BEFORE THE SUPREME COURT OF FLORIDA

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

Petitioners,

v. CASE NO: 76,811

MARY SABO,

Respondent.
_____/

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

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.

Prior to enactment of Section 768.125, Florida Statutes, there was no cause of action in Florida against a vendor of alcoholic beverages for damages caused by an intoxicated person unless the vendor served alcoholic beverages to that person in violation of Section 562.11 or Section 562.50, Florida Statutes. See Lonestar Florida, Inc. v. Cooper, 408 So. 2d 758 (Fla. 4th DCA 1982). Section 768.125 codified that existing law. Id. Section 562.11 prohibited the sale of alcohol to persons under twenty-one years of age. Section 562.50 provided a criminal penalty against a liquor vendor who served an intoxicating substance to a person habitually addicted to that substance, but only after the dispenser had been given written notice of the person's habitual addiction.

At the time Section 768.125 was enacted, civil liability could be imposed on a liquor vendor for serving alcohol to an habitual addict only if the requisites of Section 562.50 were met. Roberts v. Roman, 457 So. 2d 578 (Fla. 1st DCA 1984). Unless the vendor had written notice of an adult customer's habitual addition to alcohol, an injured person had no cause of action against a liquor vendor for serving alcohol to the customer. Id. Although the Respondent acknowledged this Court's holding in Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978 (Fla. 1984), that Section 768.125 limited any further

expansion of the existing liability of vendors to injured third parties, Respondent and the Academy of Florida Trial Lawyers argued that Section 768.125 should be interpreted in a manner that would broaden the liability of vendors in cases involving service to habitual drunkards.

The Trial Lawyers in their Amicus Curiae Brief did not argue, as did the Respondent, that constructive notice of habitual addiction would be sufficient to impose liability on a liquor vendor under Section 768.125. The Trial Lawyers argued only that written notice should not be required. This position appears to be a tacit agreement that a vendor must have some form of actual notice of a customer's habitual addiction to alcohol before the vendor can be held civilly liable for damages caused by the intoxication of the customer to whom liquor was sold.

Petitioner submits that written notice of a customer's addiction is the only means by which to prove that a vendor "knowingly" served liquor to an habitual addict. The First District in Roberts recognized that written notice was required for imposition of liability under Section 562.50 before Section 768.125 was enacted. If Section 768.125 was intended to limit any further expansion of liquor vendors' liability, it follows that written notice continued to be a requirement after the statute went into effect.

Relying heavily on the cases which have held that inculpatory knowledge of a person's age may be proven by circumstantial evidence so as to impose liability on a vendor for serving liquor to a customer not of lawful drinking age, the Respondent

contended there is no policy reason for treating the proof of knowledge required by Section 768.125 for sales to adults differently than for sales to minors. The Respondent ignored the obvious reason for allowing circumstantial evidence of knowledge in cases involving the sale of liquor to underage drinkers. The Fifth District aptly stated the reason in Willis v. Strickland, 436 So. 2d 1011, 1012 (Fla. 5th DCA 1983), wherein the court noted that a person's appearance alone can impart knowledge of his or her age "within certain ranges and to certain degrees of certainty." The Respondent offered no meaningful suggestion as to how knowledge of habitual addiction to alcohol could be imparted with any degree of certainty by mere circumstantial evidence.

None of the symptoms described on page 9 of Respondent's Answer Brief is diagnostic for alcoholism, and all can be explained or attributed to another equally logical condition. For instance, Respondent suggested that drinking every day in and of itself would establish a habitual addiction to alcohol. Even assuming that a liquor vendor knew that a customer drank every day, that knowledge would not be equivalent to knowledge that the customer was an alcoholic. If that were the case, the priest who consumes liturgical wine while celebrating Mass each day would arguably qualify as an habitual addict.

Respondent also argued that consumption of a drink over a period of thirty minutes was a sign of alcoholism. That argument is absurd. The Respondent's characterization of such consumption as "gulping," is totally inconsistent with the dictionary

definition of the word. Webster's Ninth New Collegiate Dictionary 542 defines "gulping" as "swallow[ing] hurriedly or greedily or in one swallow." A person who could stretch out one swallow for thirty minutes would undoubtedly qualify for some type of world record.

Respondent suggested that a lack of memory of events immediately prior to an accident was indicative of an alcohol-induced blackout. However, it is equally logical that the trauma of an accident itself could erase a person's memory of the time period surrounding the event. Respondent offered no suggestion as to how knowledge of any black-out should be imputed to an alcoholic beverage vendor when the black-out occurred away from the vendor's premises.

Finally, Respondent asserted that a tendency to argue should be interpreted as a sign or symptom of alcoholism. Respondent offered no insight as to how or why a vendor should assume that an argumentative customer was an alcoholic as opposed to just an argumentative person by nature. Everyone has met people who just naturally like to argue, whether they have been drinking or not. To suggest that such a trait implies alcoholism is ludicrous.

The "signposts of alcoholism" described by Respondent do not provide meaningful guidance for a liquor vendor to determine with any certainty that a person is habitually addicted to alcohol. Moreover, the article cited by Respondent suggests that addiction to alcohol is determined by the physiological disturbances that occur when alcoholism is withdrawn or denied rather than by any manifestation while the person is actually drinking. 16 American

Jurisprudence Proof of Facts, Alcoholism, Section 26, p.592. The article supports the argument made in Petitioner's Initial Brief that addiction to alcohol indicates a physiological as well as a psychological dependence on alcohol. Section 7, p.577.

Neither the Respondent nor the Trial Lawyers addressed the fact that habitual addiction to alcohol connotes a physiological dependence or suggested how a vendor was to independently determine that a customer had such a physiological need. Respondent's argument that a vendor could and should be held civilly liable for failing to recognize the complex and often confusing symptoms of alcoholism is not only ludicrous but violates fundamental principles of fairness. Neglecting to check the identification of a person who does not appear to be over the age of twenty-one can hardly be compared to failing to recognize that a person's aggressive behavior was not a personality trait but a symptom of alcohol addiction. The proof of knowledge for imposition of liability under Section 768.125 for selling alcohol to a person habitually addicted to alcohol must be direct and not circumstantial.

The Second District's conclusion in Ellis v. N.G.N. of Tampa, Inc., 561 So. 2d 1209 (Fla. 2d DCA 1990), that Section 768.125 must be read in pari materia with Section 562.50 to require written notice of habitual addiction as a prerequisite to imposition of civil liability is supported by the case of French v. City of West Palm Beach, 513 So. 2d 1356 (Fla. 4th DCA 1987), cited in Respondent's brief. The Fourth District in French recognized that Section 562.11(1)(b), part of the criminal

statute relating to sale of alcohol to minors, expressly provides a complete defense to a civil action under Section 768.125 where the underage consumer presents false evidence of his or her age, appears to be over the legal age, and the vendor in good faith relied upon the representation and appearance of the person in the belief that he or she was over the legal age to purchase or consume alcoholic beverages. While the court did not hold that Section 768.125 and Section 562.11 must be read in pari materia, it obviously did so in reaching its conclusion. Neither statute is mentioned in the other, and Section 768.125 makes no reference to any defenses available to the alcoholic beverage vendor.

Considering Section 562.11(1)(a) and (b) in light of the language in Section 768.125 subjecting a vendor to civil liability for "willfully and unlawfully" selling alcoholic beverages to an underage customer, it becomes obvious why the Legislature chose a different standard for imposing liability for serving liquor to an habitual addict. When Section 768.125 was enacted in 1980, it was "unlawful" under Section 562.11(1)(a) for a vendor to furnish alcoholic beverages to a person under twenty-one years of age. However, apparently in recognition of the facts that looks can be deceiving and identification can be falsified, the Legislature determined by enacting Section 562.11(1)(b) that civil liability should be imposed only where the vendor "willfully" ignored the obvious. Section 562.11(1)(b) explicitly recognized that a vendor could be placed on notice of a person's age by his appearance alone.

Section 562.50, on the other hand, did not place any responsibility on alcoholic beverages vendor to make an independent determination that a customer was habitually addicted to alcohol. Section 562.50 made it unlawful to serve a person habitually addicted only after the vendor received written notice from an outside source that the person was habitually addicted and that the use of liquor was working an injury to either the person himself or to the person giving written notice. The Legislature's use of the word "knowingly" in Section 768.125 thus recognized the already existing requirement that a vendor have actual knowledge of a customer's injurious and habitual addiction to alcohol before any civil liability would result for serving alcoholic beverages to that customer.

Both the Fifth District in the instant case and the First District in Pritchard v. Jax Liquors, Inc., 599 So. 2d 926 (Fla. 1st DCA 1986), failed to recognize that Section 768.125 must be read in pari materia with the criminal statutes which spawned a civil cause of action against liquor vendors in the first place. Reading Section 768.125 in conjunction with Section 562.11 and Section 562.50 clarifies legislative intent. Although the Pritchard court declined to read Section 768.125 in pari materia with Section 562.50, it did not dispense with the requirement that a vendor have actual knowledge of a customer's habitual addiction before civil liability could be imposed.

The First District did not go so far as to hold, as asserted by Respondent, that liability could be imposed by proof in the form of circumstantial evidence that a vendor should have known

that the person served was habitually addicted to alcohol. The court held only that an allegation of written notice was not necessary to state a cause of action against an alcoholic beverage vendor for knowingly serving alcohol to a person habitually addicted.

The amended complaint which the Pritchard court upheld alleged that the vendor served liquor "knowing . . . that the defendant . . . was habitually addicted to the use of any or all alcoholic beverages." 499 So. 2d at 927. The amended complaint did not allege that the vendor should have known the customer was habitually addicted. The court's holding that an allegation of written notice was not a prerequisite to state a cause of action under Section 768.125 was thus not equivalent to holding, as related by Respondent, that no direct notice was required for imposition of liability. There is not the slightest indication in Pritchard that the court considered anything less than actual knowledge by direct notice of a customer's habitual addition to be required by the statute.

The Respondent's argument that the Legislature was 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 was inconsistent with her interpretation of Section 768.125. Respondent urged that the language imposing liability for "knowingly serv[ing] a person habitually addicted to the use of any or all alcoholic beverages" be interpreted as providing a cause of action against a vendor who should have known that a person might be habitually addicted. This interpretation does

not comply with the very rules of statutory construction cited by the Respondent.

Requiring direct evidence that a vendor had actual knowledge of a customer's habitual addiction would not foster "willful blindness" on the part of vendors as suggested by Respondent. Even if it did, no harm would result. The doctrine of willful blindness implies knowledge where there is a finding that the defendant intended to cheat the administration of justice by ignoring the obvious facts of the situation. Wetzler v. State, 455 So. 2d 511, 513 n.2 (Fla. 1st DCA 1984).

Interpreting Section 768.125 as suggested by Respondent would reduce the requirement of knowledge to a pure negligence standard. The Legislature obviously did not intend to impose liability on vendors for negligently serving habitual addicts. Had it so intended, it would have used the word "negligently" rather than "knowingly."

Respondent's assertion that Section 768.125 creates a new right in members of the general public was specifically rejected by this Court in Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 980 (Fla. 1984). Because the statute simply codified the existing civil liability of liquor vendors which could result from violation of a criminal statute, the requirement of written notice to prove a vendor had actual knowledge of a customer's habitual addition does not emasculate the statute, nor does it subvert legislative intent. Written notice has always been a prerequisite to civil liability under Section 562.50, and the

Legislature did not intend to expand the potential liability of vendors by enacting 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.

Even assuming that a reasonable man could find negligence on the part of People's in serving Daniel Hoag on the night of the accident, Respondent failed to offer any rational support for the Fifth District's determination that such negligence was actionable. Respondent has acknowledged that any liability of People's must be founded on the cause of action recognized in Section 768.125. As discussed in Point I above, Section 768.125 does not provide for a cause of action in negligence but requires that a liquor vendor such as People's knowingly furnish intoxicating beverages to a person habitually addicted to alcohol.

The first inquiry under the statute thus becomes whether the person to whom liquor was served was in fact habitually addicted to

alcohol. The statute does not permit liability to be imposed on the vendor if its customer might have been an alcoholic. If the customer was not habitually addicted to alcohol, there is no liability on the part of the vendor for any damage which might result from the customer's intoxication.

Petitioner argued in its Initial Brief that any inference from circumstantial evidence that Hoag was habitually addicted to alcohol must have been established as an undisputed fact before Respondent would be entitled to rely upon additional circumstantial evidence to support a further inference that People's had knowledge of the addiction. This argument is supported by the cases of Voelker v. Combined Insurance Co. of America, 73 So. 2d 403 (Fla. 1954), and Fideli v. Colson, 165 So. 2d 794 (Fla. 3d DCA 1964), cert denied, 171 So. 2d 390 (1964), discussed in Petitioner's Initial Brief. Those cases and others hold that if more than one logical inference can be drawn from the facts supporting the initial inference and that inference is essential to the second inference, the evidence is not sufficient to submit to the jury.

Just as the evidence was not sufficient in either Voelker or Fideli, the evidence in the instant case was insufficient to allow the case to be submitted to a jury. With respect to Hoag's alleged addiction to alcohol, the question was not, as argued by Respondent, whether there was any version of the facts upon which a jury could find in Sabo's favor. Rather, the issue was whether a conclusion that Hoag was habitually addicted to alcohol was the only logical inference which could be drawn from the circumstantial evidence on that issue.

As Petitioner argued at the hearing on its motion for summary judgment, Hoag's deposition testimony that he was an alcoholic was not admissible. (R.26) Respondent's contention in her Answer Brief that Hoag's testimony was an admission against his own self interest misses the point. Even assuming the statement qualified under a hearsay exception, it was inadmissible for other reasons.

People's objected to Hoag's testimony because it is an opinion and because it was untrustworthy. While Hoag, as a lay person, may have been qualified to testify as to his own intoxication, he was not qualified to render an expert opinion that he was habitually addicted to alcohol. Moreover, Hoag's opinion was not supported by the facts since there was no evidence he was at any time physiologically dependent on alcohol.

Evidentiary matter supporting and opposing a motion for summary judgment must set forth such facts as would be admissible in evidence and must be competent to prove the matters stated therein. Holl v. Talcott, 191 So. 2d 40, 45 (Fla. 1966); Hurricane Boats, Inc. v. Certified Industrial Fabricators, Inc., 246 So. 2d 174 (Fla. 3d DCA 1971). Once the movant on a motion for summary judgment successfully meets the burden of showing the absence of any genuine issue of material fact, the opponent is required to show by competent evidence that issues do remain to be tried. Holl v. Talcott, 191 So. 2d at 43. If the opposing party on a motion for summary judgment fails to produce competent evidentiary matter sufficient to submit the case to a jury, the movant is entitled to a judgment as a matter of law. Hoag's self-serving testimony was not

admissible and was not competent evidentiary matter to preclude the entry of a summary judgment for Petitioner.

While the remaining testimony outlined on pages 20-21 of Respondent's Answer Brief could arguably support an inference that Hoag frequently became intoxicated, it also was not sufficient to preclude the entry of summary judgment because it did not lead to the inescapable conclusion that Hoag was habitually addicted to alcohol. Respondent's counter to Petitioner's argument that Hoag's work history indicated he was not an alcoholic was itself specious. Respondent is apparently contending that her article stating that 80% of all alcoholics are employable establishes that Hoag was habitually addicted.

As with the "signposts of alcoholism," Respondent took her statistic as to the employability of alcoholics out of context from the remainder of the article in which it appeared. That article also states that absenteeism of alcoholics costs almost half a billion dollars in lost wages each year. 16 American Jurisprudence Proof of Facts, Alcoholism, Section 15, p.584. Moreover, what distinguishes the alcoholic from the vast majority of people who drink is that alcohol interferes with a normal way of living for the alcoholic. Id. at 583.

There was absolutely no evidence below that alcohol interfered with a normal way of living for Daniel Hoag. It did not hamper his employment. To the contrary, Hoag apparently worked harder and longer than most of his co-workers. Most significantly, the people who knew him best did not consider him to be an alcoholic.

In this case there was no issue of material fact to preclude the entry of summary judgment in favor of People's. The evidence was legally insufficient to submit to the jury because it required an inference of knowledge to be founded upon another inference that David Hoag was habitually addicted to alcohol, and that inference was not established to the exclusion of all other reasonable theories. The trial court properly entered summary judgment in favor of Petitioner.

The Fifth District's opinion should be quashed and the summary judgment in favor of Petitioner affirmed.

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 4th day of January 1991 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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