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 No.: 2015 CA 002778

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

Petitioner cannot justify this Court's exercise of jurisdiction. First, it seeks review of a certified question that this Court's precedent answers and the First DCA correctly decided. Then—undeterred by the First DCA's denial of its motion for conflict certification—it claims this Court should exercise jurisdiction based on the "appear[ance]" of a conflict. Finally, Petitioner presents a new, independent question and improper argument about the alcohol defense. None of these issues warrants review.

STATEMENT OF THE ISSUES

The First DCA certified one question in its order on Petitioner's motions for rehearing en banc, rehearing and certification:

> 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 question does not require the Court's review.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks to quash the First DCA's carefully crafted opinion ("Opinion"). The Court need not exercise jurisdiction

because the First DCA correctly reversed the trial court's rulings and tailored its Opinion to the unique facts.

The Opinion details the operative facts.[1] At around 2 am on a Friday night, Jacquelyn Faircloth—an 18-year-old who was intoxicated—collided with a pickup truck driven by 20-year-old Devon Dwyer as she was crossing the street (App. 6). Before the two collided, Cantina 101 Restaurant and Tequila Bar had served Faircloth alcohol despite her age and Dwyer had been drinking at Respondent's establishment, Potbelly's (*id.*). Faircloth suffered severe injuries (*id.*).

Petitioner sued Potbelly's as well as various entities that owned and operated Cantina 101 (*id.*). Petitioner alleged that the defendants willfully and unlawfully furnished Dwyer and Faircloth alcohol, causing intoxication, which resulted in injury (*id.*). The trial court entered default judgment against Cantina 101 and the case ultimately went to trial (*id.*). The trial court prohibited Potbelly's from presenting a comparative-fault defense under section 768.81, Florida Statutes; or a defense under section

[1] Petitioner's appendix attaches the Opinion. This brief cites this appendix as "App. #."

768.36, Florida Statutes (barring recovery if an intoxicated plaintiff is more than 50% at fault for her injuries) (*id.*).

Ultimately, the jury found that Dwyer was intoxicated and that his intoxication contributed to Faircloth's injuries (*id.*). Because the trial court had stricken the comparative-fault defense, the verdict did not apportion fault among the parties. The trial court entered a final judgment of about $28.6 million jointly and severally against Potbelly's and Cantina 101 (*id.*). Potbelly's appealed, arguing, among other things, that it should have been allowed to present its defenses. Cantina 101 has not participated.

The First DCA reversed the judgment and remanded for further proceedings. First, the Court concluded that actions under section 768.125 allege negligence—not an intentional tort (*id.* at 9). Thus, the trial court should have allowed Potbelly's to assert a comparative-fault defense (*id.* at 12). Second, the Court reversed the trial court's ruling on Potbelly's section 768.36 defense (*id.* at 13). The Court concluded 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 11).

Petitioner filed motions for rehearing en banc, rehearing, and certification. The First DCA denied all motions but for Petitioner's motion for certification of a question of great public importance. The court certified the following question:

> 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?

Petitioner asks this Court to review the case, but has expanded the issues beyond what the First DCA certified.

ARGUMENT

Potbelly's does not dispute that the certified question grants this Court discretionary jurisdiction. *See* Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v). But this Court can and should decline review because (I) this Court's precedent answers the certified question and the Opinion correctly applies it; (II) there is no conflict to support jurisdiction; and (III) the First DCA correctly ruled on the issue it did *not* certify for review.

I. This Court's Precedent Answers the Certified Question, and the Opinion Correctly Applies It

The Opinion correctly relied on this Court's precedent to conclude that serving alcohol to patrons under the lawful drinking

age is not an intentional tort that prohibits applying comparative-fault principles (App. 7-12). Petitioner cherry-picks the precedent it deems relevant (br. at 11-12), but ignores what this Court has *already* said on this precise issue. For example, Petitioner claims that this Court "has *never* decided a case concerning the nature or elements of such a claim" (br. at 9). But this Court *has* stated that the Legislature's use of "unlawfully" in section 768.125, Florida Statutes, requires that the plaintiff "establish each of the elements of the criminal offense of section 562.11(1)(a) to prevail in a civil action." *Ellis v. N.G.N. of Tampa*, 586 So. 2d 1042, 1048 (Fla. 1991). Once these are proven, "the plaintiff has established *negligence per se*." *Id.* The Opinion properly relied on this statement, among others, to hold that Petitioner's claim alleges negligence (App. 8-9).

Other statements in *Ellis* imply an answer to the certified question consistent with the Opinion. For example, this Court stated, after an overview of its precedent: "[T]here 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). This statement belies Petitioner's assertion that this Court has "*never* considered

. . . whether such a claim sounds in intentional tort" (br. at 9). This Court has considered this issue and has identified the claim as negligence. *Ellis*, 586 So. 2d at 1047-48.

Nor does the statute say what Petitioner suggests. It excludes from comparative-fault analysis "any action based on an intentional *tort*." *See* § 768.81(4), Fla. Stat. (emphasis added). But it does not exclude all intentional *conduct*—some of which may constitute negligence (for example, a driver may intentionally run through a red light without intending the resulting accident). Thus, Petitioner's claim that "the Legislature determined that defendants who engage in *intentional misconduct* must shoulder the entire cost" misquotes the statute (br. at 10).

This Court has defined an intentional tort more narrowly than just any intentional conduct. To constitute an intentional tort, 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. Intentional behavior by itself is not enough. *See Spivey v. Battaglia*, 258 So. 2d 815, 816-17 (Fla. 1972) (holding that a defendant's act of "intentionally put[ting] his arm around

petitioner" and pulling her toward him was a negligent act because her subsequent facial paralysis was not substantially certain to follow from defendant's action).

Petitioner broadly argues that claims against vendors under section 768.125 for serving minors are "a regularly recurring part of Florida's legal landscape" and that the issue of "whether comparative fault principles apply to such a claim, or whether it sounds in intentional tort . . . will likely continue to arise . . . in *every* action premised on section 768.125" (br. at 9 (emphasis added)). Of course, Petitioner cites no authority for the latter statement, and musters only *seven* cases decided since the statute's enactment over 40 years ago to support the former (*id.*). In fact, in over four decades *fewer than 50 cases* have substantively discussed the exception for serving alcohol to minors. Thus, the statute is not a "regularly recurring part of the legal landscape in Florida." Nor do the cases suggest that "this issue will likely continue to arise . . . in every action premised on section 768.125" (br. at 9). Even if district courts regularly interpret section 768.125, that alone does not warrant review here, where the Opinion focused on the unique facts involved (*e.g.*, App. 10-12 (discussing the bars' derivative liability)).

Finally, Petitioner argues that "[a]llowing bars to reduce or eliminate their financial exposure . . . undermines the Legislature's prohibitions against underage drinking" (br. at 11). But the Opinion does no such thing. To the contrary, it states—consistent with section 768.81 and the case law—that bars will be held liable to the extent of their fault (*e.g.*, App. 11, 14).

II. The First DCA Did Not Certify a Conflict and No Express-and-Direct Conflict Exists

Petitioner argues that the Opinion conflicts with *Publix Supermarkets v. Austin,* 658 So. 2d 1064 (Fla. 5th DCA 1995), because the two cases "appear irreconcilable on the question whether this Court's prior decisions stand for the proposition that 'willfully and unlawfully' selling alcohol to minors is mere negligence" (br. at 12). Petitioner cites no basis for asserting jurisdiction on this issue. And there is none.

First, as Petitioner concedes (*id.*), the First DCA did not certify a conflict. *Cf.* Art. V, § 3(b)(4), Fla. Const. (stating that the Court "[m]ay review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal."); Fla. R. App. P. 9.030(a)(2)(A)(vi) ("The discretionary jurisdiction of the supreme court may be sought to review . . . decisions of district courts of appeal that . . . are

certified to be in direct conflict with decisions of other district courts of appeal.").

Nor does the Opinion "expressly and directly" conflict with a decision of another court of appeal or of this Court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(A)(iv). Petitioner apparently concedes as much—arguing instead that the Opinion and *Austin* "appear irreconcilable" (br. at 12).

As this Court well knows, it has no jurisdiction to review opinions that "appear irreconcilable." Its jurisdiction extends only to cases that expressly and directly conflict. No such conflict exists here. In *Austin*, the Fifth DCA concluded that the trial court should have entered summary judgment for a vendor who sold alcohol to a minor because the plaintiff failed to prove willfulness under section 768.125. 659 So. 2d at 1068. This was not an issue below, and the Fifth DCA's remarks about comparative fault align with the Opinion. *See* App. 10-11 (stating that *Austin* stands for the "proposition that comparative fault cannot be used to balance the wrongdoing of an intentional actor and a negligent one in a dram-shop exception suit. But we agree that such balancing is not permitted."); *Austin*, 658 So. 2d at 1068 ("Since there was no

contributory negligence on the part of Wurtz, and no 'phantom tortfeasors' in this case, the judgment entered against Austin should reflect the entire jury verdict."). The Opinion even *cites* to *Austin* to support its holding (App. 8).

Without citing either opinion, Petitioner argues that *Austin* and the Opinion "appear irreconcilable" in how they interpreted this Court's prior decisions (br. at 12). If Petitioner means *Austin*'s reference to this Court's statements in *Ellis* about a section 768.125 action against vendors for serving minors, 658 So. 2d at 1066, the Opinion never discusses, quotes, or relies on that language. It only refers to *Ellis* on an undisputed point (*see* App. 9). Thus, any appearance of irreconcilability is immaterial.

III. The First DCA Correctly Answered Petitioner's New Question

Finally, Petitioner's jurisdictional brief argues substantive issues it did not raise in the First DCA in its motions for rehearing en banc, rehearing, and certification (br. at 1, 13-14). This is improper. *See* Fla. R. App. 9.120(d) (stating that the argument section of petitioner's brief should be "limited *solely* to the issue of the supreme court's jurisdiction") (emphasis added); Fla. R. App. P. 9.210(f) ("In the *statement of the issues*, petitioner shall *identify* any issues independent of those on which jurisdiction is invoked

that petitioner intends to raise if the court grants review") (emphasis added). Petitioner identifies no ground for jurisdiction based on the Opinion's application of section 768.36, Florida Statutes (alcohol or drug defense). And none exists. *See* Art. V, § 3(b), Fla. Const. The First DCA did not certify a question related to that statute. And Petitioner identifies no conflict with another DCA or this Court about that statute.

Even if the Court considers the effect of section 768.36, the Court should decline review. The Opinion's holding on Potbelly's alcohol defense is narrowly tailored and does not have the wide-ranging effects Petitioner insinuates (br. at 13-14). Indeed, the Opinion notes that its reversal is based on the trial court's "identification of the cause of action as an intentional tort" and that it did not need to "address whether the alcohol defense applies to intentional torts" (App. 13). The Opinion also added that any fault attributed to Faircloth would have to be "caused by anything other than intoxication resulting from being furnished alcohol by Cantina 101"; and that the success of this defense would "depend[ ] on what the evidence shows" (*id.* at 14).

Despite this limitation, Petitioner argues that this Court "should . . . decide the issue whether section 768.36(2) provides a

defense to intentional torts" (br. at 13). Petitioner cites examples of claims that are not subject to comparative fault to "expose the obvious concerns which would arise if intoxication were a defense to intentional torts" (*id.*). But the Opinion notes that "[i]t does not appear obvious that the alcohol defense necessarily relies on the comparative fault statute" (App. 13); and that section 768.81, *by its terms*, does not apply to intentional torts (App. 7).

Indeed, Petitioner ignores the language of section 768.36, which states it applies "[i]n *any* civil action." § 768.36(2), Fla. Stat. (emphasis added). Petitioner claims that the Legislature "could not have intended such results" (br. at 14), but as the Court is aware, policy is for the Legislature, and the policy behind section 768.36 was to promote personal responsibility. *See* Fla. H.R. Comm. on Judiciary, HB 775 (1999), Final Analysis 11, 21 (June 2, 1999) (https://www.flsenate.gov/Session/Bill/1999/775/Analyses/1999 0775HJUD_HB0775Z.Jud.pdf) (stating that a goal of section 768.36 is to "encourage personal responsibility by shifting emphasis from compensation based primarily upon loss toward responsibility based upon fault"). The Opinion's interpretation of section 768.36 aligns with this purpose.

CONCLUSION

For the reasons stated, this Court should decline review.

Dated: August 22, 2022

Respectfully submitted,

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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)(A). It is written in Bookman Old Style 14-point font and contains fewer than 2,500 words.

By: */s/ Raoul G. Cantero*
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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 August 22, 2022 to the following:

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