the type of proof required by Section 768.125, Florida Statutes, to establish that a vendor "knowingly serves a person habitually addicted to the use of . . . alcoholic beverages." Any effort to construe the statute must be undertaken in light of the legislative purpose behind the statute. This court in Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984), held that by enacting Section 768.125, the legislature intended to limit the preexisting liability of alcoholic beverage vendors for damages caused by intoxicated persons.

In a well-reasoned opinion, the Second District in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990), concluded that the statute required written notice to a vendor before the vendor could be held liable for damages caused by the intoxication of a person habitually addicted to alcohol. The Fifth District reached a contrary result in the instant case. The Court held that the language in Section 768.125 did

not warrant an interpretation requiring direct evidence that bar employees knew that an adult was habitually addicted in order to hold the bar liable for damages inflicted by the intoxicated adult.

The Fifth District failed to recognize that, prior to adoption of Section 768.125, there was no common law liability of a liquor vendor for damages caused by an intoxicated adult to whom the vendor had furnished alcohol. The liability which had been recognized by Florida courts was a cause of action for negligence per se based on violation of the existing criminal statutes relating to the furnishing of alcoholic beverages. Since a vendor could be held responsible for civil damages only to persons injured by the unlawful dispensation of alcoholic beverages in violation of statute, it follows that a person injured by an adult who was habitually addicted to alcohol had no cause of action against the vendor who supplied the alcohol unless that person was one of the classes of people enumerated in Section 562.50, which imposed criminal penalties against a vendor who provided alcoholic beverages to persons habitually addicted to alcohol. Even as to the persons Section 562.50 was designed to protect, a prerequisite for their recovery of damages against the vendor was written notice by them to the vendor of the habitual drunkard's addiction.

The Fifth District failed to ascribe to the words of the statute their ordinary meaning. The word "knowingly" has been

defined as "with knowledge; consciously; intelligently; willfully; intentionally." Criminal statutes containing the word have been construed as requiring both intent and knowledge on the part of the accused to satisfy the legislative intent to limit the crime to those persons who consciously violate the law.

Rather than applying the plain meaning of the words chosen by the legislature, the Fifth District relied on cases holding that constructive notice is sufficient to hold a vendor liable for damages caused by furnishing alcohol to minors. The Fifth District ignored the fact that the legislature chose different words relating to liability for the sale of liquor to minors. The Court also ignored the obvious reasons why constructive knowledge is sufficient when service to minors is concerned.

A person's age is easily determined. A vendor cannot as easily determine that a customer is or is not habitually addicted to alcohol. As the Fifth District itself recognized, alcoholics tend to deny they have a drinking problem. Despite the fact that the alcoholic himself does not or will not admit that he is "habitually addicted" to alcohol, the Fifth District has placed the responsibility on vendors to make that determination or face the possibility of being held civilly liable for damages caused by the alcoholic's negligence.

Although the legislature did not define the term "habitually addicted," the dictionary definition of addiction

is "compulsive physiological need for a habit-forming drug." By using the word "addicted," the legislature clearly intended that liquor vendors be subjected to potential civil liability only for serving persons with a physiological need for alcohol. Use of the word "addiction" precluded any other interpretation of Section 768.125.

The Fifth District erred in its interpretation of Section 768.125. The Second District correctly held in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990), that liability can be imposed on a liquor vendor only if the vendor serves alcoholic beverages to a person habitually addicted to alcohol after receiving written notice of the customer's addiction. The opinion of the Fifth District in the instant case should be quashed, and the reasoning of the Second District adopted. The summary judgment entered in favor of the Petitioner in the instant case should be affirmed.

II.

THE FIFTH DISTRICT ERRED IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO CREATE A JURY ISSUE PRECLUDING ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PETITIONER.

The Fifth District's holding that material issues of fact precluded entry of summary judgment in favor of People's was erroneous. The reasoning of the Fifth District violates the rule against founding an inference upon an inference where the

initial inference is not established to the exclusion of any other reasonable theory. There was no competent evidence to justify an inference to the exclusion of all other inferences that Daniel Hoag had any physiological dependence on alcohol.

Because an inference that Hoag was habitually addicted to alcohol was not the only reasonable inference which could be established by the evidence, the Respondent could not rely on circumstantial evidence to support a further inference that the employees at People's knew or even had constructive knowledge of Hoag's addiction. The undisputed evidence established no basis from which a jury could conclude that People's had actual knowledge that Hoag was habitually addicted.

There being no issue of any material fact, the trial court correctly entered summary judgment in favor of People's. The Fifth District erred in reversing the summary judgment. The decision of the Fifth District should be quashed.

ARGUMENT

I.

THE FIFTH DISTRICT ERRED IN INTERPRETING SECTION 768.125, FLORIDA STATUTES, AS IMPOSING CIVIL LIABILITY FOR DAMAGES ON A VENDOR OF ALCOHOLIC BEVERAGES WHEN THERE IS ONLY CIRCUMSTANTIAL EVIDENCE THAT THE VENDOR KNOWINGLY SERVED ALCOHOL TO A PERSON HABITUALLY ADDICTED TO ALCOHOL.

The issue in this case is the type of proof required by Section 768.125, Florida Statutes, to establish that a vendor "knowingly serves a person habitually addicted to the use of . . . alcoholic beverages." Section 768.125 provides as follows:

> 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 damages caused by or resulting from the intoxication of such minor or person.

Any effort to construe the statute must be undertaken in light of the legislative purpose behind the statute. This court in Migliore v. Crown Liquors of Broward, Inc., 448 So.2d 978 (Fla. 1984), held that by enacting Section 768.125, the legislature intended to limit the preexisting liability of alcoholic beverage vendors for damages caused by intoxicated persons.

After reviewing the legislative history of Section 768.125 in detail, the Second District in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990), concluded that the statute required written notice to a vendor before the vendor could be held liable for damages caused by the intoxication of a person habitually addicted to alcohol. The Ellis court read Section 768.125 in pari materia with Section 562.50 because both statutes dealt with the same subject matter, unlawful dispensing of alcohol and the consequences thereof. Section 562.50 is a criminal statute, which provides as follows:

> 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 misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

The Ellis court's determination that Sections 562.50 and 768.125 were closely interrelated was supported by the fact that when Section 768.125 was originally enacted as a part of Chapter 80-37, Laws of Florida, it was placed directly after Section 562.50 and numbered as Section 562.51. After it was

enacted, the statute was transferred by the Joint Legislative Management Committee from the Beverage Law Enforcement chapter to the Negligence chapter. 561 So.2d at 1213.

The Ellis court also reviewed the House debate in an effort to determine legislative intent. Noting that the original version of HB 1561 required a conviction under Section 562.50 before an alcoholic beverage vendor could be held civilly liable for injury or damage resulting from intoxication of an habitual drunkard, the court concluded that the legislature intended to eliminate the requirement of a conviction while retaining the existing requisite of written notice. Id. at 1215. The limitation of liability in Section 768.125 could not broaden the existing civil liability which might arise for violating Section 562.50. As the Ellis court observed, construing Section 768.125 as permitting anything less than written notice to impose liability on a liquor vendor would have the anomalous effect of actually expanding a vendor's liability since no such liability existed before the limiting statute was enacted. Id.

The Fifth District reached a contrary result in the instant case. Adopting Pritchard v. Jax Liquors, Inc., 499 So.2d 926 (Fla. 1st DCA 1986), rev. denied 511 So.2d 298 (1987), the Fifth District held that the language in Section 768.125 did not warrant an interpretation requiring direct evidence that bar employees knew that an adult was habitually addicted in

order to hold the bar liable for damages inflicted by the intoxicated adult. The Pritchard court declined to read Sections 768.125 and 562.50 in pari materia but did so under an apparent misconception as to the legislative intent in enacting Section 768.125.

Despite the fact that this Court in Migliore had previously held that Section 768.125 limited the existing liability of liquor vendors, the Pritchard court determined that the statute created a new right in members of the general public. 499 So.2d at 929. The Pritchard opinion lacked the detailed analysis of legislative history provided by Ellis. That history establishes that the legislature intended that Sections 768.125 and 562.50 be read in pari materia.

Both the First District in Pritchard and the Fifth District in the instant case failed to recognize that, prior to adoption of Section 768.125, there was no common law liability of a liquor vendor for damages caused by an intoxicated adult to whom the vendor had furnished alcohol. The liability which had been recognized by Florida courts was a cause of action for negligence per se based on violation of the existing criminal statutes relating to the furnishing of alcoholic beverages.

In Davis v. Shiappacossee, 155 So.2d 365 (Fla. 1963), this Court recognized the general rule that, in the absence of statute, a seller of liquor is not responsible for injury to the person who drinks it. However, the claim for damages in

that case was allowable because it was based on the theory that the sale to a known minor was negligence per se inasmuch as it violated a state statute, Section 562.11. The Second District in Prevatt v. McClennan, 201 So.2d 781 (Fla. 2d DCA 1967), extended the cause of action to third parties injured by the unlawful sale of intoxicants to minors.

Since there was no common law cause of action against a liquor vendor and such a vendor could be held responsible for civil damages only to persons injured by the unlawful dispensation of alcoholic beverages in violation of statute, it follows that a person injured by an adult who was habitually addicted to alcohol had no cause of action against the vendor who supplied the alcohol unless that person was one of the classes of people enumerated in Section 562.50. The classes of people included the habitual drunkard's spouse, parents, siblings, children, or nearest relatives who were injured by the habitual drunkard's use of intoxicating drink. Even as to those persons, a prerequisite for their recovery of damages against the vendor was written notice by them to the vendor of the habitual drunkard's addiction.

Prior to the enactment of Section 768.125, no court had determined that any person injured by the intoxication of an habitual liquor addict had a cause of action for negligence per se against the vendor who supplied the addict with alcoholic drink. Clearly, the legislature did not intend for Section

768.125 to expand the potential liability of liquor vendors to third persons other than those enumerated in Section 562.50. Reading Section 768.125 in pari materia with Section 562.50 and in light of its legislative history compels the conclusion that the legislature did not intend to create any new liability by enacting Section 768.125. The Fifth District's opinion has the effect of creating a new liability to a person who was not a member of a class Section 562.50 was designed to protect.

Turning to the specific language of Section 768.125, the Fifth District failed to ascribe to those words their ordinary meaning. The word "knowingly" has been defined as "with knowledge; consciously; intelligently; willfully; intentionally." Black's Law Dictionary 784 (5th ed. 1979). Criminal statutes containing the word have been construed as requiring both intent and knowledge on the part of the accused. E.g., Kresbach v. State, 462 So.2d 62, 64 (Fla. 1st DCA 1984). Use of the word "knowingly" in a criminal statute indicates a legislative intent to limit the crime to those persons who consciously violate the law. State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982). For example, an intent and knowledge to commit trafficking in marijuana will not suffice to prove trafficking in cocaine where the statute requires that the offense be done "knowingly." Id.

The Respondent argued below that Florida courts have routinely held that the requirement of knowledge in criminal cases may be proved through circumstantial evidence from which a jury might properly infer that the accused had knowledge. The only case cited by Respondent in favor of that proposition was Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981). The crime involved in Wale was possession of marijuana, and the issue was whether there was sufficient evidence to create a jury question as to the accused's constructive possession of marijuana. Enumerating the basic elements for proof of guilt based on a constructive possession theory, the Fourth District noted that each of the elements, including knowledge that the contraband was within the presence of the accused and knowledge of the illicit nature of the contraband, could be proved by circumstantial evidence.

The same district court in State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982), held that additional proof was required in cases of alleged drug trafficking because of the addition of the word "knowingly" in the trafficking statutes. The court distinguished trafficking from cases of simple delivery or possession such as Wale. The possession statute had no requirement of a specific intent or guilty knowledge. The addition of the word "knowingly" to the trafficking statute required the State to prove intent and knowledge as elements of the crime.

The Respondent argued and the Fifth District held that circumstantial evidence of knowledge should suffice to establish liability of a vendor under Section 768.125 for service of intoxicants to habitual addicts. This reasoning relied on cases holding that constructive notice is sufficient to hold a vendor liable for damages caused by furnishing alcohol to minors. The Fifth District could conceive of no reason for treating the proof of knowledge required for sales of adults differently than for sales to minors.

The Fifth District ignored the obvious reasons why constructive knowledge is sufficient when service to minors is concerned. Primarily, a person's age is easily determined. If a bar customer appears to be younger than the legal drinking age, there is a reasonable basis to impute knowledge of the customer's age even if the vendor had no actual knowledge. Moreover, if a person is not obviously over the legal age for drinking alcohol, proof is readily available and easily obtainable in the form of a driver's license or other form of identification.

How is a vendor to make a similar determination that a customer is or is not habitually addicted to alcohol? Should a vendor require its regular patrons to provide medical certification that they are not alcoholics? Or, as suggested by Judge Cobb in his concurring opinion in the instant case, must a bar reject regular patrons altogether and/or frequently

change employees in order to escape the potential of civil liability? Surely, such a result was not intended by the legislature.

As the Fifth District itself recognized, alcoholics tend to deny they have a drinking problem. Despite the fact that the alcoholic himself does not or will not admit that he is "habitually addicted" to alcohol, the Fifth District has placed the responsibility on vendors to make that determination or face the possibility of being held civilly liable for damages caused by the alcoholic's negligence. As Judge Cobb noted in his concurring opinion, the vagueness resulting from the Fifth District's application of the statute in the instant case places the constitutionality of the statute at issue.

In the context in which the case arrived at the Fifth District, the question of the statute's constitutionality was not raised. The trial court had narrowly and literally applied the statute in entering summary judgment in favor of the Petitioner. It was only because of the Fifth District's construction of the statute that any issue of vagueness arose. Adoption of the well-reasoned logic of Ellis would remedy the vagueness problem.

If the legislature had intended constructive knowledge of habitual addiction to be excepted from the limitation of liability in Section 768.125, it could have so indicated by inserting the words "should have known" in the statute. It did

not. 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). Additionally, where a statute enumerates the things on which it is to operate, it should ordinarily be construed as excluding from its operation all those not expressly mentioned. Id.

Although the legislature did not define the term "habitually addicted," some guidance is provided by case law. For instance, in Todd v. Todd, 56 So.2d 441, 442 (Fla. 1951), this court defined "habitual intemperance" as

> ". . . the excessive use of intoxicating drinks. It is said to have been consummated when the will is dethroned by frequent indulgence and failure to control one's appetite for strong drink. It has also been applied to one whose habit of indulgence in strong drink is so fixed that he cannot resist getting drunk any time the temptation is offered. Inebriety must be frequent, excessive, and be the dominant passion. The habitual but moderate use of intoxicating liquors does not meet the test."

This definition is not conclusive because of the distinction in the plain meaning of the words "intemperance" and "addiction."

Intemperance has been defined as "lack of moderation." Webster's Ninth New Collegiate Dictionary 629 (1986). Addiction, on the other hand, is defined as "compulsive physiological need for a habit-forming drug." Id. at 55. By using the word "addicted," the legislature by the plain meaning

of the word clearly intended that liquor vendors be subjected to potential civil liability only for serving persons with a physiological need for alcohol. Use of the word "addiction" precluded any interpretation of Section 768.125 which would impose liability on liquor vendors for serving alcohol to persons who regularly drink to excess.

The Fifth District's interpretation of Section 768.125 would permit civil liability for damages to be imposed on a dispenser of alcoholic beverages when the vendor serves a customer who regularly drinks alcohol to excess but is not addicted to it. The Court assumed that proof of "habitual intemperance" would be similar to proof of "habitual addiction." This assumption was made without any reference to the plain meaning of the words and the distinction between the terms "intemperance" and "addiction."

The Fifth District's opinion as it currently exists expands vendor liability despite the fact that this Court has specifically and repeatedly emphasized the fact that Section 768.125 is to be read in a restrictive fashion. On numerous occasions this Court has held that Section 768.125 creates no new cause of action establishing civil liability of those who sell or furnish alcoholic beverages, but that it is actually a limitation on existing liability, a significant factor not lost upon the Second District in Ellis. See Dowell v. Gracewood Fruit Co., 559 So.2d 217, 218 (Fla. 1990) ("reaffirming our

earlier decisions which had held that the statute constituted a limitation on the already existing liability of vendors . . . ."") (emphasis added); Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987) ("it would . . . be anomalous and illogical to assume that a statute enacted to limit preexisting vendor liability would simultaneously create an entirely new and distinct cause of action against a social host . . . ."); Migliore v. Crown Liquors of Broward, 448 So.2d at 980 (Fla. 1984) ("we find that section 768.125 is a limitation on the liability of vendors of intoxicating beverages."). In light of the consistent restrictive approach taken by this Court, it is respectfully suggested that the Fifth District erred in its decision in the instant case.

The Fifth District erred in interpreting Section 768.125 as permitting a person not a member of a class enumerated in Section 562.50 to recover damages against a liquor vendor upon circumstantial evidence that the vendor knew the person who caused the accident was habitually addicted to alcohol and nevertheless served him intoxicating liquor. The Second District correctly held in Ellis v. N.G.N. of Tampa, Inc., 561 So.2d 1209 (Fla. 2d DCA 1990), that liability can be imposed on a liquor vendor only if the vendor serves alcoholic beverages to a person habitually addicted to alcohol after receiving written notice of the customer's addiction. The opinion of the Fifth District in the instant case should be quashed, and the

reasoning of the Second District adopted. The summary judgment entered in favor of the Petitioner in the instant case should be affirmed.

II.

THE FIFTH DISTRICT ERRED IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO CREATE A JURY ISSUE PRECLUDING ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PETITIONER.

The Fifth District's holding that material issues of fact precluded entry of summary judgment in favor of People's was erroneous. The court concluded there was sufficient evidence adduced to permit a jury to conclude that Hoag was habitually addicted to alcohol and sufficient circumstantial evidence to permit a jury to find that the employees of People's knew of Hoag's addiction. This reasoning of the Fifth District violates the rule against founding an inference upon an inference where the initial inference is not established to the exclusion of any other reasonable theory.

In Voelker v. Combined Insurance Co. of America, 73 So.2d 403 (Fla. 1954), this Court held that an inference could be founded on another inference only if the prior inference was proven under a test analogous to the criminal rule concerning circumstantial evidence. Unless the initial inference was established to the exclusion of any other reasonable theory, the evidence was not sufficient to justify submitting the case to the jury. Consequently, this Court affirmed a final judgment in favor of a defendant entered by the trial judge upon the defendant's motion for directed verdict notwithstanding the jury verdict in favor of the plaintiff

because the foundation inference had not been proven to the exclusion of all other reasonable theories.

Voelker involved a claim under a life insurance policy. The policy provided coverage for bodily injuries while actually driving or riding in an automobile when such injuries were the sole cause of loss of life by the insured. The policy excluded coverage for injuries for which there was no visible contusion or wound on the exterior of the body of the insured.

The physical facts in Voelker indicated that the insured's motor vehicle had indeed met with an accident. However, an inference that the insured received bodily injuries while actually driving or riding in the automobile was not the only reasonable inference which could be drawn from the fact of the accident. Such an inference was required to establish a predicate for the further inference that "bodily injuries" were the sole cause of loss of the insured's life.

Because there were no bruises or abrasions found on the insured's body, this court found it equally reasonable to assume that he received no bodily injuries in the accident. It was equally reasonable to infer that the insured exited his vehicle and then slipped or fell into the canal in which his body was found floating about eight feet in front of his car. If there was but one reasonable inference other than that the insured received bodily injuries in the accident, the jury would not have been justified in reaching the further inference

that the insured's internal bodily injuries were the sole cause of his death.

The rule against founding one inference upon another inference was applied under different circumstances in Fideli v. Colson, 165 So.2d 794 (Fla. 3d DCA 1964). In that case the trial court found that the driver of a motor vehicle was operating the vehicle without the owner's consent at the time of the accident. The trial court entered summary judgment for the owner of the automobile which allegedly caused the plaintiff's injury. The record showed that the driver sought and obtained permission to drive the car from her boyfriend, who was also a friend and companion of the owner.

The plaintiff in Fideli contended that the owner's consent should be inferred from the fact that the owner did not stop the driver from taking the car. The Third District rejected this argument because the inference of consent was dependent on another inference that the owner had overheard the driver's statement to the mutual friend and was aware that the car was being taken. The plaintiff's asserted position was prohibited by the rule that an inference may be founded upon another inference only when the basic inference was established to the exclusion of all reasonable inferences to the contrary. Since a jury in Fideli could have reasonably inferred that the owner had not overheard the driver's statement to the mutual friend

and was not aware the car was being taken, summary judgment in favor of the owner was affirmed.

In the instant case, there is no evidence to justify an inference to the exclusion of all other inferences that Daniel Hoag was habitually addicted to the use of alcoholic beverages. While there was ample evidence and People's does not dispute that Hoag was a regular user of alcohol, the evidence was certainly not susceptible of only one inference as to Hoag's addiction vel non. In fact, there was no competent evidence to justify an inference that Hoag was habitually addicted to alcohol.

There was absolutely no evidence below that Daniel Hoag had any physiological dependence on alcohol. Hoag's own after-the-fact testimony that he considered himself to have been an alcoholic and/or habitually addicted to alcohol at the time of the accident, is not competent evidence on this issue since the subject was not a proper one for lay opinion. Moreover, Hoag's opinion was based on the amount of liquor he consumed rather than his physiological dependence on it. Hoag's testimony suggested that he was in fact not physiologically dependent on alcohol.

Hoag did not allow his fondness for alcohol to interfere with his employment. He was a hard worker who usually arrived on the job site before his co-employees. He even worked on Saturdays and Sundays. Moreover, he apparently had the ability

and awareness to know when he had had too much to drink, as established by his testimony that he would leave the bar when he felt he had become drunk.

Because an inference that Hoag was habitually addicted to alcohol was not the only reasonable inference which could be established by the evidence, the Respondent could not rely on circumstantial evidence to support a further inference that the employees at People's knew or even had constructive knowledge of Hoag's addiction.

The undisputed evidence established no basis from which a jury could conclude that People's had actual knowledge that Hoag was habitually addicted. Pam Peeper, who probably knew Hoag better than any of the witnesses who testified, did not consider him to be an alcoholic. Diane Ringlund, a bartender with some ten years' experience and "the single best bartender" who had ever worked for her supervisor, did not consider Hoag to be an alcoholic or even a regular user of alcohol. Hoag himself did not consider that he was an alcoholic before he joined Alcoholics Anonymous some three years after the accident.

Hoag never told anyone at People's that he was an alcoholic. No member of his family ever notified People's that Hoag was an alcoholic. Pam Peeper never advised anyone at People's that Hoag was an alcoholic. There was absolutely no evidence that People's had any actual knowledge that Hoag was habitually addicted to liquor.

There being no issue of any material fact, the trial court correctly entered summary judgment in favor of People's. The Fifth District erred in reversing the summary judgment. The decision of the Fifth District should be quashed.

CONCLUSION

The opinion of the Fifth District in the instant case should be quashed, and the reasoning of the Second District in Ellis adopted and limited to cases where a person habitually addicted to alcohol or a member of any of the classes of persons enumerated in Section 562.50 suffer damages as the result of the knowing sale of alcohol to the habitual addict. The summary judgment entered in favor of the Petitioner in the instant case should be Affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 20th day of November 1990 to MARGUERITE H. DAVIS, ATTORNEY AT LAW, 215 S. Monroe Street, Suite 400, Tallahassee, FL 32301; JOHN UPCHURCH, ESQUIRE, Post Office Box 191, Daytona Beach, FL 32015; DANIEL LEE HOAG, No. 104692, Baker Correctional Institute, Post Office Box 500, Oulstee, FL 32072; and AVA F. TUNSTALL, ATTORNEY AT LAW, Dean, Ringers, Morgan & Lawton, Post Office Box 2928, Orlando, FL 32802.

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