FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4058

MAIN STREET ENTERTAINMENT, INC., d/b/a Potbelly's,

Appellant,

v.

GUARDIANSHIP OF JACQUELYN ANNE FAIRCLOTH,

Appellee.

On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

February 9, 2022

WINOKUR, J.

This case involves apportionment of liability following a tragic incident where a driver struck a pedestrian. The driver had been served alcohol at a bar, in spite of the fact that he was underage. The pedestrian had also been served alcohol at a different bar, in spite of the fact that she too was underage. The pedestrian sued both bars involved to recover her damages. Because one of the defendants in this suit should have been allowed to assert a comparative fault defense as well as the so-called "alcohol defense" to this suit, we reverse the judgment entered below.

A

The Guardianship of Jacquelyn Anne Faircloth ("Guardianship") brought action against Main Street Entertainment, Inc., d/b/a Potbelly's ("Potbelly's") and various entities that owned and operated Cantina 101, for each bar willfully and unlawfully serving alcohol to the two underage persons, causing intoxication, which resulted in injury. Evidence showed that Faircloth, an 18-year-old pedestrian, was catastrophically injured when a pickup truck driven by 20-year-old Devon Dwyer struck her at 55 miles per hour in a 30-mile-per-hour zone while she was crossing the street around 2:00 a.m. Both Faircloth and Dwyer were intoxicated; Faircloth had been drinking at Cantina 101, and Dwyer had been drinking at Potbelly's, where he was an employee and received a 50-percent discount.

The trial court entered a default judgment against Cantina 101 for failing to respond, reserving the amount of damages for trial. After the jury found that Dwyer was intoxicated and his intoxication contributed to Faircloth's injuries, the trial court entered a final judgment for approximately $28.6 million jointly and severally against Potbelly's and Cantina 101 for the injuries Faircloth sustained.

Potbelly's appealed, arguing that it should have been allowed to assert a comparative fault defense under section 768.81, Florida Statutes, and an "alcohol defense" under section 768.36(2), Florida Statutes. We agree, and address each defense below.[1]

[1] Potbelly's raises two other issues, one regarding the causation question on the verdict form and one regarding an order denying a motion for directed verdict. Because we reverse the judgment, we do not consider these issues.

B

1. Comparative fault

The comparative fault statute provides that in a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as damages for an injury attributable to the claimant's contributory fault. § 768.81(2), Fla. Stat. The court must enter judgment against each party liable on the basis of such party's percentage of fault. § 768.81(3), Fla. Stat. A negligence action is broadly defined:

> "Negligence action" means, 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.

§ 768.81(1)(c), Fla. Stat. The statute specifically notes that "[t]he substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action." *Id.* However, the statute does not apply to "any action based upon an intentional tort." § 768.81(4), Fla. Stat. The Guardianship moved for partial summary judgment, claiming that its complaint against Potbelly's alleged an intentional tort and as such, Potbelly's could not reduce its liability under the comparative fault statute. The trial court agreed, reasoning that an action based on a bar "willfully and unlawfully" selling alcohol to an underage patron is an intentional tort so that the jury could not apportion fault.

Section 768.125 is known as the dram shop statute and provides as follows:

> 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.

While the statute primarily excludes liability, it contains two exceptions, the first of which is relevant here. A history of the dram shop act is useful to explain why the "dram-shop exception" does not create an intentional tort. Prior to 1963, a seller of alcohol was generally not liable to one injured by reason of intoxication of the buyer. *See Davis v. Shiappacossee*, 145 So. 2d 758, 760 (Fla. 2d DCA 1962), *quashed*, 155 So. 2d 365 (Fla. 1963). But in 1963, the Florida Supreme Court modified the common law rule barring vendor liability and held that "'violation of the statute prohibiting the sale of alcohol to minors (see section 562.11) could give rise to civil liability' through a negligence per se theory." *Luque v. Ale House Mgmt., Inc.*, 962 So. 2d 1062, 1064 (Fla. 5th DCA 2007) (citing *Shiappacossee,* 155 So. 2d at 365). "As a judicial trend developed extending liability towards vendors of alcoholic beverages, the Florida Legislature intervened in 1980 and enacted section 562.51, [which is] now codified as section 768.125, effectively reviving the original common law rule absolving vendors from liability for sales." *Publix Supermarkets v. Austin,* 658 So. 2d 1064, 1066 (Fla. 5th DCA 1995). While section 768.125 revived the common-law dram-shop rule, it recognized the exception set forth in *Davis*, noting that one who sells alcohol to an underage person "may become liable" for damage caused by the intoxication of the underage person.

The question arose whether the dram-shop exception created a new cause of action, or simply acknowledged an existing one. In *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 979 (Fla. 1984), the supreme court acknowledged that violations of section 562.11, Florida Statutes—the statute criminalizing the sale of alcohol to minors—constitute negligence per se and gives rise to a cause of action in negligence. *Migliore* held that section 768.125, Florida Statutes, is a limitation on vendor liability and does not create a cause of action. *Id*. at 980. The Florida Supreme Court reaffirmed that section 768.125 does not create a cause of action and operates as "a limitation on the already existing liability of vendors of intoxicating beverages" in *Armstrong v.*

Munford, Inc., 451 So. 2d 480, 481 (Fla. 1984). Following the statute's enactment, selling or furnishing alcohol to a minor must be done willfully for the vendor to be liable, but the vendor is liable in negligence, not an intentional tort. *Id;* s*ee also Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991) (holding a "plaintiff must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action" and that "[o]nce these elements have been proven, the plaintiff has established negligence per se"). 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. Because 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.

This conclusion is supported by the fact that liability under the dram-shop exception is derivative.[2] In this regard, we agree with the analysis of the Fourth District in determining that a dram-shop exception action is derivative:

> Examining section 768.125, Florida Statutes, we see that the legislature explicitly intended to protect providers from liability except in cases where the provider serves an underage person or a known habitual alcoholic and "the intoxication of such . . . person" "cause[s] or result[s]" in "injury or damage." § 768.125, Fla. Stat. The negligence of a provider results in liability only when there is a "subsequent wrongful act or omission" by the

[2] Derivative liability is distinguished from vicarious liability in that "[a] vicariously liable party has engaged in no wrongful conduct," but derivative liability "involve[s] wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another." *Grobman v. Posey*, 863 So. 2d 1230, 1235–1236 (Fla. 4th DCA 2003) (citations omitted); s*ee also Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC*, 249 So. 3d 765, 769 (Fla. 1st DCA 2018).

> person who is intoxicated. Liability in this case was therefore derivative.

Okeechobee Aerie 4137, Fraternal Ord. of Eagles, Inc. v. Wilde, 199 So. 3d 333, 341–42 (Fla. 4th DCA 2016). In cases of derivative liability "(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." *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003). In short, the cause of action against Potbelly's would not exist without Dwyer's negligent conduct. While Potbelly's may be liable for the harm to Faircloth caused by Dwyer, this harm was the result of Dwyer's negligence.

We add that a derivatively liable party "is liable for *all* of the harm that [the directly liable actor] has caused." *Beck Auto Sales*, 249 So. 3d at 769 (citing *Peltz v. Tr. Hosp. Int'l, LLC*, 242 So. 3d 518, 520 n.6 (Fla. 3d DCA 2018)). Thus, while the court erred in failing to permit Potbelly's to reduce its liability by proving comparative fault, "section 768.81 does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor." *Grobman*, 863 So. 2d at 1236. While Potbelly's could reduce its liability due to the fault of other parties, it cannot require the apportionment of liability between itself and Dwyer. Under this record, Potbelly's is liable for *all* of Dwyer's fault.[3]

We reject the trial court's reliance on *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12 (Fla. 1st DCA 1996), *approved sub nom. Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997) and *Austin*, 658 So. 2d at 1064, to reach an opposite conclusion. These cases stand for the proposition that comparative fault cannot be used to balance the wrongdoing of an intentional actor

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[3] In making this observation, we do not address the possibility that injury or damage from an underage person who had been furnished alcohol was caused by or resulted from something *other than* the underage person's intoxication, for which the furnisher would *not* be liable under the dram-shop exception. Either way, the factfinder cannot apportion responsibility between the furnisher and the underage person.

and a negligent one in a dram-shop exception suit. But we agree that such balancing is not permitted. Again, because Potbelly's is derivatively liable for Dwyer's wrongdoing, the factfinder does not balance fault between a willful actor and a negligent one. 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.

The dissent's discussion of derivative liability misses the mark because it presumes that we are comparing the fault of Potbelly's to the fault of Dwyer or Faircloth, or both. This may explain why the dissent concludes that *Booth v. Abbey Road Beef & Booze, Inc.*, 532 So. 2d 1288 (Fla. 4th DCA 1988), supports the ruling below. In fact, it does not.

Booth involved only one bar—the bar that served alcohol to both the underage driver and the driver's underage passenger, who was impaired at the time of the crash and sued the bar following a crash. This is not, as the dissent contends, a "meaningless distinction." Dissenting op. at 26. It involves the very question of whose fault is being compared, the crux of the issue here. The comparative negligence question here arises between the two derivatively liable bars that served the two different underage patrons, whereas in *Booth* the comparative negligence issue arose between the bar and one of its underage patrons—the passenger who was in the collision and suffered injuries.

The bar in *Booth* argued that it was not 100% liable for the passenger's injuries because she contributed to her own injuries by choosing to ride with the impaired underage driver. *Booth*, 531 So. 2d at 1290. The Fourth District disagreed and held that the dram-shop exception applies to and protects all underage patrons to whom the bar illegally served alcohol; thus, the bar was 100% liable for the impaired passenger's injuries as well.

Unlike *Booth*, in this case different bars each served alcohol to one of the underage patrons involved in this case. Neither Dwyer nor Faircloth are responsible for the "deleterious consequences" of underage drinking. Dissenting op. at 24. 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; not between Potbelly's and its underage patron; and not between Potbelly's and Cantina 101's underage patron.

Accordingly, for purposes of the application of the comparative fault statute, an action under the "dram-shop exception" is not an intentional tort. The trial court erred in finding otherwise, and in granting the Guardianship's motion to exclude the comparative negligence defense.

2. The "alcohol defense"

The so-called "alcohol defense," section 768.36(2), Florida Statutes, reads as follows:

> 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.

Potbelly's sought a jury instruction that would permit the jury to apply the alcohol defense in determining its liability to the Guardianship. At the charge conference, the Guardianship argued that the alcohol defense only applies where fault is apportioned under comparative fault principles. Because the trial court had previously ruled that comparative fault did not apply to Potbelly's liability, the Guardianship argued that the alcohol defense likewise could not apply. Potbelly's disagreed, noting that the statute disallows recovery "in any civil action" if the plaintiff's intoxication was more than 50 percent at fault for the harm, and did not exclude torts for which comparative fault did not apply (that is, intentional torts). The trial court agreed with the

Guardianship, ruling that the "context" of the statute "deals with percentages of fault." Because this implicates comparative fault, the court ruled that Potbelly's was not entitled to assert the alcohol defense either.

It does not appear obvious that the alcohol defense necessarily relies on the comparative fault statute. The Guardianship fails to explain why a jury could not determine that a plaintiff's intoxication was more than 50 percent at fault for the harm, even if it was not required to apportion fault under the comparative fault statute. Nonetheless, the Guardianship's point is that the alcohol defense cannot logically apply to an intentional tort, which is explicitly excluded from application of comparative fault and by implication, is excluded from application of the alcohol defense.

Potbelly's response is simple. The comparative fault statute predated the alcohol-defense statute.[4] The Legislature was aware of the comparative fault statute and its express inapplicability to intentional torts, and yet chose not to limit the alcohol defense to "negligence actions," as comparative fault is. Instead, the statute states that it applies to "any civil action."

We need not address whether the alcohol defense applies to intentional torts, because we have ruled that a "dram-shop exception" action is a negligence action for purposes of the comparative fault statute. Because the identification of the cause of action as an intentional tort was the basis for the refusal to permit the alcohol defense, we reverse this ruling as well.

Nonetheless, it is unclear to us that Potbelly's would have actually benefitted from the alcohol defense, regardless of the trial court's incorrect reason for denying it. The statute disallows liability if the plaintiff, due to intoxication, was "more than 50 percent *at fault* for his or her own harm." To the extent that the harm to Faircloth was the result of her own intoxication caused by Cantina 101 serving her alcohol, she was not "at fault" for such

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[4] The comparative fault statute was enacted in 1986; the alcohol-defense statute was enacted in 1999. Ch. 86-160, § 60, Ch. 99-225, § 20, Laws of Fla.

harm. Cantina 101 was. Again, in this situation her fault would be attributed to Cantina 101 because they are derivatively liable for it. Under this scenario, the alcohol defense would not disallow recovery even if Faircloth's intoxication was more than 50 percent the reason for her harm.

We do not suggest that Potbelly's was necessarily not entitled to an instruction on the alcohol defense. If 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. Whether such a possibility could entitle Potbelly's to such an instruction depends on what the evidence shows.

C

By willfully and unlawfully serving underage patrons, both Potbelly's and Cantina 101 subjected themselves to derivative liability for the percentage of harm caused by those patrons, to the extent that harm was caused by their intoxication. Where a vendor is found liable under the dram-shop exception, it is liable for all of the harm attributed to the intoxication of the underage consumer. *Austin*, 658 So. 2d at 1066. Because the substance of this claim is negligence, Potbelly's should have been allowed to present a comparative fault defense. Potbelly's should have been allowed to assert an alcohol defense, but only if Faircloth's intoxication was caused by something other than being served alcohol at Cantina 101. Neither defense would reduce or bar the Guardianship's recovery where Cantina 101 is found liable for Faircloth's contribution, but it may reduce Potbelly's. On remand the jury should 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 its willful and unlawful conduct.

REVERSED and REMANDED.

OSTERHAUS, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

Dreadful things can happen when bars intentionally serve excessive alcohol to underaged patrons and employees, which is why Florida has long-standing criminal laws against doing so, dating back to the dismantling of Prohibition. *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 979 (Fla. 1984) (noting that the "Florida Legislature, within two years after the twenty-first amendment repealing prohibition was ratified, enacted [what is] now section 562.11, making it a crime to sell intoxicants to minors[]"); § 562.11(1)(a) & (b), Fla. Stat. (prohibiting sale or service of alcoholic beverages to persons under twenty-one years of age for consumption on licensed premises; prohibiting same as to underaged employees of licensees).

As a bookend to criminal penalties, Florida law also specifically allows civil tort actions against vendors who "willfully and unlawfully" serve alcoholic beverages to minors under a so-called Dram Shop Act.[1] § 768.125, Fla. Stat. (adopted in 1980 and unchanged since). The issue in this tort case is whether a vendor who willfully and unlawfully serves alcohol to a minor—who becomes intoxicated and injures another intoxicated minor—is entitled to rely upon a comparative negligence or intoxication

[1] "Dram shop" is an archaic phrase from the eighteenth century used to describe a "place where alcoholic beverages are sold; a bar or saloon." *Dram Shop*, *Black's Law Dictionary* (11th ed. 2019). A dram is an "apothecary measurement of fluid equal to an eighth of an ounce." *Dram*, *id.*

defense to reduce its liability. This question is purely a legal one, but the facts provide context for what's at stake.[2]

I.

The Friday night before the FSU-UF football game in November 2014, two Tallahassee bars—Potbelly's and Cantina 101—willfully and unlawfully served alcohol to Devon Dwyer (age 20) and Jacquelyn Anne Faircloth (age 18), respectively. Both became intoxicated and left the respective bars near 2am, Dwyer driving his pickup truck home from his job at Potbelly's and Faircloth walking to the dorm where she was visiting friends. Faircloth didn't make it. Driving fifty-five miles-per-hour in a thirty miles-per-hour zone, an inebriated Dwyer struck Faircloth as she attempted to cross West Pensacola Street, a main thoroughfare that bisects the FSU campus, resulting in catastrophic injuries to her. Dwyer—who had bought eighteen Bud Lights and six bourbons that evening with his fifty percent Potbelly's employee discount—fled the scene because he wanted to get away and hide his truck.[3]

Faircloth's guardianship sued both bars on her behalf, alleging that each bar had "willfully and unlawfully" served alcohol to a minor resulting in each minor's intoxication and the calamitous crash. Potbelly's stipulated that it "knew that Devon

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[2] FSU's amicus brief explains the university's efforts to address underage drinking, which is an obvious problem that leads to great harm to and criminal conduct against students and campus visitors. *See, e.g.*, *Schluck v. State*, 1D19-3724, 2021 WL 5103745, at *1 (Fla. 1st DCA Nov. 3, 2021) (drunk underage student was served alcohol at local bar and subsequently targeted for sexual assault); *Thomas v. State*, 127 So. 3d 658, 659 (Fla. 1st DCA 2013) (same).

[3] FSU's amicus brief also notes that "each of the students who witnessed or experienced the subject events and testified at trial were underage patrons of Potbelly's or Cantina 101," as well as a passenger in Dwyer's car, who was a nineteen-year-old Potbelly's bartender partially compensated with a reduced bar tab.

Dwyer was a minor and not of legal drinking age" yet it nonetheless "willfully and unlawfully furnished alcoholic beverages to him" at its bar where Dwyer "consumed alcoholic beverages" during the evening hours of Friday, November 28th, through "the morning" of Saturday, November 29th, leaving the bar just a few minutes before the crash. The parties agreed that Faircloth was intoxicated and not in a crosswalk at the time of the crash, though the guardianship objected to the former as legally irrelevant. Potbelly's denied that Dwyer was intoxicated, but a jury held otherwise and awarded $28.7 million against Potbelly's and Cantina 101 (who had earlier defaulted in the proceedings), jointly and severally, which means that both are legally responsible for paying all the damages arising from their willful and unlawful conduct in serving and intoxicating minors.

II.

On appeal, Potbelly's claims the trial court erred in disallowing its use of (a) a statutory comparative fault defense, section 768.81(4), Florida Statutes, and (b) a statutory alcohol defense, section 768.36(2), Florida Statutes. The gist of Potbelly's argument is that the guardianship's tort claim on Faircloth's behalf—one grounded in the "*willful and unlawful*" serving of alcohol to and intoxicating a minor—is a claim of *negligence* and not an *intentional tort*. Adjudging this legal dispute requires reading each of the relevant statutes together, rather than in isolation. In doing so, the most reasonable interpretation is that a claim of "willful and unlawful conduct" is an "action based on an intentional tort" that cannot be subject to comparative fault under either section 768.81(4) or 768.36(2), Florida Statutes.

A.

In 1973, Florida adopted the doctrine of comparative negligence in a landmark decision, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). This concept required juries to apportion fault on a percentage basis thereby allowing for meaningful comparison of analogous types of negligent conduct. The legislature has since refined the contours of the doctrine including the limits of the types of claims to which it applies.

In doing so, the legislature has made it abundantly clear that the use of comparative fault applies *only* to negligence-type claims, excluding all others. The comparative fault statute specifically limits itself to only a "negligence action," which it defines as "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*." § 768.81(1)(c), Fla. Stat. (2021) (emphasis added). By limiting itself to negligence and like theories, the statute thereby excludes extreme forms of negligence, such as "gross negligence" or "willful negligence," as well as intentional torts. Indeed, the statute specifically says that the concept of comparative negligence "*does not apply to . . . any action based on an intentional tort*[.]" *Id.* § 768.81(4) (emphasis added). This statutory line is necessary to allow a meaningful side-by-side comparison of *negligent-like* acts alone; acts that are unlike negligence are excluded. To safeguard comparison of negligence-like claims, the legislature said that the "substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action." *Id.* § 768.81(1)(c). This rule of interpretation is important because it prevents intentional tortfeasors from trying to characterize their misconduct as a form of negligence to shift responsibility to others and thereby reduce their liability.

With these statutory guidelines in mind, it is obvious that the guardianship's complaint against Potbelly's does not assert a "negligence action" within the meaning of the comparative fault statute. Instead, the claim asserted is that "Potbelly's *willfully and unlawfully* furnished alcoholic beverages to Devon Dwyer, knowing him to be a minor, resulting in his intoxication" and causing the crash and injuries to Faircloth. Succinctly put, the claim is *not* that Potbelly's *negligently* furnished alcoholic beverages, but that it did so "*willfully and unlawfully*." The complaint was thereby grounded in specific language most closely understood to be intentionally tortious misconduct rather than a species of negligence as defined in the plain language of the comparative negligence statute. In short, the "substance" of the claim is intentional misconduct and not mere negligence. *Id.*

This conclusion is bolstered by precedent and lexicographical guideposts. As to the latter, although dictionaries are merely "word

museums" to be used judiciously, *Country Mut. Ins. Co. v. Am. Farm Bureau Fed'n*, 876 F.2d 599, 600 (7th Cir. 1989), essentially every dictionary establishes that an action that is willful or willfully done is an intentional action and not the product of some form of negligence. The profession's leading legal dictionary defines willful as "[v]oluntary and intentional, but not necessarily malicious." *Willful*, *Black's Law Dictionary* (8th ed. 2004). In addition, the term willful, when used to describe an action, means "done on purpose; deliberate; intentional." *Willful*, *The New Shorter Oxford English Dictionary* (1999); *see also Willfully*, *id.* ("On purpose, intentionally; deliberately[.]"). Likewise, synonyms for willful and willfully include intentional and intentionally. *Willful*, *Legal Thesaurus* (1st ed. 1980); *Willful*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/-willful (last visited Dec. 8, 2021). The lists go on and on.

Lexicographically, willful conduct is synonymous with intentional conduct; and conduct that is both willful and unlawful is not only intentional, but criminal in nature. *See Unlawful*, *id.* As the guardianship points out, the legislature uses the phrase "willfully and unlawfully" only in statutory contexts involving serious, intentional criminal misconduct. Due to this uniformity of lexicographical meaning, it is unsurprising that the definition of negligence *excludes* willful conduct. *See Negligence*, *Black's Law Dictionary* ("The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, *except for conduct that is intentionally*, wantonly, or *willfully* disregardful of others' rights." (Emphases added)).

As to precedent, our supreme court has consistently maintained a clear statutory line drawn between negligence and intentional conduct, disallowing attempts to reduce the culpability of defendants who engaged in an intentional tort. *See, e.g.*, *Stellas v. Alamo Rent-A-Car, Inc.*, 702 So. 2d 232, 234 (Fla. 1997) (holding that the comparative fault statute does not allow a jury to apportion fault between a defendant, Alamo, and a nonparty intentional tortfeasor, who attacked plaintiff in a rental car). Similarly, the court has disallowed attempts by defendants to characterize their conduct as negligence when it results in an

intentional tort. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997) (holding that the comparative negligence statute does not apply to actions "founded or constructed on an intentional tort[]"). Courts addressing whether comparative negligence can be used to reduce fault for intentional torts agree. *See, e.g.*, *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 305 (Fla. 2017) (A jury finding in favor of a plaintiff on an intentional tort claim requires that the "plaintiff's award may not be reduced by comparative fault."); *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995) ("There is no logical way for a jury to balance the wrongdoing of the willful vendor and the intoxicated tortfeasor.").

B.

Despite the statute's language and caselaw saying otherwise, Potbelly's wants to reduce or eliminate its liability for its intentional tortious misconduct by allowing the jury to take account of Dwyer's and Faircloth's inebriation and their missteps by (somehow) comparing their degree of fault with Potbelly's willful and unlawful misconduct. Both this Court and the Florida Supreme Court, however, have consistently held that the comparative negligence statute does not allow such comparisons because "'negligent acts are fundamentally different from intentional acts.'" *Merrill Crossings Assocs.*, 705 So. 2d at 562 (quoting *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 20 (Fla. 1st DCA 1996, *approved sub nom*, *Merrill Crossings Assocs.*, 705 So. 2d at 563)).

Such side-by-side comparisons aren't permitted because of the inherently dissimilar and incomparable species of conduct. A man who negligently trips over a dog can't be compared to a man who willfully kicks the dog; even the dog knows the difference! Oliver Wendell Holmes, *The Common Law* 3 (1881) ("[E]ven a dog distinguishes between being stumbled over and being kicked."); W. Prosser & P. Keeton, *Prosser and Keeton on the Law of Torts* § 65, at 462 (5th ed. 1984) (discussing difference between negligence and intent). Plus, no guidelines exist for such an inapt comparison. What percentage of fault is a jury to place on a willful/intentional act? If a pedestrian is simultaneously hit by two cars, one driven intentionally into him and the other negligently, how is fault to be

compared? Answer: the Florida Legislature flatly disallows such comparisons, allowing only negligent acts to be compared with other negligent acts.

The guardianship convincingly argues that because the substance of the harm to Faircloth arose from the willful and unlawful conduct of Potbelly's, the ensuing litigation involves an "action based on an intentional tort" under the statutory framework. *Wal-Mart Stores, Inc.*, 676 So. 2d at 17 ("McDonald argues convincingly that because 'the substance of the action' arose from his being intentionally shot, the ensuing litigation constituted an 'action based on an intentional tort' for statutory purposes."); *see also id.* at 25 (Webster, J., concurring in result) ("I agree that the statute should be read as intended to limit apportionment of damages to those individuals or entities found to have been negligent—those whose conduct was more than negligent were not intended to figure into the equation."); *Hetherly v. Sawgrass Tavern Inc.*, 975 So. 2d 1266, 1267 (Fla. 4th DCA 2008) ("[The Dram Shop Act] alters the common law rule favoring taverns but only for *willfully* serving the minor. . . . The statute sounds more like an intentional tort."). This would be a different case if Dwyer and Faircloth had both acted negligently due solely to their own misjudgments, and not due to a vendor's willful and unlawful misconduct in serving each of them alcohol. Their claims against each other would be decided on the basis of comparative negligence (including the so-called alcohol defense discussed below). No intentional tort would be in play, making section 768.81(4) inapplicable; their respective negligence could be compared, apples to apples. But the guardianship's case, which involves intentional tortious misconduct by Potbelly's, is fundamentally different and thereby excluded from the comparative negligence statute, disallowing apples to oranges comparisons.

Exclusion of intentional torts from the comparative negligence statute was intended to prevent intentional wrongdoers from shifting or reducing their liability to others who may have contributed to the harm.[4] *Merrill Crossings Associates*, 705 So. 2d

[4] FSU's amicus brief expresses this point succinctly: "Allowing Potbelly's and Cantina 101 to willfully and unlawfully serve

at 562. Here, it is Potbelly's initial willful and unlawful conduct in serving and intoxicating minors that caused harm that controls the question of liability under the statutory framework given the type of claim alleged. *Austin*, 658 So. 2d at 1068 (the "culpable vendor [Publix] becomes vicariously liable for the damages caused by the intoxicated tortfeasor" who was a minor to whom Publix sold alcohol resulting in the minor's negligent driving). It doesn't matter that Dwyer and Faircloth—having become inebriated due to Potbelly's and Cantina 101's willful and unlawful misconduct—subsequently acted negligently by driving drunk and walking outside a crosswalk, respectively. Beyond the plain meaning of the comparative negligence statute, social opprobrium attaches to intentional and willful misconduct, which is why courts and leading tort gurus note that "intentional wrongdoing differs from simple negligence 'not merely in degree but in the kind of fault . . . and in the social condemnation attached to it.'" *Wal-Mart Stores, Inc.*, 676 So. 2d at 21 (quoting Prosser & Keeton, *supra*, at 462).

Potbelly's misses the mark by claiming that Florida's Dram Shop Act only permits negligence-based claims. The Act precludes tort liability against vendors of alcohol who sell to persons of lawful age; but it expressly permits claims against a vendor who "*willfully and unlawfully* sells or furnishes alcoholic beverages to a person who is not of lawful drinking age[,]" such that the vendor "may become liable for injury or damage caused by or resulting from the intoxication of such minor[.]" § 768.125, Fla. Stat. (emphasis added).[5] Despite the highlighted language, Potbelly's claims that

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alcohol to minors, and then reduce the scope of their liability based on the alleged negligence of the intoxicated minors, would reward them for their willful and unlawful conduct."

[5] The placement of the Dram Shop Act in Chapter 768, entitled "Negligence," was contrary to legislative intent. The "legislature clearly intended this act to be included within chapter 562, Beverage Law: Enforcement. *Without any legislative direction*, [chapter] 80–37[, Laws of Florida,] was subsequently codified by the Joint Legislative Management Committee as section 768.125 in the chapter dealing with Negligence." *Bankston v. Brennan*, 507 So. 2d 1385, 1386 (Fla. 1987) (emphasis added). The supreme court

the Act "*permits* a negligence claim against an alcohol vendor that willfully and unlawfully serves a minor, but it does not transform that negligence into an intentional act." In other words, Potbelly's position is that a vendor who "willfully and unlawfully" provides alcohol to minors is merely engaged in negligence.

Potbelly's argument derives from language in a smattering of easily distinguishable cases that imply or state in dicta that claims under section 768.125 relate to "negligence" actions. Notably, none of these cases directly address the specific type of claim of willful *and* unlawful misconduct alleged and proven in this case.

One case is *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991), which involved application of the *habitual drunkard* exception in section 768.125. To provide context, the court in *Ellis* surveyed the "legal history" of the duty placed on vendors of alcoholic beverages. Its detailed historical discussion concluded 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." *Id.* at 1047 (emphases added). Stated differently, a negligence-based claim historically existed, but such a claim is now *limited* by the language of section 768.125, which sets a higher standard by requiring *willful and unlawful misconduct* for claims based on the underage exception.

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justifiably rejected as vacuous the argument that the placement of section 768.125 had any legal meaning, saying:

> . . . to attach legal significance to the placement of 80–37 in the Negligence chapter, instead of its placement in the chapter on Beverage Law Enforcement as directed by the legislature which enacted 80–37, 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. For like reasons, the administrative placement of the Dram Shop Act in Chapter 768 in no way alters the substance and interpretation of the language of section 768.125 in this case.

Emphasizing this point, the Fifth District in *Austin* has characterized this use of the word "negligence" in *Ellis* as dicta, stating that:

> The above statement is dictum because *Ellis* did not concern the sale of alcohol to a minor. In the context of the entire opinion, and in light of the express provisions of the applicable statute, it is quite clear that the adjective "negligent" was inadvertently used in the quoted sentence. *Its presence there, of course, renders the sentence nonsensical since the statutory limitation referred to earlier in the sentence expressly limits a vendor's liability, in regard to sale to a minor, to a "willful and unlawful" sale and not merely a negligent one*.

Austin, 658 So. 2d at 1066 (emphasis added). The highlighted language punctuates that "negligence" is not an element of the minor exception; that would be "nonsensical" because section 768.125 requires "a 'willful and unlawful' sale and not merely a negligent one." *Id.* For this reason, the Fifth District held it was a "misreading of *Ellis*" for legal counsel to have "seized on the erroneous *Ellis* dictum as a basis to claim that a negligence cause of action still exists in Florida under section 768.125." *Id.*

Dicta aside, the central point in *Ellis* is that the two statutory exceptions use *very different* language: the minor/underage exception requires a vendor to "willfully and unlawfully" sell or furnish alcohol, but the habitual drunkard exception only requires a vendor to "knowingly" do so. Because the legislature "did not repeat the phrase *willfully and unlawfully* used in the [minor] exception," the supreme court said a plaintiff in a habitual drunkard case "need show only that the vendor *knowingly* sold alcoholic beverages to a person who is a habitual drunkard." *Ellis*, 586 So. 2d at 1048. Stated differently, a plaintiff in a habitual drunkard action bears a *lesser* burden; he need only prove knowledge but not willfulness or unlawfulness, the latter applying only under the minor exception.

In this regard, the supreme court in passing discussed the use of the word "unlawfully" in the minor exception, explaining that it

means that a plaintiff in a civil case "must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action." *Id.* It characterized the breach of the criminal statute as establishing "negligence per se." *Id.* ("Once these elements have been proven, the plaintiff has established negligence per se."); *see Negligence per se*, *Black's Legal Dictionary* ("Negligence established as a matter of law, so that breach of duty is not a jury question[.]").

Proving a violation of the criminal statute, and thereby establishing unlawfulness and negligence per se, is just the first step in the minor exception; the exception also requires proof of *willfully* selling or furnishing alcohol. The minor exception requires that plaintiffs prove unlawfulness (i.e., negligence per se) *plus* willfulness, thereby differentiating it from a purely negligence-based claim such as that under the habitual drunkard exception. Notably, the supreme court characterized that exception as "*ordinary negligence*," which sharply contrasts with the minor exception, which requires proof of both an unlawful violation of a criminal statute *and* willful misconduct. *Ellis*, 586 So. 2d at 1049 (emphasis added); *see also Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde*, 199 So. 3d 333, 337 (Fla. 4th DCA 2016) (stating that the "cause of action, when the habitual-alcoholic exception to the statute applies, 'is ordinary negligence[]'" (quoting *Ellis*, 586 So. 2d at 1049)).

C.

Potbelly's—in a single paragraph of its initial brief—attempts to characterize its liability as merely "derivative," meaning its liability is derived solely from Dwyer's misconduct and thereby limited to only Dwyer's negligence. It cites to just one case, the Fourth District's decision in *Fraternal Order of Eagles*, as support for its view, which is mistaken for a number of reasons.

First of all, *Fraternal Order of Eagles* involved the habitual drunkard exception, whose statutory language—as discussed previously—is markedly different from the minor exception, which requires a showing of willful/unlawful misconduct by a vendor. In, *Fraternal Order of Eagles*, the fraternal organization, which served a habitual drunkard named Leroy Felt, was liable for

negligently doing so and held responsible for Felt's subsequent motorcycle accident that injured the plaintiffs. The cause of action at issue in *Fraternal Order of Eagles* was "negligence" because no showing of intentional misconduct was statutorily required as is the case here.

More important, though, is the discussion of principles of derivative liability in *Fraternal Order of Eagles* and its precursor, *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003), which cut deeply into Potbelly's argument. The Fourth District in *Fraternal Order of Eagles* concluded that because the fraternal organization had "derivative" liability for Felt's accident, it was legally proper to *exclude* Felt from the verdict form. 199 So. 3d at 341–42. In other words, the jury was *not* allowed to apportion fault between Felt and the fraternal organization that negligently served him alcohol. That's because it would make no sense to put Felt on the verdict form because the "'risk of [Felt's] tortious . . . conduct is the very risk that made the [fraternal organization's] conduct negligent in the first place,' and his foreseeable conduct therefore cannot be used to reduce the [fraternal organization's] responsibility." *Id.* at 342 (quoting *Grobman*, 863 So. 2d at 1236).

Put differently, the fraternal organization could not dodge liability by enabling the jury to apportion fault to the habitual drunkard when the fraternal organization itself had created the risk that the habitual drunk might foreseeably injure others while driving his motorcycle. A law review article, cited in *Grobman*, makes this point:

> If a person whose conduct creates a foreseeable risk of misconduct by another (*in other words, a person whose liability is derivative*) can largely escape responsibility simply because the very event which made his own conduct wrongful in the first place actually occurs, then the incentive to take precautions against the risk is substantially reduced.

William D. Underwood & Michael 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) (emphasis added).

Grobman—upon which *Fraternal Order of Eagles* relied—made crystal clear that neither vicarious nor derivative liability support the apportionment of damages under Florida law. The court explained that vicarious liability is imputed to a *faultless* party (such as an employer) based on the imputed wrongful conduct of its subordinate (such as an employee). *Grobman*, 863 So. 2d at 1235. The apportionment of fault makes no sense in this context:

> Vicarious liability does not mesh with the concept of liability that can be apportioned among joint tortfeasors. The vicariously liable party is responsible to the plaintiff to the same extent as the primary actor; both are jointly liable for *all* of the harm that the primary actor has caused. In such a situation, fault cannot be divided into the percentages contemplated by section 768.81.

Id. Plus, because a "vicariously liable party has engaged in no wrongful conduct" it has no fault that can be apportioned; the basis for imposing vicarious liability is solely the "party's relationship with the negligent tortfeasor." *Id.*

Derivative liability is similar to vicarious liability except that a derivatively liable party also engages in wrongful conduct, which is the situation here: Potbelly's committed an intentional tort that caused the intoxication and wrongful conduct of Dwyer. The court in *Grobman* explained that although derivative liability "is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another." *Id.* at 1236 (quoting Underwood & Morrison, *supra*, at 642). Thus, derivative liability "is similar to vicarious liability in that (1) there is no cause of action unless the directly liable tortfeasor [Dwyer] commits a tort and (2) the derivatively liable party [Potbelly's] is liable for *all* of the harm that such a tortfeasor has caused." *Grobman*, 863 So. 2d at 1236.

Given the closeness of the two legal concepts, the court in *Grobman* concluded that no reason existed to allow apportionment of fault where derivative liability was at issue. It specifically held

that "[g]iven the similarity between derivative and vicarious liability, we hold that section 768.81 does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor." *Id.* Thus, no arguable basis exists for allowing a derivatively liable defendant such as Potbelly's off the hook for its own misconduct by allowing apportionment of the fault of the person for whom the derivatively liable defendant is legally responsible.[6]

D.

As a final coffin nail in Potbelly's arguments, it bears noting that the Dram Shop Act is not intended in any way to reduce the liability of a vendor who willfully and unlawfully serves alcohol to underage patrons (or negligently serve alcohol to habitual drunkards). It "is meant to protect a class of persons, primarily juveniles who would buy alcoholic drinks" from the deleterious consequences of unscrupulous vendors intentionally and unlawfully allowing underage drinking. *See, e.g.*, *Booth v. Abbey Rd. Beef & Booze, Inc.*, 532 So. 2d 1288, 1290 (Fla. 4th DCA 1988);[7]

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[6] The majority says the discussion in this section "misses the mark" but fails to explain why other than to say that this section presumes "that [the majority is] comparing the fault of Potbelly's to the fault of Dwyer or Faircloth, or both." But that is precisely what the majority orders on remand by requiring that "the jury should consider whether and by what percentage Faircloth's negligence contributed to the accident" due to her intoxication by Cantina 101. Plus, a remand for the jury to assess "whether such fault is chargeable to Cantina 101" is unnecessary because Cantina 101's fault was pre-determined below (and not contested on appeal) via a specific jury instruction stating that: Cantina 101 "willfully and unlawfully sold or furnished alcoholic beverages" to Faircloth; "causation is not in dispute"; and "the only issue for you to determine regarding Cantina is the amount of damages suffered by" Faircloth."

[7] *Booth* also addressed a seatbelt defense issue that was disapproved in *Bulldog Leasing Co., Inc. v. Curtis*, 630 So. 2d 1060 (Fla. 1994), but *Booth*'s holding as to the disallowance of a

see also Hetherly, 975 So. 2d at 1267 ("But we find nothing about the Dram Shop Act protecting minors who, fortified by drink, break and enter to beat someone with a beer bottle. At common law serving alcohol was not the cause of injury, only its consumption. The purpose of the Dram Shop Act was thus not to create liability so much as to abolish the common law rule that had favored taverns serving alcohol to minors." (internal citation omitted)).

In *Booth*, a bar illegally sold alcohol to a minor resulting in the minor's impairment while driving his car and causing an accident with another alcohol-impaired driver. A passenger in the minor's car—who was underage and had consumed alcohol, too—was injured and sued the bar. The bar convinced the trial judge to allow a comparative negligence jury instruction, which enabled the bar to reduce its fault to 43% and shift the remainder to the injured minors despite having acted willfully and unlawfully. The Fourth District reversed, concluding that the act was intended to protect the "minor passenger of the alcohol-impaired minor" who "is a member of the class to be protected by the statute." *Booth*, 532 So. 2d at 1290 (citing *Chausse v. Southland Corp.*, 400 So. 2d 1199, 1203 (La. App. 1st Cir. 1981). For this reason, the passenger—a minor who had consumed alcohol—could not "be deemed guilty of comparative negligence" and the *entire verdict* was required to be entered against the bar "without reduction for comparative negligence." *Id.* (emphasis added).

Here, as in *Booth* and the precedent previously discussed, nothing in Florida law or the Dram Shop Act allows a comparative negligence defense in this case; instead, a vendor who willfully and unlawfully serves alcohol to minors must bear the liability itself without deflecting fault to those persons the act was designed to protect, whether it be a minor-passenger—or as here, a minor-pedestrian—who consumed alcohol. That this case involves *two bars*—rather than one as in *Booth*—is a meaningless distinction; both bars engaged in willful and unlawful conduct by serving and intoxicating minors resulting in enormous harm for which they are liable. No "two bars acted badly" exception exists under Florida

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comparative negligence defense under the Dram Shop Act remains valid.

law that alters the conclusion that apportionment of fault is impermissible where both bars acted willfully/unlawfully.

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In summary, unequivocal language of Florida's comparative negligence statute applies only to "negligence actions" and not to intentional torts such as a vendor "willfully and unlawfully" giving alcohol to a minor. The legislature intended that only "negligence actions" be used as comparators for determining fault due to the impossibility of comparing negligent acts with intentional ones. Because the substance of the claim against Potbelly's is based on intentional tortious misconduct, the trial court correctly ruled that Florida's comparative negligence statute—by its own terms—is inapplicable. It would be a "perverse and irreconcilable anomaly" to allow the willful and unlawful misconduct of a vendor of alcohol to a minor to "diminish or defeat" its responsibility by comparing and thereby apportioning its fault contrary to the legislature's will. *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996).

III.

For like reasons, the so-called statutory alcohol defense—which requires use of comparative negligence—is inapplicable in this case. Section 768.36, Florida Statutes, entitled "Alcohol or drug defense," states in relevant part:

> (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*.

§ 768.36(2), Fla. Stat. (2021) (emphases added). Potbelly's reads the two highlighted portions to require that the jury should have been instructed to apportion fault between itself and Faircloth if subsection (a) and (b) are met; the former requires a showing of impairment due to alcohol and the latter requires use of comparative negligence to assess fault.

This reading is faulty because it would nullify the long-standing and clearly expressed statutory prohibition in section 768.81(4)—just discussed—that unequivocally disallows comparative fault where an action is based on or involves intentional misconduct. Statutes are to be construed *in pari materia*, meaning they should be interpreted to work together in harmony rather than be at war with one another. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.").

A fair and congruent reading of the two tort statutes is that (a) comparative fault doesn't apply to intentional misconduct; and (b) the alcohol defense applies only to civil negligence actions involving comparative negligence. Though section 768.36(2) says it applies to "any civil action" it also makes clear in subsection (2)(b) that comparative negligence is necessarily required because the trier of fact must determine whether a plaintiff "was more than 50 percent at fault for his or her own harm." Subsection (2)(b)'s inquiry is quintessentially a comparative negligence analysis, which the comparative negligence statute prohibits as to intentional torts. If section 768.36(2) was intended to be an exception to the universal prohibition on the use of comparative negligence in cases involving intentional torts, the legislature could have made that clear and said so, but it did not. The most reasonable interpretation is that legislature did not intend that the alcohol defense transform all intentional torts into negligence claims by forcing the use of comparative fault.

IV.

The trial judge acted properly in denying Potbelly's attempts to lessen its fault, and thereby liability, for its willful and unlawful provision of alcohol to its underage employee who became drunk and caused catastrophic harm. 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; instead, it made clear that comparative negligence has no role when intentional conduct is alleged and proven. 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. The verdict in favor of the guardianship of Jacquelyn Anne Faircloth should stand.

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