Supreme Court of Florida

No. SC2022-0910

GUARDIANSHIP OF JACQUELYN ANNE FAIRCLOTH,

To unpack the certified question, we note that section 768.81[1] says that percentage-of-fault-based liability, rather than joint and several liability, governs a “negligence action.” § 768.81, Fla. Stat. In turn, section 768.125 permits liability when a person “willfully and unlawfully” provides alcohol to an underage patron and intoxication and injury ensue. § 768.125, Fla. Stat. The issue is whether the action permitted by section 768.125 is a “negligence action,” even though the statute requires willful misconduct.

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and Faircloth were intoxicated at the time of the collision. Tragically, Faircloth suffered catastrophic and permanent injuries.

Faircloth's guardianship later sued Potbelly's and Cantina 101, two Tallahassee bars, seeking money damages. Without explicitly invoking section 768.125, the complaint alleged that Potbelly's and Cantina 101 had "willfully and unlawfully" served alcoholic beverages to Dwyer and Faircloth, respectively. The complaint said that each of the underage drinkers then became intoxicated, and that their intoxication caused the accident. Dwyer's intoxication impaired his driving, the complaint said, and Faircloth's intoxication led her to step into the street in front of Dwyer's oncoming truck.

Potbelly's responded with a comparative fault defense, arguing that any fault attributable to Faircloth should reduce the bar's liability. But the trial court rejected that defense before trial. The court decided that, since section 768.125 requires willful misconduct, the guardianship's lawsuit was not a "negligence action" for purposes of the comparative fault statute. Indeed, the trial court ruled that the lawsuit was based on an intentional tort.

The First District then decided *how* fault could be allocated in this case: "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 [Dwyer]; and not between Potbelly's and Cantina 101's underage patron [Faircloth]." *Id.* at 237. The court reasoned that, as "derivatively liable" entities, each bar was responsible for *all* the fault attributable to the underage drinker it had served. *Id.* at 236-37.

We agree with the First District that the underage drinker exception in section 768.125 permits a negligence action. But we neither approve nor disapprove the district court's "derivative liability" analysis and its conclusion that liability cannot be apportioned between a selling bar and the underage drinker who becomes intoxicated and injures himself or others. The latter issues are outside the scope of the certified question, and we will not address them further.

guardianship insists this means that the action permitted by section 768.125 is not a negligence action. We disagree.

A

The common law traditionally held that "a commercial vendor of alcoholic beverages could not be liable for the negligent sale of those beverages when either the purchaser or third persons were injured as a result of their consumption." Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042, 1044 (Fla. 1991). Courts usually reasoned that the drinker—rather than the alcohol provider—should be liable. But seminal decisions in 1959 by the New Jersey Supreme Court and the U.S. Court of Appeals for the Seventh Circuit kicked off a national trend toward expanded common law liability in this area.

By 1967, Florida courts had set aside the common law's no-liability-for-providers rule when injuries stemmed from the illegal sale of alcohol to underage drinkers. First, in Davis v. Shiappacossee, 155 So. 2d 365 (Fla. 1963), our Court found a bar liable to the parents of a 16-year-old boy who had purchased alcohol from the bar, become intoxicated, driven his car into an oak tree, and died. Then, in Prevatt v. McLennan, 201 So. 2d 780 (Fla.

2d DCA 1967), the Second District Court of Appeal found a tavern liable to a third party shot by an underage drinker to whom the tavern had sold alcohol.

The courts in *Davis* and *Prevatt* grounded liability on a theory of negligence per se. *Davis*, 155 So. 2d at 367; *Prevatt*, 201 So. 2d at 781. That theory derives a governing standard of care from statutes that do not on their face create tort li]TJTT1 -26.538 -2.342 Td[(at)5 (

proximate cause of the injury." Bryant v. Jax Liquors, 352 So. 2d 542, 544 (Fla. 1st DCA 1977).

The pre-1980 case law in this area further required the plaintiff to prove that the defendant knew or should have known that it was selling alcohol to a minor. In its seminal Rappaport decision, for example, the New Jersey Supreme Court stressed that liability would not attach to "prudent licensees who do not know or have reason to believe that the patron is a minor or is intoxicated when served." Rappaport v. Nichols , 156 A.2d 1, 10 (N.J. 1959). Similarly, in Davis , this Court found liability where the defendant had "made no effort" to ensure the lawfulness of the sale of alcohol, even though "[f]rom their ages i a l4.8 -2.342 TD8 0.59 0 Td[if1 Td6 Tw 0 -2.3sa

B

Such was the state of the common law in 1980, when the Legislature enacted section 768.125. *See* ch. 80-37, § 1, Laws of Fla. That statute reads:

> 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. We explained in *Ellis* that section 768.125 "effectively codified the original common law rule absolving vendors from liability for sales," subject to the two "exceptions" specified in the statute. 586 So. 2d at 1046.

from the statute's overall focus on limiting preexisting liability and from the text's use of the phrase "may become liable," suggesting qualified permission for continued application of the existing common-law framework. *See id.* at 981 ("When the legislature enacted this statute it was presumed to be acquainted with the judicial decisions on this subject, including *Davis* and *Prevatt*.").

To be sure, section 768.125 did modify the common law by limiting liability to situations where the sale to an underage patron is done *both* "willfully" and "unlawfully." The "unlawfully" requirement brought nothing new—the negligence per se-based cases already required proof that the alcohol provider had violated section 562.11. The term "willfully," as used in section 768.125, simply means that the alcohol provider *knew* that the recipient was under age 21. *See Case v. Newman*, 154 So. 3d 1151, 1153 (Fla. 1st DCA 2014) ("willful" sale requires knowledge that the recipient is not of lawful drinking age); *Tuttle v. Miami Dolphins, Ltd.*, 551 So. 2d 477, 481 n.3 (Fla. 3d DCA 1988) (same); *French v. City of W. Palm Beach*, 513 So. 2d 1356, 1358 (Fla. 4th DCA 1987) (same);

seller's knowledge can be proven through circumstantial evidence. See *Gorman v. Albertson's, Inc.*, 519 So. 2d 1119, 1120 (Fla. 2d DCA 1988); *Willis v. Strickland*, 436 So. 2d 1011, 1012 (Fla. 5th DCA 1983) ("Circumstantial evidence of such knowledge may consist of facts relating to the apparent age of a person.").

C

This brings us to the guardianship's argument that, by including a willfulness requirement, section 768.125 eliminated the preexisting negligence cause of action and replaced it with something other than a negligence action. The negligence label matters, of course, because the guardianship seeks to avoid the application of the comparative fault statute, section 768.81(3). That statute says: "In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(3), Fla. Stat. It "does not apply . . .

that "[t]he substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action." *Id.*

The law of torts teaches that negligence is "condu

Viewed against the common law baseline, the willfulness requirement in section 768.125 does not change the basic relationship between the seller-defendant's conduct and the plaintiff's injury. Instead, section 768.125 merely limits liability to a subset of the actors who could have been found liable under the preexisting negligence per se doctrine. As we have explained, liability in those cases partly depended on proof that the defendant knew or should have known that the purchaser of alcohol was underage. Section 768.125 retains negligence-based liability, but only for defendants who know that the purchaser is underage.

Here, the guardianship did not allege that Potbelly's intended harm to someone in Faircloth's position or that the bar knew such harm was substantially certain to occur. Potbelly's' willfulness

In this case, we have a vendor, Potbelly's, asserting that (1) despite having willfully and unlawfully furnished alcoholic beverages to a person it knew to be underage—which resulted in intoxication and injury—and (2) despite the traditional understanding of the term "willfully" as one of intent, it may avail itself of the comparative fault defense for the purpose of lessening its liability.

Because it is not legally feasible to apply the concept of comparative negligence to an intentional tort, the majority was faced with the Herculean task of transforming a statute that expressly requires a willful act into a negligence action. Somehow, notwithstanding clear and unambiguous statutory language, well-settled case law, and logic to the contrary, the majority purports to do just that. Unfortunately, the sad consequence of today's action is the erroneous erosion of Florida's longstanding dram shop act. I respectfully dissent.

The victim in this case, then an eighteen-year-old high school student, was grievously injured when she was struck by a pickup truck driven by a twenty-year-old driver. It is undisputed that both

individuals were intoxicated at the time and had been served alcoholic beverages at local bars beforehand.

The record indicates that around 2 a.m. on Saturday, November 29, 2014, the victim, who was visiting Tallahassee for the weekend, was walking with relatives and friends from the Cantina 101 Restaurant and Tequila Bar to a nearby dormitory. As she walked across the street, the driver, who was driving a pickup truck at an estimated speed of as much as fifty-five miles-per-hour in a thirty miles-per-hour zone, struck her with his truck, resulting in "catastrophic and permanent injuries." Majority op. at 3.

The driver immediately fled the scene. For a few hours prior to 2 a.m., he had been a patron at another bar—Potbelly's, which also employed him as a security guard. Having worked at Potbelly's on the afternoon and evening of Friday, November 28, he returned to the bar that night. Then, over the course of about four hours, he used his fifty percent employee discount, opened up three bar tabs, and bought a total of eighteen Bud Light beers and six bourbons. At trial, he admitted that he "probably had a beer in [his] hand the entire evening." Thus, this case did not involve a typical situation where an underage person gained admission to a bar using a

credible false identification. Indeed, Potbelly's stipulated at trial that "[o]n the evening of November 28, 2014, and the morning of

This Court adopted the doctrine of comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). There, we explained: "[T]he jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the

importantly, provides that “[t]he substance of an action, not conclusory terms used by a party, determines whether an action is a

underage person "to 'diminish or defeat' its responsibility by comparing and thereby apportioning its fault contrary to the legislature's will." *Id.* (quoting *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996)).

The egregious facts of this case make it especially unsuited for the majority's holding. This is not a case where a store clerk failed to check a customer's identification and unwittingly sold alcohol to an underage person. Here, Potbelly's repeatedly, time and again over a period of hours, furnished beer and liquor to a person who was actually employed by Potbelly's and known to be underage. That simply cannot be considered negligent misconduct. It was intentional, and Potbelly's should not be allowed to benefit from the comparative fault statute to lessen its liability.

For these reasons, I respectfully dissent.

Application for Review of the Decision of the District Court of Appeal
Certified Great Public Importance & Direct Conflict of Decisions

First District - Case No. 1D2019-4058

(Leon County)

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