IN THE SUPREME COURT OF TEXAS

NO. 02-0381

F.F.P. OPERATING PARTNERS, L.P., D/B/A MR. CUT RATE #602, PETITIONER

v.

XAVIER DUEÑEZ AND WIFE, IRENE DUEÑEZ, INDIVIDUALLY AND AS NEXT FRIENDS OF ASHLEY DUEÑEZ, CARLOS DUEÑEZ, AND PABLO DUEÑEZ, MINORS, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on March 5, 2003

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE JEFFERSON, JUSTICE SCHNEIDER, and JUSTICE SMITH joined.

JUSTICE OWEN filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

The plaintiffs in this dram-shop case were injured when their car was struck head-on by an intoxicated driver who had purchased alcohol from a convenience store that the defendant owned. The trial court refused to submit the intoxicated driver's percentage of responsibility to the jury for apportionment, as we required in *Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993) when the intoxicated driver sued his provider for his own injuries. Instead, the trial court severed the provider's cross-action against the driver and rendered judgment on the jury's verdict against the provider. The court of appeals affirmed, holding that the proportionate responsibility statute does

not apply when the injured plaintiff is an innocent third party. 69 S.W.3d 800. We hold that the proportionate responsibility statute applies to all Dram Shop Act claims, including the type at issue here. We conclude, however, that the judgment was correct because the provider is responsible to the innocent third-party plaintiffs for its own liability and that of its intoxicated patron, from whom it seeks recovery in the cross-action. We also conclude that, although the trial court should have submitted the intoxicated patron's percentage of responsibility to the jury for apportionment, its order severing the provider's cross-action against the intoxicated driver did not amount to reversible error. Finally, we hold that the trial court did not err in refusing to submit an instruction on sole proximate cause to the jury. Accordingly, we affirm the court of appeals' judgment, although on different grounds.

I

After consuming a case-and-a-half of beer, Roberto Ruiz drove his truck to a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P., and purchased a twelve-pack of beer. The store's assistant manager, Carol Solis, sold the beer to Ruiz. Ruiz then got into his truck, opened a can of beer, and put the open beer can between his legs.[1]

Ruiz then drove onto a nearby highway, and several times swerved into oncoming traffic. Two cars had to dodge his truck to avoid a collision. As he crossed a bridge less than a mile from the convenience store, Ruiz swerved across the center line and hit the Dueñezes' car head-on. At

[1] There was conflicting testimony about whether Ruiz actually drank any of the beer that he purchased at Mr. Cut Rate.

the time of the collision, Ruiz had lowered his head below his truck's dashboard as he tried to reach beneath his seat to retrieve a compact disc.

All five members of the Dueñez family suffered some injury. Nine-year-old Ashley was the most seriously hurt. She suffered a traumatic brain injury, and will require round-the-clock care for the rest of her life. Xavier Dueñez, a corrections officer, also suffered some degree of permanent brain damage.

Ruiz was arrested at the accident scene for drunk driving. He pleaded guilty to intoxication assault and was sentenced to prison. The Dueñezes initially sued F.F.P., Ruiz, Solis, Nu-Way Beverage Company, and the owner of the land where Ruiz had spent the afternoon cutting firewood and drinking. F.F.P. named Ruiz a responsible third party and filed a cross-action against him. F.F.P. named no other persons or entities as responsible for the accident. The Dueñezes thereafter nonsuited all defendants except F.F.P.

At the pretrial conference, the Dueñezes obtained a partial summary judgment that Texas Civil Practice and Remedies Code Chapter 33's proportionate responsibility provisions did not apply to this type of case. The trial court then severed F.F.P.'s cross-action against Ruiz, leaving F.F.P. as the only defendant for trial. The severed action remains pending in the trial court.

At trial, F.F.P. requested a jury instruction that "if an act or omission of any person not a party to the suit was the 'sole proximate cause' of an occurrence, then no act or omission of any other person could have been a proximate cause." The trial court refused to give the instruction. The trial court also overruled F.F.P.'s objections that the jury charge omitted: (1) any question submitting Ruiz's negligence as a responsible third party; and (2) any comparative responsibility

question asking the jury to determine what percentage of negligence causing the occurrence in question was attributable to Ruiz and what percentage was attributable to F.F.P.

The jury found, as required to impose dram-shop liability, that when the alcohol was sold to Ruiz, it was "apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others," and that Ruiz's intoxication was a proximate cause of the collision. *See* TEX. ALCO. BEV. CODE § 2.02(b). The jury returned a $35 million verdict against F.F.P., upon which the trial court rendered judgment.

The court of appeals affirmed the trial court's judgment, holding:

> [I]n third-party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person, and such a provider is not entitled to offset its liability by that of the intoxicated person.

69 S.W.3d at 805. In reaching that conclusion, the court distinguished our decision in *Sewell*, 858 S.W.2d at 356, in which we held that the comparative responsibility statute applied to dram-shop causes of action. 69 S.W.3d at 805. The court of appeals concluded that *Sewell's* holding was limited to first-party actions, in which the intoxicated patron is suing for his own injuries, and did not apply when the plaintiff is an innocent third party injured by an intoxicated patron. *Id*. The court also held that the trial court did not abuse its discretion in severing F.F.P.'s cross-action against Ruiz, concluding that F.F.P.'s statutory liability was vicarious and not direct so that any rights F.F.P. had against Ruiz did not accrue until its own liability became fixed. *Id*. at 807. Finally, the court rejected F.F.P.'s argument that the trial court should have submitted an instruction

on sole proximate cause. *Id*. at 808-09. We granted F.F.P.'s petition for review to consider Chapter 33's application and related issues.[2]

II

In enacting the Dram Shop Act, the Legislature sought to "deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public." *Sewell*, 858 S.W.2d at 356. A plaintiff seeking to impose liability on a provider under the Act must shoulder what we have called "an onerous burden of proof," *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987), approaching the common-law gross negligence standard. *See Steak & Ale of Tex., Inc. v. Borneman*, 62 S.W.3d 898, 909 (Tex. App.–Fort Worth 2001, no pet.). The Act requires a plaintiff to prove that, when the alcohol was provided, the recipient "was *obviously* intoxicated to the extent that he presented a *clear danger* to himself and others," and the recipient's intoxication was a proximate cause of the damages suffered. TEX. ALCO. BEV. CODE § 2.02(b) (emphasis added). If the plaintiff can meet this burden, the Act nevertheless affords providers a relatively simple safe-harbor. Section 106.14(a)[3] shields a provider from liability for its employee's actions if the provider establishes that it required the employee to attend a training course approved by the Texas Alcoholic Beverage Commission, the employee actually attended the course, and the provider did not encourage the employee to violate the Alcoholic Beverage Code. Act of May 21, 1987, 70th Leg.,

[2] In addition to briefing from the parties, we received briefs from several amici, including the Saltgrass Steakhouse Private Club, Inc., Waco Texas Management, Inc., on behalf of Cactus Canyon, Texas Restaurant Association, Texas Petroleum Marketers and Convenience Store Association, and Mothers Against Drunk Driving.

[3] Although this provision has since been amended, in this opinion, we refer to the version of the statute that governs these proceedings. We treat other code provisions that have been amended similarly.

R.S., ch. 582, § 3, 1987 Tex. Gen. Laws 2298, 2299 (amended 2003) (current version at TEX. ALCO. BEV. CODE § 106.16(a)); *see D. Houston, Inc. v. Love*, 92 S.W.3d 450, 453 (Tex. 2002). If the plaintiff meets the burden of proof that the Dram Shop Act imposes, and the provider is unable to establish a server-training defense, then the provider is liable "for the actions of [its] customer[]." Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2003) (current version at TEX. ALCO. BEV. CODE § 2.03).

Chapter 33 of the Texas Civil Practice and Remedies Code governs the apportionment of responsibility and applies to "any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37, 41 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.002). Section 33.003 provides that the trier of fact shall apportion responsibility "with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37, 41 (amended 2003) (current version at TEX. ALCO. BEV. CODE § 33.003). Chapter 33 expressly excludes certain types of cases from its coverage, such as workers' compensation cases, *id*. § 33.002(c)(1), but it does not exclude actions brought under the Dram Shop Act.

It is clear from Chapter 33's language that the Legislature intended all causes of action based on tort, unless expressly excluded, to be subject to apportionment. The statute was similarly plain when we decided in *Sewell*, 858 S.W.2d at 356, that Chapter 33 applied to claims brought under the Dram Shop Act. When *Sewell* was decided, Chapter 33 provided that it applied "[i]n an action to

recover damages for negligence . . . or an action for products liability grounded in negligence." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.04, 1987 Tex. Gen. Laws 37, 40 (amended 1995) (current version at TEX. CIV. PRAC. & REM. CODE § 33.001(a)). We concluded that the statute applied because the essential elements of a dram-shop action replicated those of a negligence claim. *Sewell*, 858 S.W.2d at 355-56. Since *Sewell*, the Legislature has amended Chapter 33's applicability provision to encompass "any cause of action based on tort." TEX. CIV. PRAC. & REM. CODE § 33.002. If anything, that change indicates the Legislature intended a broader application, since the term would include non-negligent tortious conduct.

The court of appeals held that *Sewell* did not apply in cases like this one because the Dram Shop Act imposes vicarious liability on F.F.P. for Ruiz's actions; thus, as between F.F.P. and the Dueñezes, there is nothing to apportion. 69 S.W.3d at 806. The court noted that vicarious liability is "problematic" in first-party suits because allowing an intoxicated patron to impose vicarious liability on a provider without regard to the patron's own conduct would be "unpalatable." Id. It was a desire to avoid this result, the court of appeals reasoned, that fueled our *Sewell* analysis, as evidenced by our statement that the decision was based on "the limited circumstances present in this cause . . . ." *Sewell*, 858 S.W.2d at 356.

It is true, though hardly remarkable, that we based our holding in *Sewell* on the facts presented, and those facts presented a first-party claim. But our holding was more broadly stated: "[T]he Comparative Responsibility Act – Chapter 33 of the Texas Civil Practice and Remedies Code – *is applicable to Chapter 2 [dram shop] causes of action.*" *Id*. at 351 (emphasis added). Nowhere did we create an exception for third-party claims. The statute's plain language leaves no doubt that

Chapter 33 applies to all claims brought under the Dram Shop Act. Moreover, the nature of the liability that the Dram Shop Act imposes on a provider does not render the proportionate responsibility statute meaningless, nor does Chapter 33's application undermine the Dram Shop Act's effect.

Causation under the Dram Shop Act is tied to the patron's intoxication rather than the provider's conduct. *See Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 413 (Tex. 2000). Because the Act imposes liability on providers "for the actions of their customers" regardless of whether the provider's conduct actually caused the injuries suffered, the court of appeals in this case concluded that the provider's liability is purely vicarious. 69 S.W.3d at 805-06. Under the court's analysis, the provider and the intoxicated patron are one and the same, like the employer and employee in a case founded upon the doctrine of *respondeat superior*. *Id.*

It is true that, if a provider's liability under the Dram Shop Act were purely vicarious, as the court of appeals held, there would be nothing for the jury to apportion between F.F.P. and the Dueñezes in this case. But the Act has a direct liability component that the court of appeals wholly ignored. Unlike true vicarious liability, in which one party's actionable conduct is imputed to another, a dram shop's liability stems in part from its own wrongful conduct. *See Sewell*, 858 S.W.2d at 355; KEETON ET AL., PROSSER & KEETON ON TORTS § 69, at 499 (5th ed. 1984). In order to impose liability under the Act, the factfinder must conclude that the provider made alcohol available to an obviously intoxicated patron whose intoxication caused the plaintiff harm. TEX. ALCO. BEV. CODE § 2.02(b). As we said in *Sewell*, "liability under [the Dram Shop Act] is premised on the conduct of the provider of the alcoholic beverages — not the conduct of the recipient or a

third party." 858 S.W.2d at 355. Accordingly, the dram shop's liability is based on its own wrongful or dangerous conduct even though the statutorily required causal link focuses on the patron's intoxication. TEX. ALCO. BEV. CODE § 2.02(b).

That a provider's liability under the Dram Shop Act has a derivative component does not make it antithetical to proportionate responsibility. Under Chapter 33, the trier of fact must apportion the percentage of responsibility attributable to each of the persons who "caus[ed] or contribut[ed] to cause in any way" the harm suffered. TEX. CIV. PRAC. & REM. CODE § 33.003. Although the Act ties causation to the intoxicated patron's actions, certainly dram-shop liability was fashioned on the notion that providing alcohol to one who is obviously intoxicated to the extent that the public is clearly endangered "contributes [in some] way" to harm that the intoxication causes. *Id.*; *see Sewell*, 858 S.W.2d at 356.

The Dueñezes contend that allowing F.F.P. to avoid its statutory liability by shifting responsibility onto its intoxicated customer will undermine the legislative policy choice to deter the sale of alcohol to obviously intoxicated persons and the Legislature's "recogni[tion] that providers of alcoholic beverages owe a duty to those who may be injured due to the consumption of those alcoholic beverages." *Sewell*, 858 S.W.2d at 354. We agree that the Legislature did not intend for an innocent third party to bear the risk of an intoxicated patron's insolvency when a provider has breached the duty that the Act imposes. But applying Chapter 33 to a dram-shop liability scheme that partially imputes causation does not thwart the Legislature's purpose. As one commentator has noted:

> Comparative negligence, in and of itself, has not changed these basic principles [of imputed negligence]. When negligence is apportioned in the presence of vicarious liability, the master bears the burden of his servant's negligence. If the master has been partially at fault, the percentage of negligence attributed to the servant is added to the percentage attributed to the master.

SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.1 (2d ed. 1986) (emphasis added) (citations omitted). Thus, while the dram shop is entitled to seek recovery from an intoxicated patron to the extent causation is imputed, rather than direct, the dram shop is liable to injured third parties for both its own actions and for its patron's share of responsibility.

This construct comports with the rule stated in section 13 of the Restatement of Apportionment of Liability that "[a] person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other . . . ." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (2000). While section 13 refers to the situation in which a party is held vicariously liable solely on the basis of another's conduct, the Restatement makes clear that a party to whom liability is imputed and who is also independently liable "is responsible for the share of the verdict assigned to [the party whose liability is imputed] and is also responsible for the share of the verdict assigned to its own negligence." *Id*. § 7 cmt. j (2000).

We conclude that, when the factfinder determines that a provider has violated the Dram Shop Act and its patron's intoxication has caused a third party harm, responsibility must be apportioned between the dram shop and the intoxicated patron, as well as the injured third party if there is evidence of contributory negligence. The resulting judgment should aggregate the dram shop's and driver's liability so that the plaintiff fully recovers from the provider without assuming the risk of

the driver's insolvency. The dram shop may then recover from the driver based upon the percentages of responsibility that the jury assessed between them.

In reaching this conclusion, we pay heed to the principle that courts should, if possible, construe statutes to harmonize with each other. *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984) (citing *State v. Standard Oil Co.*, 107 S.W.2d 550 (Tex. 1937)). In enacting the Dram Shop Act, the Legislature sought to protect innocent members of the public from the dangers intoxicated individuals pose by placing some responsibility for injury on those who sell alcoholic beverages. *Sewell*, 858 S.W.2d at 356. That is why the Act speaks in terms of "[t]he liability of providers under this chapter for the actions of their customers, members, or guests who are or become intoxicated . . . ." TEX. ALCO. BEV. CODE § 2.03. As the Iowa Supreme Court has postulated, juries in dram shop cases are likely to assign most, if not all, of the responsibility for third parties' injuries to the intoxicated patron. *See Slager v. HWA Corp.*, 435 N.W.2d 349, 357 (Iowa 1989). If the provider who serves a clearly intoxicated patron does not bear responsibility for injuries caused by the patron's intoxication, the remedy the Legislature provided in the Dram Shop Act would be meaningless, at least to the extent the intoxicated patron proves to be insolvent, hardly a result that the Legislature likely contemplated in substituting dram-shop liability for otherwise available common-law remedies.

Moreover, the Legislature has directed that, in construing statutes, we must consider the object sought to be obtained and the consequences of a particular construction. CODE CONTRUCTION ACT, TEX. GOV'T CODE §§ 311.023(1), (5); *see* TEX. ALCO. BEV. CODE § 1.02 (expressly incorporating the Code Construction Act). The Legislature has further instructed courts to liberally

construe the Alcoholic Beverage Code so that the safety and welfare of our citizens are protected. TEX. ALCO. BEV. CODE § 1.03. Rather than undermine the Legislature's purpose in enacting the Dram Shop Act, we give effect to both it and the Proportionate Responsibility Act.

In contrast, the dissent gives no weight to section 2.03(a) of the Dram Shop Act, concluding it "means only that a cause of action for damages caused by an intoxicated patron is the exclusive remedy against an alcohol provider." (OWEN, J., dissenting). But if that had been the statutory purpose, section 2.03(a) would have simply said:

> The liability of providers under this chapter is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.

Instead, subsection (a) clearly says:

> [t]he liability of providers under this chapter *for the actions of their employees, customers, members, or guests who are or become intoxicated* is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.

TEX. ALCO. BEV. CODE § 2.03(a) (emphasis added). The dissent's construction of the statute violates the fundamental rule that we are to give effect to "every sentence, clause, and word of a statute so that no part thereof [will] be rendered superfluous." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003) (quoting *Spence v. Fenchler*, 180 S.W. 597, 601 (1915)).

Finally, the dissent's discussion of the Legislature's imposition of strict liability on illegal methamphetamine manufacturers and other criminal actors improperly presumes that we are similarly exempting alcohol providers from the proportionate responsibility scheme. Clearly we are not. Instead, we apply that scheme consistent with the Dram Shop Act's language and purpose. Our interpretation gives effect to both the Dram Shop Act's express language and the statutory

proportionate responsibility scheme. Even the dissent acknowledges that our decision "may express sound public policy." (OWEN, J., dissenting). That is exactly the public policy we believe the Legislature chose when it crafted section 2.03(a).

We conclude that the court of appeals erred in holding that the proportionate responsibility statute does not apply to third-party actions under the Dram Shop Act. The judgment is correct, though, because F.F.P. is responsible to the Dueñezes for its own liability and that of Ruiz, from whom F.F.P. may recover to the extent of his imputed liability. We must now decide whether the trial court erred in severing F.F.P.'s claim against Ruiz.

III

The trial court severed F.F.P.'s claim against Ruiz and proceeded to trial with F.F.P. as the only defendant. The court of appeals affirmed the trial court's severance order, concluding that a vicariously liable party's right of recovery against a tortfeasor is through indemnity, which does not become actionable until an adverse judgment is taken. 69 S.W.3d at 807-08. Because the court considered F.F.P.'s liability vicarious in nature, it also held that Ruiz did not meet Chapter 33's definition of a responsible third party for apportionment purposes. *Id*.

As already explained, F.F.P.'s dram-shop liability is not purely vicarious; therefore the trial court should have submitted Ruiz's percentage of responsibility to the jury for apportionment under Chapter 33. But because F.F.P. is responsible to the Dueñezes for its own percentage of liability and that of Ruiz, and because there is nothing that would prevent a jury from fairly apportioning responsibility between F.F.P. and Ruiz in the severed action, the trial court's severance order did not constitute reversible error.

IV

Finally, F.F.P. contends the trial court erred in refusing to instruct the jury on sole proximate cause. F.F.P. bases its claimed entitlement to that instruction on evidence that Ruiz was reaching under the seat for a compact disc when the accident occurred, and it was this inattention rather than Ruiz's intoxication that caused the accident. The Dueñezes respond that the instruction F.F.P. requested did not preserve this argument. We agree.

F.F.P.'s requested instruction stated: "if an act or omission of any person not a party to the suit was the 'sole proximate cause' of an occurrence, then no act or omission of any other person could have been a proximate cause." The proposed submission merely instructs that if a non-party's action was the sole proximate cause of the Dueñezes' injury, then no other person's action could be a proximate cause. The instruction thus asks the jury to compare the actions of two different people rather than distinguish between the same person's intoxication and inattention. The requested instruction would not have focused the jury's attention on the act that F.F.P. contends was the sole proximate cause of the Dueñezes' injuries; thus, the trial court did not err in refusing to submit it. *See Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665-66 (Tex. 2002) .

V

For the foregoing reasons, the court of appeals' judgment is affirmed.

Harriet O'Neill
Justice

OPINION DELIVERED: September 3, 2004