IN THE SUPREME COURT OF THE STATE OF FLORIDA

GUARDIANSHIP OF JACQUELYN ANNE FAIRCLOTH,

Petitioner(s),

vs.

MAIN STREET ENTERTAINMENT INC. d/b/a POTBELLY'S,

Respondent(s).
_____/

Case No.: SC22-910
Lower Tribunal No(s):
1D19-4058;
372015CA0002778XXXXXX

FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES, ACTING FOR AND ON BEHALF OF FLORIDA STATE UNIVERSITY, AND THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES, ACTING FOR AND ON BEHALF OF THE UNIVERSITY OF FLORIDA, *AMICUS CURIAE* BRIEF

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IDENTITY AND INTEREST

Florida State University Board of Trustees, acting for and on behalf of Florida State University ("FSU"), and The University of Florida Board of Trustees, acting for and on behalf of The University of Florida ("UF"), are public teaching and research universities located in Tallahassee, Florida and Gainesville, Florida, respectively. With over 41,000 students attending FSU and over 61,000 students attending UF, the universities face many challenges in their role as a facilitator of student development. One critical challenge is addressing alcohol-related injuries and abuse, including the unlawful selling or furnishing of alcohol to a person who is not of lawful drinking age, particularly by bars and restaurants surrounding the universities. FSU and UF have an interest in the deterrence of this activity.

SUMMARY OF ARGUMENT

The public health, safety and welfare policy in section 768.125, Florida Statutes, is to partially insulate from civil liability a person who furnishes or sells alcohol to an underaged person ("minor"). Those who do so negligently are immune from civil liability. However, those who both "willfully and unlawfully" furnish or sell alcohol to

minors remain liable both civilly and criminally for intentionally doing so. *See* § 768.125, Fla. Stat. (2022).

Stated otherwise, this plain language of section 768.125 determines the type of liability action that may be brought against a person who furnishes or sells alcohol to a minor. Section 768.125 limits such an action to an intentional tort by excepting from the exemption a person who "***willfully*** and unlawfully" does so.

The plain language of section 768.125 also determines the nature of the liability for such an intentional act. The person who "willfully and unlawfully" provides alcohol to minor is "liable for injury or damage caused by or resulting from the intoxication of such minor". § 768.125, Fla. Stat. In other words, that person's liability is for the harm flowing from the intoxication of the minor who the person "willfully and unlawfully" furnished alcohol. Plainly stated, the person's liability is direct, not derivative.

Finally, Florida's comparative fault statute does not apply to liability for the intentional tort brought in accordance with section 768.125. Section 768.81(4) expressly precludes its application "to any action based upon an intentional tort." § 768.81(4), Fla. Stat. (2022).

ARGUMENT

This is a case of statutory interpretation to be reviewed *de novo*. *See Lab. Corp. of Am. v. Davis*, 339 So. 3d 318, 323-24 (Fla. 2022); *Kumar v. Patel*, 227 So. 3d 557, 559 (Fla. 2017).

I. SECTION 768.125 ALLOWS FOR A COMMON LAW ACTION WHICH BY OPERATION OF THE STATUTE'S TERMS IS AN INTENTIONAL TORT FOR A PERSON WHO WILLFULLY AND UNLAWFULLY FURNISHES ALCOHOL TO A MINOR

A. The Christopher Fugate Act provides specific liability for a licensee such as Potbelly's who served alcohol to its own underage employee.

"The Christopher Fugate Act" is section 562.11(1)(b), Florida Statutes. This provision prohibits a person licensed to sell alcohol ("vendor") from providing alcoholic beverages to a minor employee. A violation of this provision is a first-degree misdemeanor, which is an enhanced penalty.[1]

Nineteen-year-old Christopher Fugate was expecting to finish his degree at Florida State University and was working part-time at a restaurant bar in Tallahassee. S*ee* Lucy Morgan, *Case sets low price for young man's life*, Tampa Bay Times, Aug. 2, 2003, https://www.tampabay.com/archive/2003/08/02/case-sets-low-

[1] A vendor serving alcohol to any person who is underage is a second-degree misdemeanor under Section 562.11(1)(a), Florida Statutes.

price-for-young-man-s-life/. In the evening of July 24, 2002, Chris Fugate consumed "shift beers" as a reward after ending his workday. *See id.* Later that night, Fugate died due to injuries resulting from crashing his own car after consuming alcohol at the bar where he was employed. *See* Florida Senate Staff Analysis, CS/CS/SB 2520, at 5 (Apr. 22, 2003). Legislative analysis related to section 562.11(1)(b) recognized other similar instances of vendors allowing their underage employees to consume alcohol whether on duty or after-hours, resulting in those employees being killed or severely injured in automobile accidents. *See* Florida Senate Staff Analysis, CS/CS/SB 326, at 3 (Apr. 15, 2003).

In 2003, the Legislature enhanced the penalty for a vendor furnishing alcohol to a minor to a first-degree misdemeanor if that minor was employed by the vendor. *See* § 562.11(1)(b), Fla. Stat. There is an inherent difference in the knowledge and deliberativeness of a vendor serving an underage customer and a vendor serving its own employee who is a minor.[2] For instance, sections 562.11(1)(c)

[2] Section 562.111(1), Florida Statutes, in the enforcement of Florida's beverage law, in addition to Florida and federal employment laws, requires an employer to verify the age of its employee.

and (1)(d), Florida Statutes, provide the vendor a complete defense for a section 562.11(1)(a) violation if an underage customer falsely evidences his or her age and the vendor considered his or her appearance in checking identification. A subsection (1)(b) violation, however, has no such defense. That reflects the legal reality that a vendor must know the ages of its employees and, if it furnishes alcohol to a minor employee, the vendor does so with full knowledge.

Guardianship of Jacquelyn Anne Faircloth brought an action against Main Street Entertainment Inc. d/b/a Potbelly's for "willingly and unlawfully" serving alcohol to its underage employee which caused his intoxication, resulting in injury to Jackie Faircloth. *See Main St. Entm't v. Guardianship of Faircloth*, 342 So. 3d 232, 233-34 (Fla. 1st DCA 2022). Twenty-year-old Devon Dwyer who struck Faircloth with his truck had previously been consuming alcohol served to him by Potbelly's, where he was an employee who received a 50-percent employee discount on drinks. *See Faircloth*, 342 So. 3d at 234.

Section 768.125 does not insulate Potbelly's from civil liability for furnishing alcohol to its underage employee Dwyer. This provision plainly states such a vendor "who willfully and unlawfully

sells or furnishes alcoholic beverages to a person who is not of lawful drinking age" "may become liable for injury or damages caused by or resulting from the intoxication of [Dwyer]." § 768.125, Fla. Stat.

B. The First District erred by not recognizing section 768.125 allows for a common law tort against a vendor who willfully and unlawfully furnishes alcohol to a minor may become liable for harm caused by the minor's intoxication.

Faircloth brought a tort action against Potbelly's for the harm flowing from Dwyer's intoxication. That intoxication was admittedly due to Potbelly's willfully and unlawfully furnishing Dwyer, its minor employee, with a large quantity of alcohol. Section 768.125 plainly states a vendor "may become liable for injury or damage caused by or resulting from the intoxication of such minor or person." § 768.125, Fla. Stat. As such, Potbelly's is liable for Faircloth's injuries resulting from Dwyer's intoxication.

Faircloth also asserted that, because its action was based on an intentional tort under section 768.125, Florida's comparative fault statute did not apply. *See* § 768.81(4), Fla. Stat. "The trial court agreed [with Faircloth], reasoning that an action based on a bar 'willfully and unlawfully' selling alcohol to an underage patron is an intentional tort so that the jury could not apportion fault" in

accordance with section 768.81(4), Florida Statutes. *Faircloth*, 342 So. 3d at 234.

The First District disagreed. It reversed and held that an action under section 768.125's exception for vendor liability in serving a minor is not an intentional tort. *Id.* at 237. The First District erred when it held: "Because the dram shop exception does not create a cause of action, it does not transform the existing action into an intentional tort. The fact that a seller of alcohol is not liable unless the seller 'willfully and unlawfully' provides alcohol to an underage person does not alter this conclusion." *Id.* at 239.

As discussed below, the plain text of section 768.125 does not create a cause of action. It simply modifies Florida common law to insulate a vendor from civil liability for mere negligence acts but retains civil liability "for injury or damage caused by or resulting from the intoxication of" a minor to whom a vendor "willfully and unlawfully" furnishes alcohol. The statute transforms the action.

To elaborate, section 768.125 altered Florida's common law to insulate from civil liability vendors who negligently furnish alcohol to a minor. However, it also limited that insulation by retaining vendor civil liability for harm "caused by or resulting from the [minor's]

intoxication" when a vendor "willfully and unlawfully" furnishes the alcohol to the minor. The statutory requirements of "willfully and unlawfully" modify the common law cause of action for which section 768.125 provides an exception. *See State v. Egan*, 287 So. 2d 1, 3 (Fla. 1973) (the common law is in effect "except as it has been modified or superseded by statute."), § 2.01, Florida Statutes (declaring the common law to be operative yet not inconsistent with state statutes); *see also Barnett v. Fla. Dep't of Fin. Servs.*, 303 So. 3d 508, 512 (Fla. 2020) (altering the common law as specified in the statute).[3]

The First District correctly reiterated that section 768.125 itself does not create a cause of action. It erred, however, when finding this provision "does not transform the existing action into an intentional tort." *Faircloth,* 342 So. 3d at 235. As discussed below,

[3] To recognize an underlying cause of action, "the statute imposes the duty upon the reader thereof to ascertain for himself what the common law is." *Egan*, 287 So. 2d at 6. With a common law action, it is certainly within the power of the legislature to alter it. *Id.* ("Surely, no legislative adoption is necessary to affirm the existence of the common law. Just as surely, however, it is urged that a statutory enactment is essential to repeal, abrogate, or change the rules or doctrine of the common law.").

this Court's precedents have held when section 768.125's statutory terms are applied to an allowed common law cause of action the type of cause of action is changed.

Under section 768.125, the surviving common law cause of action against a vendor who serves a minor is limited to one where that vendor has "willfully and unlawfully" served alcohol to the minor. As next discussed, this limits the available civil liability to an action based upon an intentional tort.[4]

C. This Court's precedents demonstrate the proper application of section 768.125's "unlawfully" and "willfully" elements recognize legislative intent to retain common law liability for actions based on an intentional tort.

In *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963), this Court determined a violation of section 562.11, prohibiting the sale of alcohol to minors, gives rise to civil liability of the vendor for first-party injuries. This Court extended the reasoning of *Davis* in *Migliore v. Crown Liquors of Broward*, 448 So. 2d 978 (Fla. 1984), which

[4] "Unlawfully" required Faircloth to prove Potbelly's violated the relevant criminal statute, section 562.11, in serving 20-year-old Dwyer. "Willfully" required Faircloth to show Potbelly's violation of 562.11, or specifically 562.11(1)(b), was intentional in serving its own employee Dwyer.

involved an issue prior to the effective date of section 768.125. In *Migliore*, the Court held that liability for a vendor violating section 562.11 applied also to third-party damages resulting from the minor to whom alcohol was sold. The Court identified the common law cause of action based on the violation of the criminal statute itself as negligence per se. *Id.* at 979.

This Court first applied section 768.125 in *Armstrong v. Munford*, 451 So. 2d 480 (Fla. 1984). The Court recognized that a cause of action for a vendor's violation of section 562.11 (serving alcohol to a minor) existed prior to section 768.125 – and that section 768.125 did not create a cause of action. *Id.* at 481. The Court further recognized section 768.125 limited vendor liability for that prior cause of action by "requir[ing] that the selling or furnishing of the alcoholic beverages [to minors] must be done willfully." *Id.* Thus, any common law action for vendor liability serving a minor must satisfy the "willfully" element, in addition to the "unlawfully" element, in section 768.125. *See id.*

In this appeal, the First District incorrectly attributed to *Armstrong* the holding that "the vendor is liable in negligence, not an intentional tort." *Faircloth*, 342 So. 3d at 235. Nowhere does the

Armstrong opinion state such an action is one of negligence once section "768.125 controls" in applying the "willfully" requirement which was at issue. *See id.*

In *Ellis v. NGN Tampa*, 586 So. 2d 1042 (Fla. 1991), the Court addressed the exceptions to the general statutory immunity in section 768.125 which allows liability for vendors who serve minors or habitual drunkards. The Court surveyed its precedents including *Davis* and *Migliore* and confirmed that "[i]n summary, the above case law has established that, although limited by the provisions of section 768.125, there is a cause of action against a vendor for the negligent sale of alcoholic beverages to a minor that results in injury to or death of the minor or a third party." *Ellis*, 586 So. 2d at 1047. The Court identified a common law cause of action allowed by section 768.125's two exceptions (serving minors and habitual drunkards) as one in negligence – this makes sense because section 768.125 does not itself create a cause of action. Significantly, having identified the pre-existence of the common law action, the Court announced "[t]he remaining question is how the cause of action may proceed under the restrictions of 768.125." *Id.* In other words, section 768.125's restrictions, which are the requirements of

"willfully and unlawfully" with the minor exception and of "knowingly" with the habitual drunkard exception, must be considered for their statutory effect on the common law action.

For liability under the minor or habitual drunkard exception, the Court in *Ellis* determined two necessary considerations: "**[i]n applying the exceptions in section 768.125, a court must consider its terms as well as the provisions of the criminal statute dealing with the sale of alcohol.**" *Id.* (noting two distinct criminal statutes for serving a minor and serving an alcoholic) (emphasis added). In other words, the Court demanded consideration of section 768.125's "terms," or statutory elements, to the common law cause of action, which under the Court's prior precedents was based on a violation of the relevant criminal statute. In other words, if there is common law liability for vendors violating section 562.11 in serving minors, as *Ellis* discussed from the Court's precedents, courts must apply section 768.125's "willfully and unlawfully" requirements to that common law action.

The Court in *Ellis* found "the legislature's use in section 768.125 of the term *unlawfully* requires that the plaintiff must establish each of the elements of the criminal offense." *Id.* at 1048. This statutory

requirement of "unlawfully" serving a minor essentially confirms the common law standard of liability from a violation of the criminal statute. Accordingly, *Ellis* stated that "[o]nce these [section 562.11] elements have been proven, the plaintiff has established negligence per se. *See Davis*." *Id.*[5]

The Court in *Ellis* then contrasted the unlawful violation under the minor exception with the "knowingly" standard under the habitual drunkard exception. It found "knowingly" did not require the same violation of the criminal statute. *Id.* Thus, vendor liability under section 768.125 for serving a habitual drunkard altered the common law cause of action to one of only "ordinary negligence" (as opposed to negligence per se). *Id.* at 1049.

As in *Armstrong*, *Ellis* confirms that the terms of section 768.28 affect the elements of the surviving common law tort, depending on whether those terms are knowingly or unlawfully, or even willfully.

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[5] *Ellis* did not apply the "willfully" standard, and thus did not determine the resulting type of tort as one of intentional tort, because the minor exception was not at issue in the case. The Court was distinguishing how the application of "unlawfully" differed from that of "knowingly" in the habitual drunkard exception. Importantly, *Ellis* demonstrates the statutory elements must apply to the common law cause of action and in doing so those elements affect the type of common law tort.

In *Ellis* the Court stopped short of considering the "willfully" requirement because the minor exception was not at issue. But *Ellis* leaves no doubt that section 768.125 dictates the surviving common law causes of action. *See Luque v. Ale House*, 962 So. 2d 1062, 1065 (Fla. 5th DCA 2007) ("section 768.125 presupposes the existence of a cause of action against sellers of alcohol. In "limiting" or modifying the underlying action, section 768.125 now delineates the elements that a party must establish in bringing a civil action against sellers of alcohol. It was error to conclude that because the section does not create a cause of action, it does not define one either.") *Ellis* held that section 768.28's "unlawfully" requirement and "knowingly" requirement ultimately determine the type of the surviving cause of action. The same test-based determination certainly applies for the "willfully" term used when a vendor serves alcohol to a minor. *See Armstrong*.

Section 768.125 precludes liability for a vendor who merely negligently serves alcohol to a minor. But if a vendor "willfully and unlawfully" furnishes alcohol to a minor (including to the vendor's minor employee), the vendor is liable for harm due to the minor's

intoxication. This limited available common law tort is one of an intentional tort.

II. THE INTENTIONAL TORT BROUGHT BY FAIRCLOTH AGAINST POTBELLY'S FOR LIABILITY DUE TO THE INTOXICATION OF ITS UNDERAGE EMPLOYEE IS NOT SUBJECT TO COMPARATIVE FAULT UNDER SECTION 768.81

Under section 768.125, Potbelly's "may become liable for injury or damage caused by or resulting from the intoxication of such a minor or person." § 768.125, Fla. Stat. This means Potbelly's liability flows directly from the intoxication of its minor employee due to Potbelly's willfully and unlawfully serving him alcohol. There is no need for any further negligent act to occur for liability. For instance, if Devon Dwyer had suffered serious injury due to alcohol poisoning upon his consumption of alcohol at the bar, Potbelly's may become liable for that harm due to intoxication without any negligent act at all by Dwyer. Similarly, just because an inebriated Dwyer was himself negligent in his driving drunk and striking Faircloth makes no difference under the statute as to Potbelly's liability, which hinges only on his intoxication. Once Potbelly's willfully and lawfully furnished Dwyer alcohol, Potbelly's may be liable for "injury or

damage caused by or resulting from the intoxication of [its minor employee]."

To reiterate, under section 768.125, Potbelly's is directly liable for Faircloth's injury and damages "caused by" or "resulting from" Dwyer's intoxication. As discussed above, this intoxication was due to Potbelly's intentional conduct in violation of section 562.11. The fact that the highly intoxicated Dwyer left Potbelly's in his truck and negligently injured Faircloth does not alter Potbelly's liability. On its premises, Potbelly's "willfully" furnished its minor employee a very large amount of alcohol. That made Potbelly's tort intentional. Having intoxicated Dwyer, Potbelly's is directly liable for the injury or damage caused by or resulting from that intoxication.

As discussed above, Potbelly's committed an intentional tort when it willfully served alcohol to its underage employee. Given Potbelly's liability for an action "based upon an intentional tort," Florida's comparative fault does not apply. *See* § 768.81(4), Fla. Stat. Whether or not Dwyer himself was negligent is immaterial to Potbelly's own liability.

In *Merrill Crossings Associates v. MacDonald*, 705 So. 2d 560, 563 (Fla. 1998), the Court interpreted section 768.81(4) by agreeing

with the Fourth District's decision in *Slawson v. Fast Food Ent.*, 671 So. 2d 255 (Fla. 4th DCA 1996). The Fourth District determined in *Slawson* that "[t]he words chosen, 'based upon an intentional tort,' imply to us the necessity to inquire whether the entire action against or involving multiple parties is found or constructed on an intentional tort. In other words, the issue is whether an action comprehending one or more negligent torts actually has at its core an intentional tort by someone." *MacDonald*, 705 So. 2d at 563 (quoting *Slawson*). Here, the entire action Faircloth brought against Potbelly's is "based on an intentional tort" committed by Potbelly. Again, Dwyer may have been negligent in driving drunk, but his negligence is not the basis of Potbelly's liability under section 768.125. Instead, Potbelly's liability is based on the intentional tort of serving alcohol to a minor employee who became intoxicated and whose intoxication caused Faircloth's injury and damages.

The First District erred in holding Potbelly's did not commit an intentional tort, stating that "[t]his conclusion is supported by the fact that liability under the dram-shop exception is derivative." *Faircloth*, 342 So. 3d at 235. The First District described derivative liability as involving an actor who was negligent such that "[w]hile

Potbelly's may be liable for the harm to Faircloth caused by Dwyer, this harm was the result of Dwyer's negligence." *Id.* at 236. This holding ignores the plain language of section 768.125. The statute plainly states that Potbelly's, which "willfully and unlawfully" furnished alcohol to Dwyer, "may become liable for injury or damage caused by or resulting from the intoxication of [Dwyer]." § 768.125, Fla. Stat. To uphold the First District's reasoning, this Court would have to rewrite section 768.125 so that Potbelly's liability is derivative from Dwyer's subsequent actions, not direct from his intoxication. To do so would require a rewriting of the statutory vendor's liability for injury or damage "the minor caused" instead of the injury or damage "caused by or resulting from the intoxication of the minor." The statute clearly does not contemplate derivative, nor even vicarious, liability. Instead, the plain language of the statute holds Potbelly's directly responsible for willfully and unlawfully providing alcohol to its underage employee (direct liability).

For Faircloth's common law tort action against Potbelly's, all that matters under section 768.125 is that: (1) Potbelly's "willfully and unlawfully" furnished alcohol to Dwyer, and (2) his "intoxication" caused or resulted in Faircloth's injury and damage. Potbelly's

liability flows directly from Dwyer's intoxication, an intoxication due to Potbelly's intentional tort in willfully (and unlawfully) furnishing alcohol to its minor employee. Accordingly, section 768.81(4) applies to preclude comparative fault.

CONCLUSION

The certified question should be answered in the negative. The action brought in this case in accordance with section 768.125 is an intentional tort, thus precluding comparative fault under section 768.81(4).

Dated this 17th day of January, 2023.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission through the Florida Courts E-Filing portal to all counsel or parties of record listed below, on this 17th day of January, 2023.

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I HEREBY CERTIFY this *Amicus Curiae* brief complies with the type size and style requirements of Rules 9.045(b) and 9.210(b), Florida Rules of Appellate Procedure, and has been prepared in Bookman Old Style, 14 Point Font. This *Amicus Curiae* brief complies with the type volume limitations set forth in Rules 9.210(b) and 9.370(b), Florida Rules of Appellate Procedure. This brief contains 3,438 words, excluding the parts of the brief exempt by Rule 9.045(e).

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