

IN THE SUPREME COURT OF FLORIDA

Case Number SC22-910

**GUARDIANSHIP OF JACQUELYN
ANNE FAIRCLOTH,**

Petitioner,

vs.

**MAIN STREET ENTERTAINMENT,
INC., d/b/a POTBELLYS,**

Respondent.

On Discretionary Review from the
First District Court of Appeal
Case Number 1D19-4058

Petitioner's Brief on Jurisdiction

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STATEMENT OF THE ISSUES

- The district court certified the following as 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?

- Petitioner also asks the Court to decide an independent, but related issue:

Whether a party liable for "willfully and unlawfully" selling alcohol to an underage patron, pursuant to section 768.125, Florida Statutes, is entitled to raise the plaintiff's intoxication as an affirmative defense, pursuant to section 768.36(2), Florida Statutes?

STATEMENT OF THE CASE AND FACTS

The Petitioner-Guardianship sued two Tallahassee bars after the intoxicated operator of a pickup truck, Devon Dwyer, struck an intoxicated pedestrian, Jacquelyn Faircloth, now the Guardianship's ward. Dwyer was traveling at 55 miles per hour in a 30 mile per hour zone when he struck Faircloth, tragically injuring her.¹ Neither Dwyer nor Faircloth was of lawful drinking age. Dwyer had been drinking at the Respondent bar ("Potbelly's"). Faircloth had been drinking at Cantina 101. (App. 6)

The Guardianship alleged Potbelly's and Cantina 101 had each "willfully and unlawfully" served alcohol to the minors, resulting in their intoxication, and further resulting in Faircloth's injuries. (App.

6) The Guardianship's claims were based on section 768.125, Florida Statutes, which provides:

a person 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.

¹ Petitioner's appendix ("App.") at 5-6.

(App. 7-8) The trial court entered a default against Cantina 101. (App. 6)

Potbelly's sought to defend the case based on the comparative fault statute, section 768.81, Florida Statutes, and the "so-called 'alcohol defense'" statute, section 768.36(2), Florida Statutes. (App. 6-7; 12) Section 768.81 requires apportionment of fault and damages in a "negligence action," and actions based on "like theories." (App. 7) Section 768.36(2)(b) bars recovery for personal injuries "if the trier of fact finds" the plaintiff, when injured, was under the influence of drugs or alcohol to the extent her "normal faculties were impaired," and "more than 50 percent at fault for ... her own harm." (App. 12)

The trial court entered partial summary judgment on the comparative fault defense. It reasoned the comparative fault statute does not apply to intentional torts, § 768.81(4), Fla. Stat., and "willfully and unlawfully" selling alcohol to a minor is an intentional tort rather than negligence. (App. 7) The trial court also concluded the alcohol defense was unavailable to Potbelly's because it required application of comparative fault, and comparative fault principles did not apply to a claim for "willfully and unlawfully" selling alcohol to a minor. (App. 12-13)

The jury found Dwyer was intoxicated and that his intoxication caused Faircloth's injuries. The trial court entered a final judgment for \$28.6 million, based on the jury's verdict, jointly and severally against Potbelly's and Cantina 101. Potbelly's appealed, arguing it was entitled to assert both defenses. (App. 6)

A divided panel of the district court reversed. The majority held the liability imposed by section 768.125 is based on "negligence, not an intentional tort." It stated this Court has already "clearly held" Petitioner's claims sound in negligence. According to the majority, 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." (App. 9)

The majority also reasoned that liability under section 768.125 is purely "derivative," because the intoxicated minor is the negligent tortfeasor, for whom a seller is ultimately liable. (App. 9-10) According to the majority, "[w]hile Potbelly's may be liable for the harm to Faircloth caused by Dwyer, this harm was the result of Dwyer's negligence." (App. 10) Because this case involved two bars, it concluded Dwyer's negligence should have been compared against

Faircloth's negligence, which in turn should have been attributed to Cantina 101. (App. 11-14)

On the alcohol defense, the majority reversed because it had already concluded the trial court erroneously determined the Guardianship's claims sounded in intentional tort. (App. 13) Still, the majority questioned whether the alcohol defense would benefit Potbelly's, based on its conclusion that the Guardianship's claims were purely derivative. As it explained, Faircloth cannot be "at fault" for her own intoxication if her intoxication was caused by Cantina 101. (App. 13-14) If Faircloth became intoxicated for some other reason, then "the alcohol defense could possibly limit Potbelly's liability." (App. 14)

In the retrial envisioned by the majority, the jury would consider whether and by what percentage Faircloth's negligence contributed to the accident, whether such negligence was the result of intoxication, and whether such fault is chargeable to Cantina 101 because of willful and unlawful conduct. (App. 14)

Judge Makar dissented. He noted Dwyer bought eighteen Bud Lights and six bourbons at Potbelly's, where received a 50-percent discount as an employee, before becoming "inebriated." Potbelly's

stipulated it knew Dwyer “was a minor ... yet it nonetheless ‘willfully and unlawfully furnished alcoholic beverages to him.’” (App.16-17) Potbelly’s denied Dwyer was intoxicated but the jury “held otherwise.” (App. 17)

Judge Makar concluded the willful and unlawful sale of alcohol to a minor, based on section 768.125, is an intentional tort. It is accordingly excluded from the comparative fault statute. The statute applies “*only* to negligence-type claims, excluding all others,” and expressly excluding “*any action based on an intentional tort.*” (App. 18 (emphasis placed by Judge Makar) (quoting section 768.81(4)) The “substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.” (App. 18 (quoting section 768.81(1)(c))

Based on this statutory text, Potbelly’s conduct is “intentionally tortious misconduct rather than a species of negligence.” (App. 18) Judge Makar supported this conclusion with citations to legal and English dictionaries indicating willful misconduct is synonymous with intentional misconduct. (App. 18-19) Moreover, intentional misconduct and negligence cannot be compared because they are inherently dissimilar, and the exclusion of intentional torts from the

comparative fault statute is intended to prevent intentional wrongdoers from shifting their liability. (App. 20-22)

Judge Makar addressed Potbelly's claim that this Court has already decided the certified question. (App. 23) He noted the decision in *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064 (Fla. 5th DCA 1995), which calls such a claim a "misreading" of this Court's decision in *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991). (App. 24)

Judge Makar stated it would be a "perverse and irreconcilable anomaly" to allow the willful and unlawful misconduct of a vendor to a minor to 'diminish or defeat' its responsibility by comparing and thereby apportioning its fault contrary to the legislature's will." (App. 30 (quoting *Slawson v. Fast Food Ent.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996); see also App. 32 ("Willfully serving alcohol to minors is intentional misconduct that deservedly precludes culpable vendors, like Potbelly's, from shirking their legal responsibility for the life-altering consequences of their intentional misjudgments."))

Judge Makar also concluded Potbelly's was not entitled to an alcohol defense. He reasoned "comparative negligence is necessarily required" for the application of section 768.36(2)(b) because "the trier

of fact must determine whether a plaintiff ‘was more than 50 percent at fault for his or her own harm.’” (App. 31) This “inquiry is quintessentially a comparative fault analysis, which the comparative fault statute prohibits as to intentional torts.” He did not agree the legislature transformed “all intentional torts into negligence claims” for purposes of this statute. (App. 31 (*see also* App. 32 (“The legislature did not intend its comparative negligence statutes to treat negligent actions and intentional, criminal acts—such as Potbelly’s—in the same way.”))

Petitioner sought rehearing, rehearing en banc, certification of conflict,² and certification of a question of great public importance. The district court denied such relief, except for certifying a question of great public importance, which the court rephrased as presented above. (App. 34)

ARGUMENT

I. The Court Has Discretionary Jurisdiction.

The Court has discretionary jurisdiction to review a district court decision, like the decision here, which “passes upon a question

² Petitioner asserted the district court’s decision conflicts with the Fifth District’s decision in *Austin*.

certified by it to be of great public importance.” Art. V. § 3(b)(4), Fla. Const.

II. The Court Should Exercise Jurisdiction to Decide Whether the Comparative Fault Statute, Section 768.81, Florida Statutes, Applies to Actions for “Willfully and Unlawfully” Selling Alcohol to Underage Patrons, Brought Pursuant to Section 768.125, Florida Statutes.

Claims against vendors of alcohol based on their willful and unlawful sale of intoxicants to minors, under section 768.125, are a regularly recurring part of Florida’s legal landscape.³ This Court, however, has never decided a case concerning the nature or elements of such a claim, except to hold the statute does not extend to social hosts. *Bankston v. Brennan*, 507 So. 2d 1385, 1385 (Fla. 1987). Thus, the Court has never considered whether comparative fault principles apply to such a claim, or whether it sounds in intentional tort. The issue will likely continue to arise, however, in every action premised on section 768.125.

³ See *Case v. Newman*, 154 So. 3d 1151 (Fla. 1st DCA 2015); *Kirkman Road Sports Pub & Rest., Inc. v. Dempsey*, 723 So. 2d 384 (Fla. 5th DCA 1998); *Austin, supra*; *O’Neale v. Hershoff*, 634 So. 2d 644 (Fla. 3d DCA 1994); *Tuttle v. Miami Dolphins, Ltd.*, 551 So. 2d 477 (Fla. 3d DCA 1988); *French v. City of West Palm Beach*, 513 So. 2d 1356 (Fla. 4th DCA 1987); *Burns v. Three of a Kind, Inc.*, 439 So. 2d 1004 (Fla. 5th DCA 1983).

The likely recurrence of this issue supports the exercise of jurisdiction to definitively state whether the “substance” of such claims is negligence within the meaning of the comparative fault statute or whether, as Judge Farmer observed, “The statute sounds more like an intentional tort.” *Heatherly v. Sawgrass Tavern Inc.*, 975 So. 2d 1266, 1267 (Fla. 4th DCA 2008) (dictum).

If, as Petitioner contends, the substance of its claim is an intentional tort, the district court’s opinion conflicts with the Legislature’s determination that comparative fault principles do not apply to such claims. § 768.81(4), Fla. Stat. Rather, the Legislature determined that defendants who engage in intentional misconduct must shoulder the entire cost of harms caused by that misconduct. *See also Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 562 (Fla. 1997) (quoting Prosser & Keeton on the Law of Torts § 65 at 462 (5th ed. 1984) (“intentional wrongdoing differs from simple negligence ‘not merely in degree but in the kind of fault ... and in the social condemnation attached to it’”). The importance of deciding whether a common tort action is subject to comparative fault and apportionment of damages is apparent. *See* W.D. Underwood & M.D. Morrison, *Apportioning Responsibility in Cases Involving Claims of*

Vicarious, Derivative or Statutory Liability for Harm Directly Caused by the Conduct of Another, 55 Baylor L. Rev. 617, 624 (2003) (“Few cases of tort responsibility could be more important” than those “examining whether the liability” of one party “is derived from the wrongful conduct of another,” and whether their liability “should be apportioned.”).

Moreover, as explored by Florida State University, an amicus curiae in the district court, underage drinking remains a significant public health problem, leading to death, sexual assault, and other injuries, in addition to motor vehicle accidents. The claim supplied by section 768.125 provides an important disincentive to those who profit from the willful and unlawful sale of alcohol to minors. Allowing bars to reduce or eliminate their financial exposure for harms caused by the intoxication of minors undermines the Legislature’s prohibitions against underage drinking.

The Court has reviewed related issues as questions of great public importance, a fact which attests to the need for uniform application of the state’s beverage and tort laws, and the importance of mechanisms enacted by the Legislature to regulate threats to public safety posed by underage drinking. *See Armstrong v. Munford*,

Inc., 451 So. 2d 480, 481 (Fla. 1984) (certified question whether section 768.125 superseded § 562.11, Fla. Stat. for claims involving a minor’s intoxication); *Bankston*, 507 So. 2d at 1385 (certified question whether section 768.125 extended to social hosts); *Barber v. Jensen*, 450 So. 2d 830, 830-31 (Fla. 1984) (certified question whether section 562.11 supported cause of action prior to enactment of section 768.125); *see also Persen v. Southland Corp.*, 656 So. 2d 453 (Fla. 1995) (certified question whether habitual drunkard provision of section 768.125 applies to closed-container sales for off-premises consumption).

Finally, Petitioner believes the district court’s decision conflicts with the Fifth District’s decision *Austin*. The district court declined to certify a conflict between the two, as Petitioner requested, but they do 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. The Court should accept jurisdiction and decide the certified question to ensure a uniform application of section 768.125.

III. The Court Should Also Decide Whether a Party Liable For “Willfully and Unlawfully” Selling Alcohol to an Underage Patron, Pursuant to Section 768.125, Florida Statutes, Is Entitled to Raise the Plaintiff’s Intoxication As an Affirmative Defense, Pursuant to Section 768.36(2), Florida Statutes.

The Court should also decide the issue whether section 768.36(2) provides a defense to intentional torts. A few examples expose the obvious concerns which would arise if intoxication were a defense to intentional torts. Conversion, for example, is an intentional tort. *Edelstein v. Marlene D’Arcy, Inc.*, 961 So. 2d 368, 371 (Fla. 4th DCA 2007). There is no comparative fault defense to claims for conversion, though plaintiffs may bear fault in losing the subject property. *Kerrigan v. Am. Orthodontics Corp.*, 960 F.2d 43, 45 (7th Cir. 1992). A conversion plaintiff’s intoxication, however, could not properly defeat the right to recover damages resulting from the defendant’s intentional theft, even if in a state of sobriety, the plaintiff would have locked the door to her home and avoided the loss.

Similarly, there is “no such thing as the ‘negligent’ commission of an ‘intentional’ tort” like battery, and no comparative fault defense. *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996). Section 768.36 could not properly bar a civil claim for sexual battery

against an intoxicated victim's attacker, even if the victim might have completely avoided the attack had she been sober.

The Legislature could not have intended such results, particularly in regard to claims brought pursuant to section 768.125, where one obvious purpose of the statute is to protect minors from the consequences of intoxication. *See Ellis*, 586 So. 2d at 1046-47 (minors "lack the ability to make a responsible decision in the consumption of alcohol"), *quoted in Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 777 n.2 (Fla. 1st DCA 1994); *Barnes v. B.K. Credit Service, Inc.*, 461 So. 2d 217 (Fla. 1st DCA 1985) (statute furthers "ultimate legitimate interest" in protecting minors from their own "immaturity"). Thus, section 768.125 supplies a claim against sellers of alcohol acting "willfully and unlawfully" regardless of whether the intoxicated minor or a third party is injured. *E.g., Kirkman*, 723 So. 2d at 384; *Case*, 154 So. 3d at 1152. In this setting, the seller is an intentional tortfeasor whose conduct cannot properly be compared against that of an intoxicated minor. Addressing this issue will also ensure a uniform, logical and text-based application of the pertinent statutes.

CONCLUSION

The Court should exercise jurisdiction and decide the issues identified in this brief.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been sent by electronic mail to Clerk of Court and to all counsel on the attached list this 23d day of July, 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complied with the font and word limit requirements of Florida Rules of Appellate Procedure 9.045 and 9.210 because it is composed in Bookman Old Style 14-point, type and contains 2,499 words, excluding the cover page, tables, statement of the issues, and certificates.

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