IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-910

GUARDIANSHIP OF JACQUELYN ANNE FAIRCLOTH, Petitioner, vs. MAIN STREET ENTERTAINMENT, INC., d/b/a POTBELLY'S, Respondent.	DCA Case No.: 1D19-4058 L.T. Case: 2015-CA-002778

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE FIRST DISTRICT COURT OF APPEAL

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INTRODUCTION TO STATEMENT OF THE CASE AND FACTS

This case is before the Court on review of a certified question from the First District Court of Appeal. It involves the interpretation of section 768.125, Florida Statutes, entitled, "Liability for injury or damage resulting from intoxication." The statute shields alcohol vendors from liability for injuries resulting from intoxication, with two specific exceptions:

> A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, **except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age** or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages **may become liable for injury or damage caused by or resulting from the intoxication of such minor or person**.

§ 768.125, Fla. Stat. (2014) (emphasis added).

This case implicates the first exception. The case arose from a late-night accident on Pensacola Street in Tallahassee. At around

2am, Jacquelyn Faircloth crossed the street without looking for oncoming traffic. Devon Dwyer, driving a truck, hit her. She suffered severe injuries. Petitioner, the Guardianship of Jacquelyn Faircloth ("Plaintiff"), sued two restaurant/bars: Respondent, Main Street Entertainment, Inc. d/b/a Potbelly's ("Potbelly's"); and the owners of Cantina 101 Restaurant and Tequila Bar ("Cantina 101"). The complaint alleged that both bars "willfully and unlawfully" sold alcohol to underage patrons—Potbelly's to Dwyer and Cantina 101 to Faircloth; that the two patrons became intoxicated; and that their intoxication caused Faircloth to suffer severe injuries. The trial court precluded Potbelly's from presenting either a comparative-fault defense (based on section 768.81, Florida Statutes) or the so-called alcohol defense (based on section 768.36, Florida Statutes). The jury returned a verdict above $30 million. Judgment was entered against Potbelly's and the other defendants, jointly and severally.

Reversing the trial court's rulings, the First DCA held that Potbelly's had a right to assert both a comparative-fault defense and an alcohol defense. The court held that section 768.125 describes a negligence action; and that the trial court erred in denying Potbelly's

the opportunity to present its defenses. The court did, however, certify a question of great public importance:

> WHETHER THE COMPARATIVE FAULT STATUTE, SECTION 768.81, FLORIDA STATUTES, APPLIES TO TORT ACTIONS INVOLVING THE DRAM-SHOP EXCEPTION CONTAINED IN SECTION 768.125, FLORIDA STATUTES, AGAINST A VENDOR WHO WILLFULLY AND UNLAWFULLY SOLD ALCOHOL TO AN UNDERAGE PATRON, RESULTING IN THE PATRON'S INTOXICATION AND RELATED INJURY?

This Court accepted jurisdiction. Plaintiff also contests the First DCA's interpretation of section 768.36. As we show below, the First DCA correctly interpreted both statutes.

A. Facts Relevant to the Appeal[1]

In late November 2014, Faircloth (then a high-school senior) and her family visited Tallahassee, where her brother, J.T., was a

[1] "R. #" refers to the record page numbers as marked on the bottom of each page. "T#. #" refers to the page numbers of the trial transcript as marked on the top right corner with the accompanying volume number. "S.R. #" refers to the page numbers in the supplemental record as marked on the bottom of each page. For all record citations, the page number on the document, not the PDF page number, are cited.

college student, to attend the Florida State vs. Florida football game (*see* T4. 486-90, 497, 513-14; T5. 633-34). That Friday evening, she had been drinking at J.T.'s dorm before she and others went to Cantina 101, where she had more drinks (*see* T4. 487-90; T5. 635-39). Both J.T. and her cousin Katie testified that Faircloth was intoxicated at Cantina 101 (T4. 515-17; T5. 639-40). Katie, in fact, found Faircloth in the restroom, where it appeared that Faircloth had vomited, and decided to take her back to the dorm (T5. 640). At about 1:45 a.m. on Saturday morning, Katie and her boyfriend left the bar with Faircloth, who was having trouble walking (T5. 639, 641-42).

Around 2:00 a.m., Faircloth stepped onto Pensacola Street (*see* T3. 315; T4. 503-05; T6. 732). She walked swiftly and crossed the road at an angle (*see, e.g.*, T5. 517-18; T6. 732-33, 735). J.T., on the opposite side of the road, saw Faircloth walk into the street and also saw headlights approaching over the hill (T4. 503-04, 517-18). He cried out to Faircloth that a car was coming, but she did not react; he yelled again but she did not stop (T4. 503-05, 517-18). After failing to heed J.T.'s two warnings, she collided with Dwyer's vehicle (T4. 504-05). She suffered extensive injuries (*see, e.g.*, T3. 374).

Dwyer, 20 years' old at the time, was employed at Potbelly's. He was not on duty that night and consumed alcohol as a patron (*see* T3. 315; T4. 395-96).[2] As an employee, he received a 50% discount on food and drinks (T4. 396, 423-24), but this was not part of his compensation (T4. 424). At trial, Dwyer could not remember the precise number of drinks he had that night, but testified that he drank about one beer per hour over the three to four hours he spent there (*see* T4. 399, 422-23). He had been at the bar with some friends, opened a bar tab, and allowed his friends to order drinks on his tab (*id.*). Bar receipts showed that he was charged for 18 beers and six bourbons (T4. 397-99). Plaintiff prepared an affidavit for Dwyer's signature, which he read at trial, in which he swore that the receipts

[2] Plaintiff states—without citation or support—that it was "undisputed" that Potbelly's business practices included "unlawful acts" (br. at 5) and lobs other aspersions about Potbelly's "apparent business model" (br. at 18, 20, 34). Potbelly's disputes Plaintiff's irrelevant and unsubstantiated characterization of its business, which in any case would be irrelevant (*see* R. 2171 (excluding evidence about "instances of underage drinking that occurred" other than on the relevant date and referring to such evidence as "highly prejudicial and irrelevant")). For example, there is no evidence that "Potbelly's underage employees were literally paid with free or discounted alcohol in exchange for their labor" (br. at 18) (*see, e.g.*, T. 424).

showed what he "purchased, not what [he] consumed" (R. 1153-58; T4. 421-22).[3]

Dwyer testified he did not feel impaired by alcohol before driving (T4. 428-29). Co-worker Jacob Salow, who was riding in Dwyer's vehicle that night, did not believe he was intoxicated (T5. 609-11). No eyewitness testified that Dwyer was swerving or weaving—only that he was driving above the 30-mile-per-hour limit (*see* T4. 518-19; T6. 737, 740).

Dwyer testified he did not see Faircloth before the collision (*see* T4. 403-04, 414-15). Salow testified that just after the impact Dwyer repeatedly said something like "she walked in front of me," or "she stepped in front of my car" (T5. 595, 606). Dwyer's headlights were on (*see, e.g.*, T4. 518), but eyewitnesses testified that the area was poorly lit and that surrounding trees shadowed the street (T4. 519-

[3] Plaintiff mischaracterizes evidence (br. 7-8) about a call by Dwyer to Potbelly's owner's phone and Potbelly's management of its video surveillance (*see* T4. 412 (Dwyer testifying he does not recall making a phone call to *Potbelly*'s phone, which was monitored by employees); T5. 568 (investigator testifying that he obtained two hard drives from Potbelly's IT technician after the collision)). This evidence, and any related argument insinuating misconduct on Potbelly's part (br. at 35) is irrelevant, designed solely to jaundice this Court's view of the issues, and should be ignored.

20; T6. 733). Faircloth was wearing dark clothes (*see* R. 3166; T4. 498-99).

Because Dwyer believed that, as a 20-year-old, he would be charged with a DUI if *any* alcohol was found in his system, he fled the scene (T4. 404-05, 427). He drove his vehicle to a friend's house and left it there (T4. 406). Jessica Reed, Salow's girlfriend, picked up both of them and drove Dwyer home (T4. 407-08; T5. 597). She noticed nothing unusual about Dwyer's demeanor and it did not appear to her that he was intoxicated (T6. 676-77).

Only one witness testified that Dwyer was "drunk" (T5. 621, 622). But she admitted she was "pretty drunk" herself, and she saw Dwyer only "in passing" (T5. 620, 629). She had "[n]o idea" how much alcohol or what type of alcohol Dwyer consumed (T5. 629). She could not recall when she saw him, when she concluded he was drunk, or even if she had seen him consuming any drinks (*see* T5. 623-24, 627). Thus, Potbelly's disputes that Plaintiff established that Dwyer was intoxicated and his intoxication caused Faircloth's injuries.

B. Course of Proceedings

Plaintiff sued Potbelly's as well as various entities that owned

and operated Cantina 101 (R. 135-43). Plaintiff alleged that the defendants willfully and unlawfully furnished Dwyer and Faircloth alcohol and were liable for her injuries. Although the complaint does not cite a statute, Plaintiff relied on section 768.125. Potbelly's pled several affirmative defenses (R. 150-53), including comparative negligence under section 768.81, Florida Statutes, (R. 152 ¶ 9; R. 1142-52) and the "alcohol defense" under section 768.36, Florida Statutes, which bars recovery if an intoxicated plaintiff is more than 50% at fault for her injuries (R. 150 ¶ 3). The trial court repeatedly rejected Potbelly's requests to assert these defenses (R. 2151-59, 2716-17, 2752-53, 2922-23, 2951-52, 4210-11, 4654-57; S.R. 4805-06).

The case went to trial twice (R. 2922-23). Cantina 101 defaulted and appeared at neither trial (R. 51, 54-55). In the first trial, the jury deadlocked (R. 2930). At the second trial, the trial court again prevented Potbelly's from presenting a comparative-fault defense and an alcohol defense. Potbelly's stipulated that it had willfully and unlawfully served alcohol to Dwyer, who was not of lawful drinking age, but contested whether he was intoxicated and whether any intoxication caused Faircloth's injuries (T3. 314-15; T10. 1275).

After six trial days, the jury found the defendants liable and awarded Plaintiff $30,840,015.57 (R. 3072-73). The trial court entered a final judgment for $28,684,416.05 jointly and severally against Main Street and the Cantina 101 entities (R. 3763-64).

Potbelly's appealed, arguing, among other issues, that it should have been allowed to present its defenses.

C. Proceedings in the First DCA

The First DCA reversed the judgment and remanded. The court held that actions filed under section 768.125 allege negligence, not an intentional tort. *Main St. Entertainment, Inc. v. Faircloth*, 342 So. 3d 232, 235 (Fla. 1st DCA 2022). Thus, Potbelly's should have been permitted to assert a comparative-fault defense under section 768.81. *Id.* at 237.

The First DCA relied on this Court's precedent: "In short, the Florida Supreme Court has clearly held that an action for liability on the ground that the defendant has sold alcoholic beverages to an underage person alleges negligence." 342 So. 3d at 235. It explained that "[b]ecause the dram shop statute 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.* Its conclusion was "supported by the fact that liability under the dram-shop exception is derivative." *Id.* It concluded that "[n]either Dwyer nor Faircloth are responsible for the 'deleterious consequences' of underage drinking. Instead, Potbelly's and Cantina 101 are responsible. We hold that Potbelly's may raise a comparative negligence defense between itself and, ultimately, Cantina 101 as derivatively liable entities[.]" *Id.* at 237.

The First DCA also held that Potbelly's had a right to assert a defense under section 768.36. 342 So. 3d at 238. It stated that it did not appear "obvious that the alcohol defense necessarily relies on the comparative fault statute," *id.* at 237, but did not need to address whether the alcohol defense applied to intentional torts because of its ruling on the comparative-fault defense. *Id.* at 238. The court concluded that "[i]f fault attributable to Faircloth was caused by anything other than intoxication resulting from being furnished alcohol by Cantina 101, the alcohol defense could possibly limit Potbelly's liability." *Id.* Ultimately, the Court held that "Potbelly's

was entitled to have the jury compare its fault (derived from Dwyer) to Cantina 101's (whose fault was derived from Faircloth), or if circumstances permitted, to Faircloth's itself." *Id.* at 236.

Plaintiff filed motions for rehearing, rehearing en banc, and certification. The First DCA denied the motions for rehearing and rehearing en banc. It granted only Plaintiff's motion for certification of a question of great public importance, which is quoted above.

D. Standard of Review

The interpretation of statutes is a pure question of law, which is subject to de novo review. *Peoples Gas Sys. v. Posen Constr.*, 322 So. 3d 604, 616 n.11 (Fla. 2021).

SUMMARY OF THE ARGUMENT

Florida has adopted a comparative-fault model for negligence actions. The First DCA correctly held that comparative-fault principles apply to actions alleging violations of section 768.125 arising from the sale of alcohol to an underage patron. The substance of this action is negligence. This Court has already stated as much. Both the language of, and the context surrounding, section 768.125 confirm it. Indeed, the statute resides in the "Negligence" chapter of the

Florida statutes; courts have used negligence terms to describe the action; and the statute provides for derivative liability for vendors based on the negligence of minors whose intoxication causes injury.

Plaintiff argues that the action is not subject to comparative fault because section 768.125 includes the phrase "willfully and unlawfully." But the surrounding language in the statute, the context in which it was enacted, other statutes, and this Court's own definition of an intentional tort show that the use of "willfully and unlawfully" in this section does not render the action an intentional tort.

Plaintiff also challenges the First DCA's interpretation of section 768.36. That statute expressly applies in "*any* civil action," § 768.36(2), Fla. Stat. (2014) (emphasis added). The legislature made no exception for actions involving section 768.81 or 768.125—both of which existed when the legislature enacted section 768.36. Plaintiff's interpretation would render meaningless the phrase "any civil action."

ARGUMENT

I. THE COMPARATIVE-FAULT STATUTE APPLIES TO ACTIONS UNDER SECTION 768.125 AGAINST VENDORS WHO WILLFULLY AND UNLAWFULLY SERVE ALCOHOL TO UNDERAGE PATRONS

This Court should answer the certified question "yes" and hold that the comparative-fault statute applies to actions under section 768.125 against vendors who willfully and unlawfully serve alcohol to underage patrons. For comparative fault to apply, section 768.125 would have to describe a negligence action. As we explain below, (A) section 768.81's description of "negligence" is broad and non-exclusive; (B) section 768.125's text and context show that it describes a negligence action rather than an intentional tort; (C) this Court's precedent supports that conclusion; and (D) Potbelly's derivative liability arises from the underage patrons' negligence.

A. The Statute's Description of "Negligence" is Broad and Non-Exclusive

Plaintiff argues that comparative fault does not apply to an action arising from the willful and unlawful sale of alcohol to an underage patron because it is not a "negligence action" as defined by sec-

tion 768.81 (br. at 22-29, 41-44). But section 768.81 defines a "negligence action" broadly and non-exclusively. The Court should reject Plaintiff's narrow interpretation.

In Florida, the "system of comparative negligence was implemented for the express purpose of allowing recovery in negligence cases based on a jury's allocation of comparative fault . . . among all individuals who were negligent in bringing about an injury." *Birge v. Charron*, 107 So. 3d 350, 357 (Fla. 2012). This Court recently reiterated that "the doctrine of comparative fault is designed to *compute* each party's liability based on the damages they *caused* as opposed to the damages they suffered." *Peoples Gas Sys.*, 322 So. 3d at 614 (cleaned up) (holding that sections 556.106(2)(a) and (b), Florida Statutes (which address liability for damages to underground facilities), created a cause of action sounding in negligence and that comparative fault applies to that action).

The parties agree that section 768.81 dictates when comparative fault applies, and that it states that comparative fault applies in "negligence action[s]." *See* § 768.81(3), Fla. Stat. ("In a negligence action, the court shall enter judgment against each party liable on

the basis of such party's percentage of fault."). The statute expressly applies to plaintiffs as well, providing that "contributory fault chargeable to the claimant diminishes proportionately the amount awarded as . . . damages." § 768.81(2).

The statute defines a "negligence action" broadly, as, "*without limitation,* a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories." *Id.* § 768.81(1)(c) (emphasis added). It also provides that the "substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action." *Id.* The statute does not apply to ". . . any action based upon an intentional tort." § 768.81(4), Fla. Stat.

Section 768.125 states that 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 damage caused by or resulting from the intoxication of such minor or person." *Id.* (emphasis added). Like the comparative-fault statute, this statute is found within Chapter 768 of the Florida Statutes, which is titled

"Negligence." Plaintiff submits that its action is not a "negligence action" as defined in section 768.81 (br. at 22-29, 41-44). But as the statute reflects and Plaintiff's own authority acknowledges, *see Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 302 (Fla. 2017), section 768.81's description of a "negligence action" is unambiguously *non*-exclusive.

To hold that Plaintiff's suit is a "negligence action," this Court need not conclude that it falls within one of the examples in section 768.81(1)(c). As the statute says, those categories are listed "without limitation." And no party suggests that Plaintiff's claim is a strict-liability, products-liability, professional-malpractice, or breach-of-warranty claim. Thus, the Court should disregard Plaintiff's arguments about such claims (br. at 41-44) because Plaintiff never raised them before and they are not determinative. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (concluding that an argument was waived because it was not raised in either the trial court or the district court); *Oyster Pointe Resort Condo. Ass'n v. Nolte*, 524 So. 2d 415, 419 (Fla. 1988) (declining to consider an argument raised for the first time on appeal).

B. Both the Text of the Statute and Its Context Prove that the Action for Which Potbelly's Would be Liable is Negligence, Not an Intentional Tort

Plaintiff posits that "one who acts 'willfully and unlawfully' is not merely guilty of negligence" (br. at 29) because "willful and unlawful" misconduct is "no different from 'intentional' misconduct" (br. at 29-32, 49). But section 768.81 excludes from the comparative-fault analysis "any action based upon an intentional *tort*." *See* § 768.81(4), Fla. Stat. (emphasis added). It does not exclude all intentional *conduct*. Depending on the context, intentional *conduct* may constitute negligence (for example, a driver may intentionally run a red light without intending injury or property damage). And as Plaintiff concedes, when this Court interprets statutes, context matters (br. at 21). "Context is a primary determinant of meaning." *Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). The statute's context clarifies that the phrase "willfully and unlawfully" does not render the action described in section 768.125 an "intentional tort."

Plaintiff insists that "the comparative fault statute does not apply to this action because the action is 'based on an intentional tort'" (br. at 49). But this Court has defined an intentional tort more narrowly than just intentional conduct. There must be a "deliberate intent to injure or engage[] in conduct which is substantially certain to result in injury or death." *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 438 (Fla. 2001), *superseded by statute on other grounds*, Ch. 2011-215, § 2, Laws of Fla. As one of Plaintiff's authorities warns, intentional behavior by itself is not enough. *Spivey v. Battaglia*, 258 So. 2d 815, 816 (Fla. 1972) (holding that a defendant's act of "intentionally put[ting] his arm around petitioner" and pulling her towards him was a negligent act because her subsequent facial paralysis was not substantially certain to follow from the defendant's action). Other courts have reached similar conclusions. *See Petit-Dos v. Sch. Bd. of Broward Cty.*, 2 So. 3d 1022, 1025 (Fla. 4th DCA 2009) (holding that a driver who struck a deaf student while fleeing from the police was not liable for an intentional tort because it was not substantially certain that fleeing from the police would cause such an injury).

Plaintiff apparently concedes that at least part of the *D'Amario* definition is accurate: it cites secondary sources reflecting similar language (br. at 50-51, 54). Indeed, Plaintiff adopts that language and claims that "it is 'substantially certain' that willful and unlawful sales to a minor resulting in intoxication will produce an injury" (br. at 51). But Plaintiff's complaint did not allege that Potbelly's actions were substantially certain to result in injury or death, and did not allege that Potbelly's (or Dwyer) deliberately intended to injure her. Rather, Plaintiff alleged that Potbelly's "willfully and unlawfully" served a minor, who *then* caused injury (*see* R. 138 ¶ 18-19; R. 143 ¶¶ 29-30). Although serving alcohol to a person under legal age may create a *foreseeable* risk of injury to the minor or a third party (thus constituting negligence), it is not "substantially certain to result in injury or death" so as to become an intentional tort. *See D'Amario*, 806 So. 2d at 438. In fact, Plaintiff concedes this point (br. at 52 ("To be sure, it is not 'substantially certain' that willfully and unlawfully serving a minor to the point of intoxication will lead to further injury of the minor, or third-party injuries.")).

Despite its concession, Plaintiff relies on the phrase "willfully and unlawfully," which it repeatedly construes as a "mens rea," to argue that Potbelly's conduct is not mere negligence (*e.g.*, br. at 17, 31, 54). But Florida law recognizes that negligence can be willful. *See, e.g.*, § 166.234(7), Fla. Stat. (2021) (assessing interest and penalties for failure to pay tax only in the case of "willful neglect, *willful negligence*, or fraud") (emphases added); § 196.102(5)(b), Fla. Stat. (2021) (describing an exemption from taxation for disabled first responders if injuries were "[d]irectly and proximately caused by service in the line of duty . . . without *willful negligence* on the part of the first responder") (emphasis added); § 326.004(11), Fla. Stat. (2021) ("Any person injured by the fraud, deceit, or *willful negligence* of any broker or salesperson or by the failure of any broker or salesperson to comply with the Yacht and Ship Brokers' Act or other law may file an action for damages upon the respective bonds against the principals and the surety.") (emphasis added). Indeed, Plaintiff's own argument that a party's mental state can be "completely irrelevant" to its failure to exercise reasonable care (br. at 33) confirms that a willful act need not be an intentional tort.

The legislature did not need to use the term "negligence" in section 768.125 because the action at common law before it was enacted *was* negligence. *Ellis v. N.G.N. of Tampa*, 586 So. 2d at 1045 (Fla. 1991) ("Our holding put this state in the forefront of those jurisdictions that modified the original common law rule to allow some negligence claims against vendors of alcoholic beverages on the basis that a *sale* could be the proximate cause of an injury."). The original common-law rule absolved vendors from liability. *Id.* at 1046. But in reaction to a judicial trend expanding vendor liability, the legislature reversed course, while carving out two limited exceptions. *Id.* ("The statute effectively codified the original common law rule absolving vendors from liability for sales but provided exceptions for sales to those who were not of a lawful drinking age or to a person habitually addicted to alcoholic beverage use."); *see also Armstrong v. Munford, Inc.*, 451 So. 2d 480, 481 (Fla. 1984) (noting that section 768.125 constitutes a "limitation on the already existing liability of vendors of intoxicating beverages"); *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 981 (Fla. 1984) (adopting an opinion holding that a violation of section 562.11 constituted negligence per

se). Indeed, the first part of section 768.125 affirms "the original common law rule that 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." *Ellis*, 586 So. 2d at 1047.

The statute's use of the phrase "willfully and unlawfully" does not transform the negligence action into an intentional tort. Courts have held that a "'willful' sale or furnishing of alcoholic beverages to a person not of lawful drinking age requires 'knowledge that the recipient is not of lawful drinking age.'" *Case v. Newman*, 154 So. 3d 1151, 1153 (Fla. 1st DCA 2014) (citation omitted); *see also Tuttle v. Miami Dolphins, Ltd.*, 551 So. 2d 477, 481 n.3 (Fla. 3d DCA 1988) (defining "willfully" in section 768.125 to mean "knowledge that the recipient is not of lawful drinking age"). Thus, the term "willfully" is intended to protect vendors who do not know that a particular patron is underaged. *See Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 947 (Fla. 2020) ("We also adhere to Justice Joseph Story's view that every word employed in a legal text is to be expounded in its

plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.'" (cleaned up)).

The statute's use of the term "unlawfully" has its own purpose. This Court has found "that 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 in section 562.11(1)(a)," Florida Statutes (which prohibits the sale of alcohol to minors),[4] "to prevail in a civil action." *Ellis*, 585 So. 2d at 1048; *see also Persen v. Southland Corp.*, 656 So. 2d 453, 454 (Fla. 1995) ("The minor exception has been construed as mirroring liability under the criminal statute[.]"). "Once these elements have been proven, the plaintiff has established negligence per se." *Ellis*, 585 So. 2d at 1048 (citation omitted).

Thus, when section 768.125 states that a vendor "who *willfully and unlawfully* sells or furnishes alcoholic beverages to a person who

[4] Section 562.11(1)(a), Florida Statutes, provides that "[a] person may not sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age or permit a person under 21 years of age to consume such beverages on the licensed premises."

is not of lawful drinking age . . . *may* become liable for injury or damage caused by or resulting from the intoxication of such minor or person," it provides that the vendor who furnishes a person under 21 years old alcoholic beverages knowing that the patron was underage may be held liable for negligence for any resulting injuries.

Plaintiff relies on distinguishable criminal statutes to establish that "willfully and unlawfully" instead means "intentional, serious misconduct" (br. at 31 n.7). In the context of those statutes, it certainly does. *See, e.g.*, § 806.01(1), Fla. Stat. (referring to "willfully and unlawfully" damaging a dwelling or structure which might be occupied, by fire or explosion); § 827.03(1)(a)(2), Fla. Stat. (providing that "willfully and unlawfully" caging a child is aggravated child abuse). But Plaintiff disregards its own earlier admonition, quoting this Court's decision in *Davis*, that "[t]he words of a governing text are of paramount concern, and what they convey, *in their context*, is what the text means" (br. at 21) (emphasis added). In the context of those statutes, the willful act conveys an intent to injure persons or property. In the context of section 768.125, it does not.

Plaintiff also makes several other new arguments (br. at 32, 51-53) that the Court should disregard. *See, e.g.*, *Sunset Harbour Condo. Ass'n*, 914 So. 2d at 928; *Nolte*, 524 So. 2d at 419. In any event, all of them fail. For example, Plaintiff relies on a statute about the contribution among joint tortfeasors (br. at 32), which prohibits a tortfeasor who has "intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death" from obtaining contribution. § 768.31(2)(c), Fla. Stat. (2022). Plaintiff uses this statute to claim that section 768.125 addresses intentional misconduct (br. at 32). But the language of that statute differs from the language here: to prohibit contribution, the tortfeasor not only must have intended the conduct; it must have intended to *cause* or *contribute* to the injury. And the federal case Plaintiff cites does not discuss section 768.125 (br. at 32). It merely recognizes that Florida's adoption of comparative fault permits contribution because "it would be undesirable for this Court to retain a rule that under a system based on fault, casts the entire burden of a loss for which several may be responsible upon only one of those at fault." *Carlson v. American Airlines (In re Air Crash near Cali)*, 24 F. Supp. 2d 1340, 1347 (S.D. Fla. 1998) (quoting

Lincenberg v. Issen, 318 So. 2d 386, 391 (Fla. 1975)). The same is true here. Sections 768.31 and 768.81 both aim to apportion each defendant's share of fault.

Plaintiff muses about causation and moral culpability (br. at 32, 52-53). But section 768.125 is clear that a bar "may become liable" for "injury or damage caused by or resulting from the intoxication" of the minor whom the vendor willfully and unlawfully served and who became intoxicated. Section 768.125 permits a negligence action against a vendor who willfully and unlawfully serves alcohol to a minor. It just does not transform it into an intentional tort.

C. This Court Has Interpreted Section 768.125 as Limiting Actions Otherwise Sounding in Negligence

Plaintiff also attacks the First DCA's reliance on this Court's precedent to conclude that comparative fault applies (br. at 35-40). But this Court's precedent supports the First DCA's holding.

This Court analyzed the exception of section 768.125 addressing underage patrons in *Ellis v. N.G.N. of Tampa*. In doing so, this Court reviewed its precedent on alcohol-vendor liability. It explained that its decision in *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla.

1963), "put this state in the forefront of those jurisdictions that modified the original common law rule to allow some *negligence* claims against vendors of alcoholic beverages on the basis that a *sale* could be the proximate cause of an injury." 586 So. 2d at 1045 (emphasis added). As this Court noted, the legislature enacted section 768.125 because of a "judicial trend to extend liability towards vendors of alcoholic beverages." *Id.* at 1046. It explained that "[t]he statute effectively codified the original common law rule absolving vendors from liability for sales but provided exceptions." *Id.* This Court emphasized that the statute was not intended to *create* a cause of action, but to *limit* the common law imposing vendor liability. *Id.* at 1046 (noting that the Court had previously "reaffirmed [its] holding in *Migliore* . . . that the statute constituted a limitation on the existing liability of vendors."); *see also Persen*, 656 So. 2d at 454 ("We have repeatedly recognized that this statute was enacted to *limit the existing liability of liquor vendors*, which had been broadened by judicial decision" (emphasis added)). And in summarizing its prior cases, this Court described the preexisting cause of action as one sounding in negligence:

> In 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 the injury to or death of the minor or a third party.

Ellis, 585 So. 2d at 1047.

To support its conclusion that the claim sounds in negligence, this Court used iterations of "negligence" and discussed the claim using negligence terminology. *Id.* at 1047-49. For example, it noted that "providing alcoholic beverages to minors involves the obvious foreseeable risk of the minor's intoxication and injury to himself or a third person." *Id.* at 1046.

Lower courts have similarly used negligence terms when describing the action. *See*, *e.g.*, *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 398 (Fla. 1st DCA 2004) ("[A] bar or tavern has a legal duty to refrain from serving alcoholic beverages to minors, and a breach of that duty may subject the bar or tavern to liability for injuries caused by an intoxicated minor."); *Sipes v. Albertson's Inc.*, 728 So. 2d 1243, 1246 (Fla. 5th DCA 1999) ("We do not find it to be necessarily beyond the realm of reasonable foreseeability . . . that willfully serving a minor

alcohol will cause that minor to become intoxicated and . . . to injure another . . . .").

Plaintiff dismisses part of *Ellis*'s discussion of the statute as dictum and criticizes the First DCA opinion for relying on it (br. at 37-38). But the opinion mentions *Ellis* only *once*—after a "see also" signal, with a parenthetical that a "plaintiff must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action" under section 768.125 and that "[o]nce these elements have been proven, the plaintiff has established negligence per se." 342 So. 3d at 235. Plaintiff has never contested this conclusion. It even concedes that the term "unlawfully" refers to "violating statutory prohibitions enacted to protect underage persons and the public" (br. at 54).

Plaintiff insists that *Ellis's* reference to the "*negligent* sale of alcoholic beverages to a minor" is dictum because the holding involved the part of the statute addressing the sale of alcohol to "habitual drunkards" (br. at 38). It cites statements to that effect in *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064, 1066 (Fla. 5th DCA 1995) (br. at 38). But *Austin's* own discussion of *Ellis* is dictum. Its

holding was that Publix was entitled to summary judgment because there was no evidence of a willful sale to a minor—rendering irrelevant its discussion of *Ellis*. *Austin*, 658 So. 2d at 1067-68.

In any event, even if the Court's statements in *Ellis* were dicta, this Court's dicta is persuasive, relevant, and in this case correct. *See Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 392 (Fla. 2013) (relying on Florida Supreme Court dictum because it was "[m]ore than just persuasive, *Custer* is correct . . . and relevant caselaw"); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) ("However, there is dicta and then there is dicta, and then there is Supreme Court dicta."). Indeed, Plaintiff itself relies on other parts of *Ellis* (*e.g.*, br. at 27-28, 45-46).

While it is true that *Ellis* addressed the habitual-drunkard exception in section 768.125, this Court's analysis shows how both exceptions explain the statute's meaning and application. 586 So. 2d at 1047-49; *see also BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 290 (Fla. 2003) ("To ascertain the meaning of a specific statutory section, the section should be read in the context of its surrounding sections."). And Plaintiff, too, relies on a habitual-drunkard case to

argue that section 768.125 "now delineates the elements" for "an action based on the willful and unlawful sale to an underage person" (br. at 40) (citing *Luque v. Ale House Mgt., Inc.*, 962 So. 2d 1062, 1065 (Fla. 5th DCA 2007)). But the "elements" Plaintiff claims exist (br. at 28-29, 40) do not negate that the substance of the action is negligence.

Plaintiff also aims to discredit the First DCA's reliance on this Court's precedent to hold that the action sounds in negligence (br. at 35-40). But in *Ellis* this Court interpreted the same cases Plaintiff discusses. In fact, this Court relied on those cases to conclude 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 the injury to or death of the minor or a third party." 586 So. 2d at 1047 (emphasis added). Thus, the First DCA correctly determined that Plaintiff's action is a "negligence action."

D. Section 768.125 Makes a Bar Derivatively Liable For Their Minor Patrons' Negligence

Plaintiff next argues that the First DCA incorrectly held that vendor liability under section 768.125 is derivative—that is, it depends on the underage patrons' subsequent acts (br. at 18, 44-49). This type of liability involves "wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another. The liability is derivative because it depends upon a subsequent wrongful act or omission." *Barnett v. State*, 303 So. 3d 508, 514 (Fla. 2020) (citation omitted).

Plaintiff argues that the comparative-fault statute does not apply because "the negligence of the patrons is irrelevant" (br. at 44), but this argument (br. at 44-49) contradicts its position since the case's inception. For example, the complaint alleged that Dwyer and Faircloth's intoxication caused Faircloth's injuries (R. 138 ¶ 19 ("The injury to Jackie Faircloth was *caused by or resulted from the intoxication of Devon Dwyer*.") (emphasis added); ¶ 15 ("*As a result of the influence of the alcoholic beverage consumed at Cantina 101*, *she* stepped into the roadway and was struck by a motor vehicle driven by Devon Dwyer") (emphasis added)). And at trial, Plaintiff told the

jury that Dwyer and Faircloth were "both" a "contributing cause" of Faircloth's injuries (T10. 1287).

In the First DCA, Plaintiff continued to argue the patrons' negligence. It tried to directly connect Dwyer's intoxication with Faircloth's injuries (ans. br. at 19 ("[T]here was a causal relationship between Dwyer's intoxication and striking Jackie with his truck."); *id.* at 47 ("The only inference the jury had to draw was the ultimate inference: Dwyer's intoxication was a proximate cause of his striking Jackie with his truck.")). And Plaintiff acknowledged that Faircloth's intoxication affected her actions, too (ans. br. at 38 ("Plaintiffs do not deny Jackie was intoxicated, and her intoxication affected her actions . . . .")). It was only *after* the First DCA issued its opinion that Plaintiff asserted this argument in its motion for rehearing en banc, rehearing, and certification (Mots. at 13-15). *See* Fla. R. App. P. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding").

The record also belies Plaintiff's statement that "no party ever alleged Dwyer was negligent, or at-fault in any way" (br. at 19) (*e.g.*, R. 2105, 2110, 2139, 2205, 2222). Plaintiff's answer brief stated that

Potbelly's was "fairly consistent in requesting that the jury try the issues whether Dwyer and Jackie were negligent, and that their respective shares of fault be compared" (ans. br. at 13).

And Plaintiff itself alleged the patrons' negligence. Plaintiff alleged that Dwyer's intoxication caused the collision (*see* R. 138 ¶ 19; 143 ¶¶ 29-30)—a negligence allegation. *See, e.g.*, *D'Amario*, 806 So. 2d at 438 (addressing whether section 768.81 applies in crashworthiness cases and holding that "negligent conduct induced by the use of alcohol" is not an intentional tort), *superseded by statute on other grounds*, Ch. 2011-215, § 1, Laws of Fla. On appeal, Plaintiff did not dispute that Dwyer's actions sounded in negligence. Because Potbelly's is derivatively liable for his actions, any negligence on his part is attributed to Potbelly's.

The same is true for Faircloth's actions, which would be attributable in part to Cantina 101.[5] Faircloth's actions—jaywalking while inebriated and wearing dark clothing in a poorly lit area (*see*

[5] We say "in part" because a jury could conclude that some of Faircloth's intoxication resulted from her drinking in her brother's dorm before going to Cantina 101. To that extent, her injuries cannot be attributed to either Potbelly's or Cantina 101. Thus, the jury could allocate some comparative fault to her.

T3. 316; T4. 498-99, 518-20; T6. 732-33, 735; R. 3166)—were also negligent. *See*, *e.g.*, *Falnes v. Kaplan*, 101 So. 2d 377, 379 (Fla. 1958) ("[T]he pedestrian was negligent when he chose to walk on the pavement while there was abundant space to walk elsewhere."); *Nelson v. Ziegler*, 89 So. 2d 780, 784 (Fla. 1956) ("It is unquestionably negligence for an intoxicated person to wander into a busy highway.") (Drew, C.J., concurring). Plaintiff stipulated *both* that Faircloth was intoxicated at the time of the collision *and* that the collision occurred "at a point on the roadway other than within a marked or unmarked crosswalk" (T3. 316). Plaintiff alleged that Faircloth was struck by Dwyer's vehicle "[a]s a result of the influence of the alcoholic beverage[s] consumed at Cantina 101" (R. 138 ¶ 15); and even conceded to the jury that she was a "contributing cause" of her own injuries (*see* T10. 1287). Plaintiff's own authority supports that these statements essentially concede comparative negligence. *See Schoeff*, 232 So. 3d at 312 ("[W]here the plaintiff agreed to submit the fault issue to the jury and conceded some fault, the plaintiff consented to treating the case as a negligence action and effectively waived any post-verdict argument that the damages amount should not be reduced.").

If this had been an intentional tort, Faircloth's negligence would be irrelevant.

Plaintiff claims that the First DCA recognized that "an underaged patron's negligence is irrelevant" in an action involving a single bar but the involvement of two bars changed that conclusion (br. at 48). Plaintiff misunderstands. The First DCA concluded that "the cause of action against Potbelly's would not exist without Dwyer's negligent conduct." 342 So. 3d at 236. The court discussed the relevance of two bars in response to the dissent's characterization of whose fault would be compared. The majority recognized that the underage patrons' fault cannot be compared against the fault of the bars that served them. *Id.* at 236-37. Indeed, it declared: "Neither Dwyer nor Faircloth are responsible for the 'deleterious consequences' of underage drinking . . . . Instead, Potbelly's and Cantina 101 are responsible." *Id.* at 237. The First DCA maintained that the only parties subject to liability are the vendors.

Plaintiff also argues that section 768.125 "is not a derivative liability law because there is no *requirement* that the underaged patron be negligent or otherwise engage in tortious conduct" (br. at 46-

47). Plaintiff made this argument for the first time in its motions for rehearing en banc, rehearing, and certification (Mots. at 17), even though it had not responded to Potbelly's arguments on this point (initial br. at 21; reply br. at 6). Instead, it offered an irrelevant argument about vicarious liability and described derivative liability as a "meaningless label" (ans. br. at 28-29). Now that the First DCA has explained the difference between derivative and vicarious liability, *see* 342 So. 3d at 246, Plaintiff presents the argument. This argument should be rejected on this basis alone. *See* Fla. R. App. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding").

In any event, Plaintiff's argument fails. Under section 768.125, liability arises only if there is "injury or damage *caused by or resulting from the intoxication*" of that minor. § 768.125, Fla. Stat. (emphasis added). Such language describes a vendor's potential derivative liability. The statute does not impose liability for merely selling or providing alcohol to a minor. And the only other courts that have addressed the question have concluded that derivative liability applies in similar cases. *Irvin v. LJ's Package & Lounge, Inc.*, 321 So. 3d

300, 305 (Fla. 2d DCA 2020) (describing two bars' liability under section 768.125 as "derivative and completely overlapping of the damage caused by" the intoxicated driver they served); *Okeechobee Aerie 4137, Fraternal Ord. of Eagles, Inc. v. Wilde*, 199 So. 3d 333, 341-42 (Fla. 4th DCA 2016) ("The negligence of a provider results in liability only when there is a subsequent wrongful act or omission by the person who is intoxicated. Liability in this case was therefore derivative." (cleaned up)); *see also Austin*, 658 So. 2d at 1068 ("Section 768.125 indicates that the culpable vendor becomes vicariously liable for the damages caused by the intoxicated tortfeasor.").

By serving Dwyer alcohol Potbelly's would be liable for Dwyer's later acts caused by his intoxication. *See* Florida Causes of Action § 2:40.5 ("Derivative liability is similar to vicarious liability in that: (1) there is no cause of action unless the directly liable tortfeasor commits a tort; and (2) the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused."). And although Plaintiff tries to highlight facts about Potbelly's actions (*e.g.*, br. at 34-35), Potbelly's stipulated before trial that it willfully and unlawfully sold alcohol to Dwyer (T3. 314-15). The jury was left to decide whether

Dwyer was impaired and whether his actions caused Faircloth's injuries (R. 3072).

Plaintiff's hypotheticals on this point do not move the ball. Plaintiff claims that Potbelly's would be liable even if Potbelly's had "sold Dwyer soft drinks willfully spiked with alcohol" (br. at 47). But Plaintiff would have to establish that Potbelly's willfully and unlawfully sold alcohol to Dwyer; that Dwyer became intoxicated because of Potbelly's service or sale of alcohol to him; *and* that his intoxication caused his injuries. As in this case, Potbelly's would be responsible for injuries caused by Dwyer's intoxication. The same is true for Plaintiff's other hypotheticals about Dwyer injuring himself or Salow being injured (br. at 45). In these scenarios, Plaintiff would still have to establish that *Dwyer's intoxication* caused his or Salow's injuries. These hypotheticals illustrate that both the vendors' *and* their underage patrons' actions matter. Potbelly's liability, if established, would derive from both Dwyer's actions and its own.

Similarly here, Potbelly's is liable to the extent that it caused Dwyer's intoxication and Dwyer's intoxication in turn caused Faircloth's injuries. Put differently, Potbelly's would not be liable to

Plaintiff if the jury finds either that (1) Dwyer was *not* intoxicated, or (2) his intoxication did not cause Faircloth's injuries.

Plaintiff also claims—again for the first time—that Potbelly's "did not *plead* that Dwyer (a nonparty) was negligent," so Potbelly's could not ask the jury to consider Dwyer's negligence or fault (br. at 47). Again, the Court should reject this argument as waived. *Sunset Harbour Condo. Ass'n*, 914 So. 2d at 928; *Nolte*, 524 So. 2d at 419. At trial, Plaintiff conceded that Dwyer and Faircloth were a contributing cause of Faircloth's injuries (T. 1286-87). Plaintiff did not object to Dwyer's inclusion on the verdict form, and its proposed verdict form and jury instructions referred to Dwyer by name (R. 1630, 1642; *see also* R. 2958). And Potbelly's did not need to name Dwyer as a potential *Fabre* defendant because the basis for his name being on the verdict form would be to represent *Potbelly's* percentage of fault.

In any event, even if section 768.125 did not support derivative liability, comparative fault would still apply. Each relevant parties' actions would be considered and the bars would be responsible for their percentage of fault. Comparative fault applies because the action sounds in negligence.

II. SECTION 768.36 APPLIES IN ANY CIVIL ACTION, WHETHER IT ASSERTS NEGLIGENCE OR AN INTENTIONAL TORT

Plaintiff also contests the First DCA's holding that section 768.36, Florida Statutes—the "alcohol defense"—applies in this case (br. at 54-57). Section 768.36 prohibits recovery for intoxicated plaintiffs more than 50% at fault for their injuries:

> (2) In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:
>
> (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and
>
> (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

Plaintiff argues that section 768.36 does not apply to intentional torts (br. at 55). The First DCA declined to address the issue, noting that its holding "that a 'dram-shop exception' action is a negligence action for purposes of the comparative fault statute" obviated the

need to decide whether the statute applied to intentional torts. 342 So. 3d at 238.

The same is true now: if this Court holds that section 768.125 authorizes a negligence action, then not only would comparative fault apply; the alcohol defense would apply as well. If, on the other hand, this Court holds that the statute describes an intentional tort, then it must decide whether section 768.36 applies to such torts. It does.

The parties agree that the Court's task in interpreting a statute is to "give effect to the words that the legislature has employed in the statutory text." *Davis*, 339 So. 3d at 323. "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Id.* (citations omitted). On its face, section 768.36 applies "[i]n *any* civil action." § 768.36(2), Fla. Stat. (emphasis added). This language is unambiguous: the defense can be asserted in *any* civil action. The statute provides no exception or limitation.

Plaintiff claims that other parts of the statute suggest that comparative-fault principles do not apply (br. at 55). To do so, Plaintiff

must ignore the phrase, "[i]n any civil action," and add words. Plaintiff's interpretation would mean that "any civil action" means "any civil action except those where comparative fault does not apply"; or "in any civil action alleging negligence." But courts should not add language to the statute to discern its meaning. *Statler v. State*, 349 So. 3d 873, 879 (Fla. 2022) ("In construing this statute, this Court must give the statutory language its plain and ordinary meaning, and is not at liberty to add words that were not placed there by the Legislature." (cleaned up)); *Coates v. R.J. Reynolds Tobacco Co.*, 2023 WL 106899, at *5 (Fla. 2023) ("[O]ur job is to faithfully apply the law as written").

This case is unlike cases Plaintiff cites where provisions required further interpretation because of limiting language after the word "any." *See, e.g.*, *Davis*, 339 So. 3d at 325 (interpreting the phrase "any matters concerning reimbursement"); *Ham*, 308 So. 3d at 948 (Fla. 2020) (interpreting the phrase "in any action . . . with respect to the contract"). The phrase "any civil action" needs no interpretation.

Plaintiff promotes reading section 768.36 *in pari materia* with

section 768.81, but overlooks the context surrounding the provisions and the context in which section 768.36 was enacted (br. at 56-57). *See* Scalia & Garner, Reading Law at 252 ("[*In pari materia*] rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so."). The comparative-fault statute, which expressly applies only to *negligence* actions, *see* § 768.81, Fla. Stat., cannot limit the application of section 768.36, which applies in "*any* civil action." *See, e.g.*, *BellSouth Telecomms., Inc.*, 863 So. 2d at 291 ("A generally accepted canon of construction provides that when the legislature includes a provision in one section of a statute but excludes it in another, courts will deem the difference intentional and will assign meaning to the omission."); *see also* Scalia & Garner, *Reading Law* at 33 ("The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued").

If the legislature had wanted to limit section 768.36 to comparative-fault cases, it knew how to do so. When it enacted section 768.36 in 1999, *see* Ch. 99-225, § 20, Laws of Fla., sections 768.125 and 768.81 already existed. *See* Ch. 80-37, § 1, Laws of Fla.; Ch. 86-160, §§ 60, 65, Laws of Fla. "The legislature is presumed to know existing law when it enacts a statute." *Holmes Cty. Sch. Bd. v. Duffell*, 651 So. 2d 1176, 1179 (Fla. 1995). The Legislature targeted these statutes in 1999 because it enacted comprehensive modifications to the civil justice system—including to section 768.81. *See* Ch. 99-225, § 27, Laws of Fla.

Section 768.36 allows the jury to consider Faircloth's actions that were independent of the bars' conduct. There is no dispute that Faircloth was intoxicated (T3. 316; *see also* T3. 325). Plaintiff even told the jury that she was a "contributing cause" of her injuries (*see* T3. 337-38, 342; *see also* T10. 1286-87, 1289). Potbelly's had a right to assert its defense that, as a result of her intoxication, Faircloth was more than 50% at fault for her own harm.

As the First DCA's opinion states, any fault attributed to Faircloth would have to be "caused by anything other than intoxication

resulting from being furnished alcohol by Cantina 101"; and the success of this defense would "depend[ ] on what the evidence shows." 342 So. 3d at 238. Faircloth's intoxication from alcohol that Cantina 101 served her is attributed to Cantina 101 and increases *its* comparative fault relative to Potbelly's. But the evidence also showed that Faircloth had been drinking in her brother's dorm *before* the group left to Cantina 101. A jury should decide whether she was more than 50% at fault for her injuries.

CONCLUSION

For the reasons stated, this Court should affirm the First DCA's decision.

Dated: April 25, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this motion was filed through the Florida Courts' e-Filing Portal System and a copy was served by electronic submission on April 25, 2023 to the following:

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CERTIFICATE OF COMPLIANCE

Under Florida Rule of Appellate Procedure 9.045(e), I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B). It is written in Bookman Old Style 14-point font and contains fewer than 13,000 words.

By: */s/ Raoul G. Cantero*
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