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

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

Argued on March 5, 2003

JUSTICE OWEN, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT and JUSTICE BRISTER, dissenting.

While the Court's determination that a provider of alcohol should be vicariously liable for a patron's intoxication may express sound public policy, I am constrained to conclude that it does not correctly apply the Legislature's statutory proportionate responsibility scheme and reads more into the Dram Shop Act than the words chosen by the Legislature can bear. First, although the Court says proportionate responsibility[1] applies to causes of action under the Dram Shop Act,[2] that is not

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[1] TEX. CIV. PRAC. & REM. CODE §§ 33.001-.017. This case is governed by the law in effect in July 1997. There have been amendments to both the Proportionate Responsibility Act and the Dram Shop Act since then. Because those revisions do not impact this case and for ease of reference, quotations are from and citations are to the current versions of these Codes, unless otherwise indicated.

[2] TEX. ALCO. BEV. CODE §§ 2.01-.03.

the Court's actual holding. Instead, the Court holds that the most substantive parts of proportionate responsibility — liability commensurate with the percentage of responsibility found by the trier of fact — do not apply.[3] A provider of alcohol is liable to a claimant for 100 percent of the damages regardless of the percentage of responsibility assigned by a jury. In the Court's view, the *sole* function of the proportionate responsibility statutes is to determine the amount for which an alcohol provider may seek indemnity from an intoxicated patron.

Second, in 1993, this Court held unequivocally in *Smith v. Sewell* that "[a]pplication of the principles of comparative responsibility to causes of action brought under [the Dram Shop Act] establishes a consistent and equitable approach to the issue of 'dramshop liability' generally, and first party 'dramshop liability' specifically."[4] We made it very clear that an alcohol provider's liability under the Dram Shop Act was for its own conduct, not that of its intoxicated patron: "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."[5] Today, the Court overrules this holding, even though it purports to rely upon it, saying the Dram Shop Act "imposes liability on providers 'for the actions of their customers,'" and that a provider's liability is thus *vicarious* (although only partially vicarious, rather than "purely vicarious") for the actions of its patron.[6]

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[3] ___ S.W.3d at ___ (concluding that a provider of alcohol "is liable to injured third parties for both its own actions and for its patron's share of responsibility" without regard to the percentages of responsibility assigned by the factfinder).

[4] 858 S.W.2d 350, 356 (Tex. 1993).

[5] *Id.* at 355.

[6] __ S.W.3d at __.

Sewell held there was no vicarious liability at all, only comparative responsibility.[7] The Court's decision today is in direct conflict with our holding in *Smith v. Sewell*.

Third, in the eleven years since *Sewell* was decided, the Legislature has amended the Dram Shop Act and has extensively amended the proportionate responsibility statutes, but it has never excluded a cause of action against a provider of alcohol from comparative or proportionate responsibility. We must presume that the Legislature knew of our holding in *Sewell* and that by subsequently re-enacting the Proportionate Responsibility Act and the Dram Shop Act, it accepted this Court's construction of those statutes.[8]

Fourth, the Legislature has, at differing times, specifically included and excluded certain torts from all or parts of the proportionate responsibility scheme.[9] For example, the Legislature created a strict liability cause of action against manufacturers of methamphetamine and took great pains to say that these manufacturers' liability is *not* limited by proportionate responsibility.[10]

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[7] *Sewell* said:

> A provider of alcoholic beverages is under a statutory duty to refrain from providing alcohol to an individual when it is apparent to the provider that the individual is obviously intoxicated to the extent that he presents a clear danger to himself and others.
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> . . . .
>
> However, 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 354-55.

[8] *See Wich v. Fleming*, 652 S.W.2d 353, 355 (Tex. 1983) (quoting *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 187 (Tex. 1968) (quoting *Cunningham v. Cunningham*, 40 S.W.2d 46, 50 (Tex. 1931))); *Coastal Indus. Water Auth. v. Trinity Portland Cement Div., Gen. Portland Cement Co.*, 563 S.W.2d 916, 918 (Tex. 1978).

[9] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 33.002(c), .013(b).

[10] *Id.* §§ 33.002(c)(3) ("This chapter does not apply to . . . a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99."), 99.002 (strict liability for damages arising from methamphetamine manufacture), .004 (providing that a methamphetamine manufacturer is "jointly liable with any other

Instead, a manufacturer of methamphetamine is "jointly liable with any other defendant for the entire amount of damages arising from the manufacture."[11] There is no comparable treatment of providers of alcohol in either the Dram Shop Act or the Proportionate Responsibility Act.

In light of the express provisions of the Dram Shop Act and the Proportionate Responsibility Act, and our decision in *Sewell* authoritatively construing them,[12] I simply cannot agree with the Court that the only purpose the Legislature's proportionate responsibility scheme serves is to determine an alcohol provider's indemnity rights against an intoxicated patron. I respectfully dissent.

I

When construing statutes, we, of course, begin with the statutes themselves. The Dram Shop Act provides:

> **§ 2.02. Causes of Action**
>
> (a) This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

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defendant for the entire amount of damages arising from the manufacture"), .005 ("Chapter 33 does not apply in an action for damages arising from the manufacture of methamphetamine.").

[11] *Id*. § 99.004.

[12] When *Sewell* was decided in 1993, Chapter 33 of the Texas Civil Practice and Remedies Code was called the "Comparative Responsibility Act." The Act has since been amended several times and is now the "Proportionate Responsibility Act," but the amendments do not alter the analysis of the issues raised in this case. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271, *amended by* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, §§ 2.04-.11B, 1987 Tex. Gen. Laws 37, 40-44, *amended by* Act of May 29, 1989, 71st Leg., R.S., ch. 380, § 4, 1989 Tex. Gen. Laws 1490, 1492, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971-75, *amended by* Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 17, 1995 Tex. Gen. Laws 2988, 3003, *amended by* Act of May 21, 2001, 77th Leg., R.S., ch. 643, § 2, 2001 Tex. Gen. Laws 1208, 1208-09, *amended by* Act of June 2, 2003, 78th Leg., ch. 204, §§ 4.01-.12, 2003 Tex. Gen. Laws 847, 855-59 (current version at TEX. CIV. PRAC. & REM. CODE §§ 33.001-.017).

> (b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that:
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> (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
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> (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.[13]
>
> **§ 2.03. Exclusivity of Statutory Remedy**
>
> (a) The 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.
>
> (b) This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter.
>
> (c) This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.[14]

The Court's entire rationale hinges on a single phrase in section 2.03 that says: "The *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."[15] This sentence means only that a cause of action for damages caused by an intoxicated patron is the exclusive remedy against an alcohol provider. I do not believe the Legislature intended the single phrase parsed by the Court to mean that a provider of alcohol is liable for 100 percent of the damages caused by an intoxicated patron whenever there is a finding

[13] TEX. ALCO. BEV. CODE § 2.02.

[14] *Id.* § 2.03.

[15] *Id.* (emphasis added).

that alcohol was provided in contravention of the Act and injury occurred. Nor does the phrase on which the Court's entire rationale depends say that an alcohol provider has the right to indemnity from the intoxicated patron. The phrase in section 2.03 cannot bear the weight the Court places on it. This becomes even more apparent when the history and details of the proportionate responsibility scheme are examined carefully.

II

The 1997 version of the proportionate responsibility scheme applies to this case because the collision that injured the Dueñezes occurred in July 1997. At that time, section 33.013 of the Civil Practice and Remedies Code provided, with certain exceptions, that a defendant was liable only for the percentage of responsibility found by the trier of fact, unless the percentage of responsibility was found to exceed 50 percent.[16] In that event, a defendant was jointly and severally liable for damages recoverable by the claimant:

> **§ 33.013. Amount of Liability**
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> (a) Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.
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> (b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if the percentage of responsibility attributed to the defendant is greater than 50 percent.[17]

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[16] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Law 3242, 3271, *amended by* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974 (former TEX. CIV. PRAC. & REM. CODE § 33.013(a), (b)), *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.07, 4.10(5), 2003 Tex. Gen. Laws 847, 858-59.

[17] *Id.*

Section 33.003 provided that the factfinder was to compare a defendant's responsibility with the responsibility of the claimant, other defendants, and any responsible third party joined by a defendant.[18]

This was generally the state of the law at the time we decided *Smith v. Sewell* in 1993.[19] In that case, Sewell became intoxicated at a bar. On his way home, he lost control of his car and was severely injured in a one-car accident. He sued the bar. This Court recognized that a cause of action against a provider of alcohol is a direct action for the wrongful conduct of the provider. The Court said, "[L]iability 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."[20] The Court said this is true "regardless of whether the intoxicated individual injures himself or a third party."[21] The Court then examined the comparative responsibility scheme and its exclusions and concluded that a cause of action against a provider of alcohol was "not excluded" from the Comparative Responsibility Act and, therefore, the comparative responsibility scheme applied.[22] The Court was very clear that the Legislature's intent was that "each of the parties involved in causing the injury" would have its percentage of responsibility determined: "Application of the Comparative Responsibility Act to

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[18] TEX. CIV. PRAC. & REM. CODE § 33.003.

[19] 858 S.W.2d 350 (Tex. 1993) (construing the Dram Shop Act and the Comparative Responsibility Act); *see also supra* note 12.

[20] *Sewell*, 858 S.W.2d at 355.

[21] *Id*.

[22] *Id.* at 356.

causes of action brought under [the Dram Shop Act] requires the trier of fact to determine the percentage of responsibility attributable to *each* of the parties involved in causing the injury."[23]

The Court spelled out the import of this statutory construction, holding that the intoxicated person "will be entitled to recover damages only if his percentage of responsibility is found to be less than or equal to 50 percent," and further, "[e]ven if recovery is not barred under section 33.001(a) & (c), any damages must be reduced by a percentage equal to the intoxicated individual's percentage of responsibility."[24]

The Court also made clear that the comparative responsibility scheme applied when the claimant was a third party rather than the intoxicated patron. "Application of the principles of comparative responsibility to causes of action brought under [the Dram Shop Act] establishes a consistent and equitable approach to the issue of 'dramshop liability' generally, and first party 'dramshop liability' specifically."[25]

The dissent in *Sewell* would have held that the Dram Shop Act did not create a cause of action for intoxicated patrons, so there could be no first party claims.[26] But, with regard to innocent third parties who unmistakably had a cause of action, the dissent agreed with the Court that the comparative responsibility provisions applied to limit a provider's liability to an injured third party if the provider was found less than 51 percent responsible:

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[23] *Id*. (emphasis added).

[24] *Id*.

[25] *Id*.

[26] *Id.* (Gonzalez, J., dissenting).

> I do agree wholeheartedly with the Court's conclusion that the Comparative Responsibility Act applies to [the Dram Shop Act]. Such a holding prevents an injured party from placing all the blame on the bar owner; instead, at least part of the responsibility will be placed on the truly culpable party in the best position to prevent the injury, the drunk driver.[27]

Today, the Court concludes that the Dram Shop Act "partially imputes causation" to the provider.[28] Thus, the Court says, "the dram shop is liable to injured third parties for both its own actions and for its patron's share of responsibility."[29] Citing the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, the Court says "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.'"[30]

There are numerous problems with this analysis. First, the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY is not the law in Texas. The Proportionate Responsibility Act and the Dram Shop Act are. Those statutory provisions govern this case, not the Restatement. Were this Court the Legislature, it could amend the Proportionate Responsibility Act, the Dram Shop Act, or both, to effectuate its notion of the fairest way to deal with an alcohol provider's liability, and the approach the Court has chosen might be an acceptable, perhaps even preferable, public policy. But we are not the Legislature, and we have to give effect to what it has written. The Court's imposition

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[27] *Id.* at 359 n.6.

[28] __ S.W.3d at __.

[29] *Id*. at __.

[30] *Id*. at __ (alteration in original) (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. j (2000)).

of vicarious liability conflicts with the Proportionate Responsibility Act. The Court says 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."[31] But the Legislature *did* intend for an innocent third party to bear the risk of a joint tortfeasor's insolvency as a general proposition. A tortfeasor who is found less than 51 percent responsible does not have to pay the entire amount of damages, only its proportionate share.[32] There are exceptions for certain torts, but claims against providers of alcohol are not among those exceptions. Whether an innocent third party should bear the risk that one of several joint tortfeasors is insolvent has been the subject of longstanding debate in American jurisprudence. But the Texas Legislature made hard choices and charted a course that this Court must uphold.

The Legislature has said who is *not* entitled to proportionate responsibility, so that the risk of insolvency when there is more than one tortfeasor does not fall on an innocent third party. But alcohol providers are not among those enumerated. For example, the Legislature created a strict liability cause of action against a person who manufactures methamphetamine for death, personal injury, or property damage arising from the manufacture of that drug.[33] The Legislature also created strict liability for any exposure by an individual to the manufacturing process, including exposure to the methamphetamine itself or any of the byproducts or waste products incident to the manufacture.[34] The Legislature has declared that a person who manufactures methamphetamine and

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[31] *Id.* at __.

[32] TEX. CIV. PRAC. & REM. CODE § 33.013(a), (b)(1).

[33] *Id*. § 99.002.

[34] *Id*. § 99.003.

is found liable for any amount of damages arising from the manufacture is jointly liable with any other defendant for the entire amount of damages arising from the manufacture.[35] The Legislature specifically said in both the statute that created the cause of action against such manufacturers and in amendments to the Proportionate Responsibility Act that the proportionate responsibility scheme "does not apply in an action for damages arising from the manufacture of methamphetamine."[36] The Legislature did not include a similar exclusion for alcohol providers in either the Proportionate Responsibility Act or the Dram Shop Act, which creates the exclusive cause of action against an alcohol provider.

At the time of the Dueñezes' injuries, the proportionate responsibility scheme imposed joint and several liability on those who caused toxic tort injuries and those who released hazardous substances into the environment if their responsibility was equal to or greater than 15 percent.[37] Thus, in such cases, liability was not limited by proportionate responsibility. In 2003, the Legislature revisited that exclusion and repealed it in its entirety.[38] Now, defendants found liable for these tortious acts are subject to the general proportionate responsibility scheme. If they are less than 51 percent responsible, they are liable only for the percentage assessed by the factfinder.[39]

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[35] *Id.* § 99.004.

[36] *Id.* § 99.005; *see also id.* § 33.002(c)(3).

[37] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974 (former TEX. CIV. PRAC. & REM. CODE § 33.013(c)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.10(5), 2003 Tex. Gen. Laws 847, 859.

[38] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974 (former TEX. CIV. PRAC. & REM. CODE § 33.013(c)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.10(5), 2003 Tex. Gen. Laws 847, 859.

[39] TEX. CIV. PRAC. & REM. CODE § 33.013(a), (b)(1).

The Legislature has carved out exceptions for a host of criminal acts, declaring that there should be joint and several liability instead of proportionate responsibility, but only if there was specific intent to do harm to others and the defendant acted in concert with another.[40] The list of crimes is numerous and broad in scope, ranging from capital murder to fraudulent destruction of a writing, and also includes theft when "the punishment level . . . is a felony of the third degree or higher."[41]

When the Legislature has chosen to impose joint and several liability rather than proportionate liability, it has clearly said so. The Legislature has not clearly said that alcohol

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[40] *Id*. § 33.013(b)(2). In 2003, the Legislature moved the list of criminal acts from section 33.002(b) to 33.013(b)(2). *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.01, 4.07, 4.10(1), 2003 Tex. Gen. Laws 847, 855, 858-59. Section 33.013(b) currently provides:

> (b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:
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> (1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or
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> (2) the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in so doing proximately caused the damages legally recoverable by the claimant:
> (A) Section 19.02 (murder);
> (B) Section 19.03 (capital murder);
> (C) Section 20.04 (aggravated kidnapping);
> (D) Section 22.02 (aggravated assault);
> (E) Section 22.011 (sexual assault);
> (F) Section 22.021 (aggravated sexual assault);
> (G) Section 22.04 (injury to a child, elderly individual, or disabled individual);
> (H) Section 32.21 (forgery);
> (I) Section 32.43 (commercial bribery);
> (J) Section 32.45 (misapplication of fiduciary property or property of financial institution);
> (K) Section 32.46 (securing execution of document by deception);
> (L) Section 32.47 (fraudulent destruction, removal, or concealment of writing); or
> (M) conduct described in Chapter 31 the punishment level for which is a felony of the third degree or higher.

[41] TEX. CIV. PRAC. & REM. CODE § 33.013(b)(2); *see also* TEX. PENAL CODE §§ 31.01-.15.

providers are jointly and severally liable instead of proportionately liable. That fact has not deterred the Court in the least. Even though "vicarious" liability or "joint and several" liability are terms never used by the Legislature in setting forth the parameters of a cause of action against a provider of alcohol, the Court nevertheless imposes vicarious and joint and several liability.

If, as the Court says, a provider of alcohol is vicariously liable for its patron's share of responsibility, then when a jury finds that a patron was 15 percent responsible for his or her own injuries, the provider of alcohol is still liable to the patron for that 15 percent together with the percentage of responsibility assigned to the provider. That means that what this Court said in *Smith v. Sewell* was wrong. The Court held in *Smith v. Sewell* that the comparative responsibility scheme required a direct comparison and apportionment of responsibility.[42] The provider was not required to pay the patron all of his damages and then seek indemnity with the hope that the intoxicated patron's other creditors would not have higher priority claims to the damages awarded.

If, as the Court says, a provider of alcohol is vicariously liable for its patron's share of responsibility, then it does not matter if a jury finds an intoxicated patron was 60 percent responsible for his or her own injuries. Since liability is vicarious, the provider is liable for *all* the damages caused by the patron's conduct, and section 33.001, which says a claimant may not recover if his percentage of responsibility is greater than 50 percent, does not apply.[43] The Dram Shop Act makes no distinction between claims by drunk patrons and those injured by drunk patrons. A provider of alcohol is equally liable to both. There is liability if "it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to

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[42] 858 S.W.2d 350, 356 (Tex. 1993).

[43] TEX. CIV. PRAC. & REM. CODE § 33.001.

the extent that he presented a clear danger to *himself* and *others*."[44] If the limitations of liability in section 33.013 of the Proportionate Responsibility Act limiting a defendant's liability to the percentage of responsibility assigned to it do not apply, as the Court says, then the same type of limitations applicable to a claimant in section 33.012, which requires that the claimant's damages be reduced by the claimant's percentage of responsibility,[45] do not apply. There is no basis for construing the two sections differently.

If, as the Court says, a provider of alcohol is vicariously liable for its patron's share of responsibility, then multiple providers of alcohol found responsible are all jointly and severally liable, without regard to section 33.013, which limits liability to "the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility."[46] For example, suppose that Joe Doe became obviously intoxicated at his home, then went to three different bars. He bought an alcoholic drink at the first, but consumed none of it. At each of the other two establishments, he bought and consumed a beer. He then injured an innocent third party while driving home. A jury found Joe 75 percent responsible, the first establishment he visited 5 percent responsible, and each of the other two providers 10 percent responsible. The first provider is jointly and severally liable for 80 percent of Joe's damages even though the jury apportioned its responsibility at 5 percent. The Court says it is giving effect to the statutory proportionate

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[44] TEX. ALCO. BEV. CODE § 2.02 (emphasis added).

[45] TEX. CIV. PRAC. & REM. CODE § 33.012 ("If the claimant is not barred under section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.").

[46] *Id.* § 33.013(a).

responsibility scheme.[47] But liability for 80 percent of the damages when a jury has found 5 percent responsibility is not the Legislature's proportionate responsibility scheme. It is the Court's.

It bears repeating that the only statutory language the Court can find that supports its conclusion that the proportionate *liability* provisions of the Proportionate Responsibility Act do not apply is a phrase in a sentence in section 2.03 of the Alcoholic Beverage Code that says, "The *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."[48] I simply cannot discern all the consequences the Court ascribes to this phrase.

The Court's opinion today overturns *Smith v. Sewell* sub silento by effectively holding that in cases in which the policy underlying the proportionate responsibility scheme is the most compelling – when the intoxicated person injures him- or herself and sues the provider, the provider must pay 100 percent of the patron's damages, then seek to "recover" from that patron, who may well be insolvent. Under the Court's analysis, the risk of the intoxicated patron's insolvency must be borne exclusively by the alcohol provider. That directly contravenes our holding in *Smith v. Sewell*.

III

In *Smith v. Sewell*, the Court unequivocally held that the comparative responsibility scheme applied to all Dram Shop Act causes of action.[49] Part of the reasoning that led to that holding was

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[47] ___ S.W.3d at ___.

[48] TEX. ALCO. BEV. CODE § 2.03 (emphasis added).

[49] *Smith v. Sewell*, 858 S.W.3d 350, 355-56 (Tex. 1993).

that the Legislature had set forth exclusions or exceptions to the comparative responsibility statute and the Dram Shop Act was not among them.[50] Since the decision in *Smith v. Sewell*, the Legislature has revisited the exclusions to its comparative, and later proportionate, responsibility scheme, more than once. It still has not included the Dram Shop Act among those exclusions. This signifies legislative acceptance of this Court's interpretation of the Dram Shop Act and the Comparative Responsibility Act in *Smith v. Sewell*.

In *Wich v. Fleming*, this Court held "'[T]he Legislature must be regarded as intending statutes, when repeatedly reenacted, as in the case here, to be given that interpretation which has been settled by the courts.'"[51] We also held in *Coastal Industrial Water Authority v. Trinity Portland Cement Division, General Portland Cement Co.*:

> [T]he fact that the amended statute carries forward the same language considered by [a] court indicates a legislative adoption of the construction theretofore given said statute. The rule is well settled that when a statute is re-enacted without material change, it is presumed that the legislature knew and adopted the interpretation placed on the original act and intended the new enactment to receive the same construction.[52]

Given the many instances in which the Legislature has (1) expressly said that certain causes of action are excluded from the Proportionate Responsibility Act, which would otherwise limit liability commensurate with proportionate responsibility, and (2) has expressly tailored special joint and several liability provisions for some causes of action, the phrase in section 2.03 cannot

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[50] *Id.*

[51] 652 S.W.2d 353, 355 (Tex. 1983) (quoting *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 187 (Tex. 1968) (quoting *Cunningham v. Cunningham*, 40 S.W.2d 46, 50 (Tex. 1931))).

[52] 563 S.W.2d 916, 918 (Tex. 1978).

reasonably be read to require vicarious liability and joint and several liability in lieu of proportionate liability for alcohol providers.

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I respectfully dissent.

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Priscilla R. Owen
Justice

OPINION DELIVERED: September 3, 2004