

IN THE SUPREME COURT OF FLORIDA

Case Number SC22-910

**GUARDIANSHIP OF JACQUELYN
ANNE FAIRCLOTH,**

Petitioner,

vs.

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

Respondent.

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

PETITIONER'S REPLY BRIEF

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I. THIS IS NOT A “NEGLIGENCE ACTION.”

A. PLAINTIFF’S ARGUMENTS ARE PRESERVED.

Plaintiff has not presented this Court with “a new theory” or “changed horses in midstream,” as to any of the three statutes discussed in this appeal. *Sanchez v. Miami-Dade County*, 286 So. 3d 191, 194-95 (Fla. 2019). Plaintiff has continuously made the same arguments and contentions.

First, Plaintiff has continuously maintained this is not a “negligence action,” as defined by section 768.81(1)(c). (Ans. Br. 16) (*See, e.g.*, R.515 (statute “applies only in ‘a negligence action’”); 1172 (Legislature “listed the things that comparative fault did apply to”); AP.258; 261; 279 (statute applies only to a “negligence action,” which includes causes of action listed in statute); 263 (court must determine whether action is based on “enumerated theories” or “like theories”))

Second, Plaintiff did not waive the right to assert the minors’ negligence is irrelevant, simply because Plaintiff alleged the minors’ actions were proximate causes of Jackie’s injuries. (Ans. Br. 32-33) For example, when Plaintiff alleged Jackie’s injuries resulted from Dwyer’s intoxication (R.143), Plaintiff was merely including an

essential element of a claim brought pursuant to section 768.125. (In. Br. 28-29) Plaintiff never alleged Dwyer was negligent; nor did Plaintiff embrace the burden to prove his negligence. (Ans. Br. 32-33) To the contrary, Plaintiff expressly argued against Potbelly's position Plaintiff had "somehow indirectly sued Dwyer for negligence." (R.4339-40)

If this really were a "negligence action," it was incumbent upon Potbelly's to *plead* Dwyer's negligence to have the jury consider it. (In. Br. 47) Plaintiff plainly preserved this point as well. (See R.2746 (jury should not consider Dwyer's negligence because it was "not anywhere alleged in the pleadings"); 4341 (it is "Lawsuit 101" that nonparty does not appear on a verdict form unless nonparty's negligence is raised in a pleading); 4342-43 (Potbelly's "didn't do it," *i.e.*, it failed to preserve the right to "put Dwyer on the verdict form")) The same point appears in Plaintiff's First District answer brief. (See AP.279 (Potbelly's wanted Dwyer on the verdict form, but this was "not allowed" because Potbelly's never asserted his negligence in a pleading.))

Third, Plaintiff did not waive the right to argue against the assertion Potbelly's liability under section 768.125 was purely

derivative and resulted from Dwyer's negligence. (Ans. Br. 36-37) When Potbelly's raised the derivative liability issue (R.4337-38), Plaintiff argued there was only a single claim pursued against Potbelly's, *i.e.*, a claim for its own misconduct. Plaintiff's claim was not based on another "underlying tort" committed by Dwyer, but one which depended on a "proximate causal relationship" between Potbelly's own actions and the "harm ... sued for." (R.4339-40)

In the First District, Plaintiff certainly described the term "derivative liability" as a "meaningless label." (AP.270) This was an obvious reference to the comparative fault statute's requirement that a court disregard "conclusory terms used by a party" when describing an action. § 768.81(1)(c), Fla. Stat. Potbelly's omits the rest of the *same sentence* it quotes from Plaintiff's First District brief, which confirms Plaintiff's argument is unchanged: the term derivative liability "fails to acknowledge the fact and substance" of Potbelly's own wrongdoing as the tortfeasor. (AP.270) The substance of the action could not properly be understood without focusing on what Potbelly's—the wrongdoer—did. (AP.271; *see also* AP.266; 273 (minors are among persons protected by section 768.125))

B. THE MINOR EXCEPTION IS NOT A NEGLIGENCE LAW.

Potbelly's asserts section 768.125 is a negligence law, referencing its "context," including its placement in Chapter 768, Florida Statutes ("Negligence") (Ans. Br. 15-16) Section 768.125's location in the books, however, has no legal significance. Section 768.125 was supposed to be placed within Chapter 562, pertaining to the enforcement of the state's beverage laws. "Without any legislative direction," it was moved to Chapter 768 by the Joint Legislative Management Committee. *Bankston v. Brennan*, 507 So. 2d 1385, 1386 (Fla. 1987).

[T]o attach legal significance to the placement of [section 768.125] in the Negligence chapter, instead of its placement in the chapter on Beverage Law Enforcement as directed by the legislature which enacted [the statute], would in effect allow the Joint Legislative Management Committee, authorized by section 11.242(5)(e) to transfer acts, *to alter the substance of a statute*. This we refuse to do.

Id. at 1387; *see also State v. Bussey*, 463 So. 2d 1141, (Fla. 1985) (placement of controlled substance statute in Chapter 817 pertaining to fraud did not render statute a fraud statute).

Potbelly's does not provide support for the First District's conclusion that this Court has already "clearly held" Plaintiff's claim

is for negligence. (AP.411) And Plaintiff did not “attack” the First District for relying on the Court’s prior precedents. (Ans. Br. 26) Rather, Plaintiff demonstrated (1) those precedents do not contain any such holding, and (2) the reference to the word “negligence” in *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1047 (Fla. 1991) was necessarily dicta, insofar as section 768.125’s minor exception is concerned. (In. Br. 35-40)

Potbelly’s tries to justify the First District’s reasoning on the theory that the Court should accord special status to its own dicta. (Ans. Br. 30) The Court’s dicta may certainly be considered, though it is not dispositive. *Gonzalez v. State*, 125 So. 3d 373, 374 (Fla. 3d DCA 2013). If the Court’s dicta cannot be reconciled with its holding and reasoning, however, the dicta should have no persuasive effect. *Ellis’s holding* is the statute’s habitual drunkard exception requires proof of mere “knowledge.” 586 So. 2d at 1048. Its *reasoning* is rooted in the statute’s text, which draws a clear contrast between the habitual drunkard exception (“knowingly”) and the minor exception (“willfully and unlawfully”).

As *Ellis* explains, it was “*important to note* the distinction in the operative language” of the two exceptions when assessing the

substance of the habitual drunkard exception. *Id.* at 1047. *Ellis* ultimately supports Plaintiff's argument that in enacting section 768.125, the Legislature necessarily erected a *higher burden* to recover damages against a bar which sells alcohol to minors. (In. Br. 37) Despite *Ellis's* actual holding and reasoning, Potbelly's asks this Court to read "willfully" to mean "knowingly," and argues that a "willful" actor is merely a negligent one. (Ans. Br. 18-20; 22-24)

The argument is not only incompatible with the statute's text, but also its history. Section 768.125 *eliminated* negligence actions based on the sale of alcohol to minors, but created an exception when a bar engages in willful misconduct. In doing so, the Legislature defined the only permissible cause of action against a licensee, and erected a higher burden of proof than Florida courts had ever required. The remaining cause of action does not sound in "negligence," but intentional tort. (In. Br. 28; 38-39; 49-54)

The Florida Defense Lawyers Association ("FDLA"), as an amicus supporting Potbelly's, surveys many other state dram shop statutes, mostly without identifying their substance. (FDLA Br. 3-18) FDLA accordingly fails to explain how those statutes could inform this Court's construction of section 768.125, if at all. One such

statute, however, requires that a licensee act “willfully and knowingly” before it can be subject to liability for sales to minors. (FDLA Br. 4 (citing Colo. Rev. Stat. § 12-47-801)) In construing that statute, the Colorado Supreme Court indicated the word “willfully” was deleted from a portion of the same statute which gives rise to liability against social hosts who serve alcohol to minors. The amendment was to terminate its status as an intentional tort, which had left homeowners uninsured as social hosts. *Przekurat ex rel. Przekurat v. Torres*, 428 P.3d 512, 516 n. 3 (Colo. 2018). Thus, the current Colorado statute supports liability against a social host who “knowingly” serves a minor. Colo. Rev. Stat. § 44-3-801(4)(a)(I). In cases involving a licensee, however, the additional requirement of acting “willfully” remains. Colo. Rev. Stat. § 44-3-801(3)(a)(I). Again, the point is that willful torts are substantively different, and synonymous with intentional torts.

Potbelly’s references the existence of something called “willful negligence,” a phrase which appears in certain statutes cited by Potbelly’s. (Ans. Br. 20) Section 768.125 is not a “willful negligence” statute, and the word “negligence” nowhere appears in the statute’s text. Still, the “substance” of a hypothetical “willful negligence” action

confirms its substance is not “like” a “negligence action” as defined by the comparative fault statute. § 768.81(1)(c), Fla. Stat.

“Willful negligence” is a legal theory which requires proof “evinced a reckless disregard of human life or rights which is the equivalent of an intentional act or a conscious indifference to the consequences of an act.” *Rupp v. Bryant*, 417 So. 2d 658, 669-70 (Fla. 1982). Potbelly’s atextual suggestion that section 768.125’s reference to willfulness *could mean* “willful negligence” is ultimately self-defeating. Like other forms of “willful” misconduct, the phrase “willful negligence” implies a *mens rea* or degree of moral culpability that differs from the “substance” of “negligence actions” covered by the comparative fault statute, and those based on “like theories.” (In. Br. 29-34)

“Willful negligence” is itself an “inaptly” conceived phrase because it differs in character from negligence. That is why, at common law, a party guilty of “willful negligence” could not raise the defense of contributory fault. Rather, the courts equated “willful negligence” with intentional misconduct for this purpose. *Acosta v. Daughtry*, 268 So. 2d 416, 420 (Fla. 2d DCA 1972); *see also Florida Ry. Co. v. Dorsey*, 52 So. 963, 966 (Fla. 1910) (“willful, wanton, or

malicious” misconduct precluded application of contributory fault). The same principles remain in effect today, after adoption of the comparative fault statute. *See Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 21 (Fla. 1st DCA 1996) (Because “willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, ... a plaintiff’s negligence cannot be compared with a defendant’s willful and wanton conduct.”) (citation omitted), *approved, Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997).

Potbelly’s focuses on the phrase “without limitation” in the definition of a “negligence action” under section 768.81(1)(c). In doing so, it suggests the comparative fault statute extends to a virtually limitless category of cases. (Ans. Br. 15-16) But the phrase cannot itself be a term *without some limitation*, given the rest of the same provision. Any “fair reading” of section 768.81(1)(c), necessarily includes consideration of the statute’s “entire text,” including its other parts. *Lab. Corp. of America v. Davis*, 339 So. 3d 318, 323-24 (Fla. 2022).

The balance of that text requires consideration of a particular action’s “substance,” and whether it rests on “theories” which are

“like” those expressly defined to constitute a negligence theory. And, as noted, it prevents mislabeling a cause of action to avoid the statute’s effect. That is the context which informs the meaning of the phrase “without limitation.” If the action is not one enumerated in the definition, and its underlying theory is not “like” any of the enumerated theories, it is not a “negligence action.” (In. Br. 31-43) Because the willful and unlawful sale of alcohol to minors is not like any of those theories, an action based on such conduct is not a “negligence action.”

C. THE MINOR EXCEPTION IS NOT A DERIVATIVE LIABILITY LAW.

Section 768.125, titled “Liability for injury or damage resulting from intoxication,” 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.

The statute imposes liability for the consequences of a minor’s *intoxication*, when willful and unlawful misconduct by a licensee results in the minor’s intoxication. It does not impose liability for the consequences of a minor’s negligence, or other wrongdoing. It makes

no difference whether the minor has engaged in actionable conduct. For this reason, section 768.125 is not a derivative liability law. See *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003) (existence of derivative liability depends upon the commission of “a tort” by a subsequent actor).

Plaintiff did not sue Potbelly’s for Dwyer’s negligence, or cast Potbelly’s as derivatively liable for Dwyer’s conduct. (In. Br. 9) Plaintiff’s complaint makes this clear:

17. Devon Dwyer was ... a 20-year-old employee of Potbelly’s who had completed his shift and had remained at the bar consuming alcoholic beverages provided by his employer and was at the time of the collision intoxicated.

18. At all times the Defendant Potbelly’s willfully and unlawfully furnished alcoholic beverages to Devon Dwyer, a person not of lawful drinking age.

19. The injury to Jackie Faircloth was caused by or resulted from the intoxication of Devon Dwyer.

29. On the evening of November 28, 2014 and early morning of November 29, 2014, agents or employees of the Defendant Potbelly's willfully and unlawfully furnished alcoholic beverages to Devon Dwyer, knowing him to be a minor, resulting in his intoxication.

30. As a result, Jackie Faircloth was struck by Mr. Dwyer’s automobile and sustained catastrophic bodily injury....

(R.138; 143) This pleading reveals two things: (1) Plaintiff fairly identified and pled the elements of a claim pursuant to section 768.125; and (2) consistent with those elements, Plaintiff did not allege a right to recovery that depended on Dwyer's negligence.

The statute's identification of willful sales and intoxication as the root cause of potential injury or damage is consistent with basic principles of proximate cause. The law recognizes that a given outcome can be influenced by multiple causes. *Ruiz v. Tenet Hialeah Health., Inc.*, 260 So. 3d 977, 982 (Fla. 2018). There is no requirement that all such causes be actionable or even wrongful for a jury to determine whether a defendant's unlawful conduct is the ultimate, *legal cause* of injury. The trial court instructed the jury accordingly, giving standard instructions on legal cause and concurring cause, which required the jury to determine if Dwyer's *intoxication* was the legal cause of Jackie's injuries. (T.1277) These instructions were consistent with section 768.125, which does not require negligence or any wrongdoing by an intoxicated minor.

Potbelly's agrees the existence of a derivative liability claim depends upon the tortious conduct of an independent actor. (Ans. Br. 32) But it does not identify Dwyer's actionable or tortious

misconduct, except to repeat Plaintiff's allegations Dwyer became *intoxicated* and his intoxication was the cause of the crash and Jackie's injuries. (In. 32-34) Potbelly's simply does not accept that *it* is the sole tortfeasor under section 768.125 for willfully causing Dwyer's intoxication, and thus the party responsible for the consequences of his intoxication. That remains true regardless of whether the minor engaged in actionable conduct, or is blameless. (In. Br. 46-47)

Plaintiff's construction of the statute aligns with decisions (1) supporting a cause of action for the minor's own injuries resulting from intoxication, and (2) precluding a comparison of fault between a willfully culpable vendor of alcohol and a minor to whom alcohol is sold. (In. Br. 45-49) Potbelly's does not challenge the rules contained in such decisions, but tries to justify the First District's ignoring the latter rule in a two-bar case such as this. (Ans. Br. 36) But its justification ultimately depends on the erroneous legal conclusion that section 768.125 is a derivative liability law (Ans. Br. 32-40), which this Court should reject.

II. THIS IS AN INTENTIONAL TORT ACTION.

A. PLAINTIFF'S ARGUMENTS ARE PRESERVED.

Plaintiff was not required to allege it was pursuing an intentional tort claim, or state the that claim satisfied the common law conception of an intentional tort. (Ans. Br. 19) For example, conversion is an intentional tort. *Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368, 371-72 (Fla. 4th DCA 2007). A conversion plaintiff need not state she is bringing an intentional tort, nor allege the defendant's unlawful act was substantially certain to cause harm. She need only allege the elements of conversion, with sufficient facts to support them. *See* Fla. R. Civ. P. 1.939 (model conversion complaint). Here, there is no dispute Plaintiff stated a cause of action pursuant to section 768.125. The issue whether Plaintiff's claim is one for intentional tort was properly joined when (1) Potbelly's filed its affirmative defense raising Jackie's fault (R.152), and (2) Plaintiff replied, stating "comparative fault is not a defense to an intentional tort." (R.209) Nothing more was required for the issue to be resolved in the trial court.

Plaintiff did not waive the right to analogize section 768.125 to the contribution statute, § 768.31(2)(c), Fla. Stat., where the latter

statute equates intentional misconduct with willful misconduct. (Ans. Br. 25) This is but another in a list of dictionary definitions, statutes, and court decisions supporting Plaintiff's argument that the word "willfully" means "intentionally," and Potbelly's committed an intentional tort. Principles of preservation did not prevent Plaintiff from adding to that list. *Lincare Holdings Inc. v. Ford*, 307 So. 3d 905, 913 (Fla. 2d DCA 2020). Plaintiff has made the same *argument* throughout, *i.e.*, this is an intentional tort case. (See, *e.g.*, R.1183 (Potbelly's acknowledging this was Plaintiff's argument); AP.258; 263-65 (arguing "willful" means "intentional"))

B. POTBELLY'S COMMITTED AN INTENTIONAL TORT.

Potbelly's fails to meaningfully address the argument this is an intentional tort action because word "willfully" means "intentionally," and a willful tort is synonymous with an intentional one. *Shuman v. State*, 56 So. 694, 696 (Fla. 1911); *Williams v. State*, 109 So. 805, 806 (Fla. 1925); Black's Law Dictionary 1335 (5th ed. 1979). (In. Br. 29-30; 50-51) Potbelly's also fails to meaningfully address Plaintiff's argument that its conduct *in this case* constituted an intentional tort, because the facts and circumstances of its misconduct portray

Potbelly's as an intentional tortfeasor rather than a negligent one. (In. Br. 17-18; 20; 53-54) The volume of alcohol sold "willfully and unlawfully" to Dwyer—24 drinks in a single evening—standing alone reflects a high degree of moral culpability. (In. Br. 5; 20; 53-54)

Potbelly's takes exception to allegedly unsubstantiated "aspersions" about its business practices. (Ans. Br. 5 n. 2) It was undisputed, however, that Potbelly's provided underage employees with an employment-related *benefit* of half-priced alcohol sales. (T.396; 424) It was also undisputed that Potbelly's provided its underage employee with the "perk" of a "bar tab," the character of which is clear, *i.e.*, alcohol in exchange for the minor's labor. That same evidence was admitted by the trial court. (T.592) The trial court excluded additional evidence of repeated, underage sales from *other* nights, after Potbelly's admitted it had willfully and unlawfully sold alcohol to Dwyer. (R.1591; 2171; T.314-15) Still, the facts of Potbelly's apparent business model are pertinent in considering the nature of its misconduct.

Similarly, Plaintiff did not mischaracterize evidence indicating Potbelly's attempted to conceal its role in Dwyer's intoxication. (Ans. Br. 6 n. 3) Regardless of what Dwyer now asserts, his cell phone

records demonstrate that he made a call directly to Potbelly's owner, Dan Gilbertson, after the crash. (R.3640; 3701; T.1065) After the police asked Gilbertson whether he had a video recording system in Potbelly's that night, the hard drives from the system were moved off-site. (T.455; 567-68) Potbelly's repeatedly delayed efforts by the police to obtain any video surveillance recordings. (T.566-68) When the police finally recovered the system's hard drives from an outside firm retained by Potbelly's, they were blank. (T.582-83) The trial court admitted this evidence, and it too supports Plaintiff's legal arguments that Potbelly's engaged in intentional misconduct. (In. Br. 53-54)

Potbelly's also contends it did not commit an intentional tort because its willful misconduct (to which it stipulated in the case of Dwyer) was not substantially certain to result in harm. (Ans. Br. 18) Potbelly's treats the common law concept of harm too narrowly, and ignores the Legislature's role in setting public policy. The issue raised by the common law conception of an intentional tort is whether there is a substantial certainty of *some* harm or injury, not only catastrophic harm or injury. When willful and unlawful sales produce a minor's intoxication—which is the minimum actionable threshold for a claim under section 768.125—*harm* occurs for the obvious

reason that it is inherently harmful for a minor to be intoxicated. (In. Br. 51)

The prohibition of alcohol sales to minors necessarily implements a legislative policy that minors should not consume any alcohol procured unlawfully. (In. Br. 51) Florida's legislative prohibition against sales of alcohol to minors dates to at least 1935. (In. Br. 27 n. 6) Minors are not even allowed to possess alcohol. § 562.111(1), Fla. Stat. In other words, the Legislature has already determined that *consumption* of alcohol by minors is itself harmful. It is substantially certain that minors on the receiving end of unlawful sales will consume alcohol, resulting in the harm the Legislature has sought to prevent. (In. Br. 20; 51-52) Potbelly's does not dispute these contentions.

III. THE ALCOHOL DEFENSE STATUTE DOES NOT APPLY.

Section 768.36 operates to foreclose a plaintiff's recovery "[i]n any civil action ... *if* the trier of fact finds" the plaintiff was intoxicated, *and* as a result of her intoxication, she was "more than 50 percent at fault for ... her own harm." Because of the condition imposed by the word "if," the statute cannot properly apply in cases

where the finder of fact does not measure a claimant's comparative fault, such as an intentional tort case. (In. Br. 54-55)

Potbelly's meets this "whole-text" construction, *Lab Corp.*, 339 So. 3d at 324, by ignoring the phrase "if the trier of fact finds ..." and the conditions which follow it. Potbelly's relegates the language upon which Plaintiff relies as mere "other parts of the statute," asserting they do not inform the Court's construction. (In. Br. 42) These are basic interpretive errors, which the Court does not endorse. *Id.* Potbelly's position is that the phrase "any civil action" means *every* civil action: "The statute provides no exception or limitation." (Ans. Br. 42) The statute cannot reasonably be read, however, by omitting consideration of the word "if." (In. Br. 55-56) Plaintiff simply asks the Court to give effect to the words Potbelly's ignores.

Logic and common sense also align with Plaintiff's construction of the text. If Potbelly's construction were correct, then the statute must be applied in every intentional tort case. If the Court considers how that would actually work in intentional tort cases, the Court will readily see how Potbelly's construction of the statute is unreasonable. As noted, conversion is an intentional tort. There is no comparative fault defense, though plaintiffs are frequently at fault in

losing their property. *Kerrigan v. Am. Orthodontics Corp.*, 960 F.2d 43, 45-46 (7th Cir. 1992). A conversion plaintiff's intoxication should not defeat the right to recover damages resulting from an intentional theft, even if while sober, 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 apply to defeat an intoxicated plaintiff's sexual battery claim, with arguments she would have avoided the attack had she been sober. In these instances, as with other intentional torts, there is no fault-based comparison to be made.

If Potbelly's construction of section 768.36 were correct—that section 768.36 applies to *every* civil action—then it would have to apply in every action brought pursuant to section 768.125, regardless of the number of bars or intoxicated minors involved, and regardless of whether one conceptualizes a bar's liability as purely derivative, as the First District did. Notably, the First District appears to have held that section 768.36 *does not apply* as between an intoxicated minor and the bar which willfully served *that* minor.

(AP.412-13; 415-16) That holding is itself incompatible with Potbelly's construction of section 768.36. The First District was correct that such comparisons should not be made, but for a different reason, *i.e.*, because Plaintiff's claim sounds in intentional tort.

CONCLUSION

The Court should quash the District Court's decision.

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 5th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies 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 3,987 words.

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