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, AS NEXT FRIENDS OF CARLOS DUENEZ AND PABLO DUENEZ, MINORS, RESPONDENTS

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

Argued November 30, 2005

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE BRISTER, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion.

JUSTICE O'NEILL filed a dissenting opinion.

On December 12, 2002, we granted this petition for review, and on September 3, 2004, the Court issued an opinion. On April 8, 2005, we granted the petitioner's motion for rehearing, re-argued the case, and issued an opinion on November 3, 2006. Today we deny the respondents' motion for rehearing. We withdraw our opinion of November 3, 2006 and substitute the following in its place.

We are asked to revisit our holding in *Smith v. Sewell* that the proportionate responsibility scheme of chapter 33 of the Texas Civil Practice and Remedies Code requires an apportionment of responsibility under chapter 2 of the Alcoholic Beverage Code. 858 S.W.2d 350 (Tex. 1993). We decline the invitation to reverse *Sewell* and instead affirm its holding that the language of the proportionate responsibility statute includes claims under the Dram Shop Act. Neither the purpose nor the language of the Act makes a dram shop automatically responsible for all of the damages caused by an intoxicated patron, regardless of a jury's determination of the dram shop's proportion of responsibility. Instead, pursuant to Chapter 33, a dram shop is responsible for its proportionate share of the damages as determined by a jury. Accordingly, we reverse the court of appeals' judgment and remand the case for a new trial.

I. Factual and Procedural Background

After spending the day cutting firewood while 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 climbed into his truck, opened a can of beer, and put the open beer can between his legs. There was conflicting testimony about whether Ruiz actually drank any of the beer that he purchased at Mr. Cut Rate.

Ruiz then drove onto a nearby highway and swerved into oncoming traffic several times. Two cars dodged his truck to avoid a collision. As he crossed a bridge approximately a mile and a half from the Mr. Cut Rate convenience store, Ruiz swerved across the center line, hitting the Duenezes' car head-on. All five members of the Duenez family suffered injuries.

Ruiz was arrested at the accident scene for drunk driving. He pled guilty to intoxication assault and was sentenced to prison. The Duenezes brought a civil suit against 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. filed a cross-action against Ruiz, naming him as a responsible third-party and a contribution defendant. The Duenezes thereafter nonsuited all defendants except F.F.P.

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

The Duenezes' claim against F.F.P. proceeded to trial. At the charge conference, the trial court refused to submit questions for determination of Ruiz's negligence. The court also failed to submit questions on the proportionate responsibility of Ruiz and F.F.P.

The jury found 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. 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 800, 805. In reaching that conclusion, the court distinguished our decision in *Sewell*, in which we held that the comparative responsibility statute applied to dram-shop causes of action. *Id.* 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 is inapplicable when the plaintiff is an innocent third party injured by an intoxicated patron. *Id*. at 805-06. The court also held that the trial court did not abuse its discretion in severing F.F.P.'s contribution claim against Ruiz, concluding that because F.F.P.'s statutory liability was vicarious and not direct, F.F.P. had an indemnity claim rather than a contribution claim against Ruiz. *Id.* at 807-08.

We granted F.F.P.'s petition for review. While the petition was pending, Xavier, Irene, and Ashley Duenez settled their claims against F.F.P. Only the claims of Pablo and Carlos Duenez against F.F.P. remain before the Court.

II. Statutory Interpretation

Statutory construction is a legal question that we review de novo, ascertaining and giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words. *Tex. Dep't of Transp. v. City of Sunset Valley,* 146 S.W.3d 637, 642 (Tex. 2004).

A. The Dram Shop Act

The Legislature enacted the Dram Shop Act 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. Section 2.02 of the Alcoholic Beverage Code sets forth the scope and elements of this 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.
>
> (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
> >
> > (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

TEX. ALCO. BEV. CODE § 2.02 (emphasis added).[1] If a plaintiff meets the "onerous burden of proof" imposed by the Dram Shop Act, then the provider is liable for damages proximately caused by its employees or patrons. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987); *see also* TEX. ALCO. BEV. CODE § 2.03.[2] In the Dram Shop Act, the Legislature created a duty, not recognized at common law, on alcohol providers and increased the potential liability of providers as a means of deterring providers from serving obviously intoxicated individuals. Historically, the "rule of non-liability" held that an alcohol provider owed no duty to third persons for injuries caused by the

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[1] The Legislature has amended much of the code applicable to this case. For clarity, the text references the codified version of the statutes applicable to the case as current law with the full citation appearing in footnotes. Citations without clarifying footnotes refer to the version in effect on the date of this opinion.

Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674, *amended by* Act of June 17, 2005, 79th Leg., R.S., ch. 643, § 1, 2005 Tex. Gen. Laws 1617, 1617 (current version at TEX. ALCO. BEV. CODE § 2.02).

[2] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674, *amended by* Act of June 20, 2003, 78th Leg., R.S., ch. 456, § 1, 2003 Tex. Gen. Laws 1698, 1698-99 (current version at TEX. ALCO. BEV. CODE § 2.03(a)).

provision of alcohol. *Sewell*, 858 S.W.2d at 352; *Poole*, 732 S.W.2d at 310; *see also* Joel Smith, Annotation, *Common-Law Right of Action for Damages Sustained by Plaintiff in Consequence of Sale of Gift of Intoxicating Liquor or Habit-Forming Drug to Another*, 97 A.L.R.3d 528 (1980). Providers also were generally able to avoid liability because the consumption of alcohol, rather than its provision, was considered the sole proximate cause of injury to the patron and third persons. *Poole*, 732 S.W.2d at 309. Finally, even if the sale was a proximate cause of intoxication, injury was considered to be an unforeseeable result of the patron's intoxication. *Id.* The common law effectively precluded dram shops from incurring liability when their intoxicated patrons caused injury to third parties. *Id.*; *see also Mata v. Schoch*, 337 B.R. 135, 136 (Bankr. S.D. Tex. 2005).

Relying on "modern analysis," in 1987 the Court in *Poole* discarded the "absolute rule of no liability" and imposed a duty on a dram shop not to serve alcoholic beverages to a person it knows or should know is intoxicated. *Poole*, 732 S.W.2d at 310. For the first time, the Court held that a provider of alcohol is negligent as a matter of law when he knowingly sells an alcoholic beverage to an intoxicated person, and the Court relaxed the standards for proving proximate cause and foreseeability. *Id.* at 313-14. The claimant was still required to prove that the dram shop's conduct was the proximate cause of his or her injury to recover. *Id.* at 313.

The Legislature acted to address the problem of providers' excessive provision of alcohol to patrons. A week after this Court issued *Poole*, the Dram Shop Act became effective and narrowed potential liability from *Poole* in several ways. *See id.* First, it made the Act the exclusive means of

pursuing a dram shop for damages for intoxication. TEX. ALCO. BEV. CODE § 2.03.[3] Second, as an element of liability, the patron must be "*obviously* intoxicated," not just intoxicated, when the dram shop serves him alcohol. *Id.* § 2.02 (emphasis added).[4] Third, under Chapter 2, "the intoxication of the recipient must be a proximate cause of the damages." *Sewell*, 858 S.W.2d at 355 (citing TEX. ALCO. BEV. CODE § 2.02(b)).

The common foundation of both CHIEF JUSTICE JEFFERSON's and JUSTICE O'NEILL's dissents is the contention that the Legislature abolished the element of proximate cause for a third party to recover from a dram shop and replaced it with "a form of vicarious liability," as Chief Justice Jefferson labels it, or "imputed liability," as JUSTICE O'NEILL terms it. The dissenters contend that once the dram shop provides alcohol to an obviously intoxicated patron, it becomes responsible for all subsequent injuries caused by the patron's intoxication. This assumption forms the basis of their conclusions that submitting a proportionate liability question to the jury does not change the dram shop's joint and several liability for all of the damages. For example, even if the patron consumed none of the alcohol purchased from the dram shop, the dissenters would hold the provider liable for all the injuries caused by the patron to third parties. The statutes do not support their approaches, which would nullify the effect of the expansive language in the proportionate responsibility statute.

The dissenters contend that the failure to read vicarious or imputed liability into the Act undermines the legislative purpose. On the contrary, the Act accomplishes the objective of deterring the sale of alcohol to obviously intoxicated persons in several ways. The Act provides a previously

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[3] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2003).

[4] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2005).

foreclosed remedy against sellers of alcohol. And unlike the prior common law, dram shops now owe a duty to patrons and injured third parties under specified circumstances and can be subject to civil liability for the damages they proximately cause. *Compare Poole*, 732 S.W.2d at 309 *with Sewell*, 858 S.W.2d at 355. The Legislature also deterred irresponsible conduct by providing that a dram shop's alcohol license is subject to revocation for violating the Act. TEX. ALCO. BEV. CODE § 2.02(b).[5]

JUSTICE O'NEILL finds the imposition of imputed liability on providers in a single phrase in Section 2.03 of the Act, set out in italics: "The *liability of providers under this chapter for the actions of their 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." __ S.W.3d __; TEX. ALCO. BEV. CODE § 2.03.[6] Although JUSTICE O'NEILL states that Chapter 33 applies, she nevertheless concludes that "the dram shop is liable to injured third parties for both its own actions and for its patron's share of responsibility." __ S.W.3d __. She borrows support for this position from section 7 of the Restatement of Torts: 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.* at __; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. j (2000) (stating that "[t]he employer is responsible for the share of the verdict assigned to the employee and is also responsible for the share of the verdict assigned to its own negligence"). The common law

[5] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2005).

[6] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2003).

has been supplanted by statute and Section 7 is not the law on this issue in Texas. The Proportionate Responsibility Act and the Dram Shop Act govern this issue.

JUSTICE O'NEILL insists that the Legislature intended the phrase "the liability of providers under this chapter for the actions of their customers," to mean that providers under this chapter *are liable* for the actions of their customers. __ S.W.3d __; TEX. ALCO. BEV. CODE § 2.03.[7] The statute can mean this only if words not in the text are inserted. Read as written, in context, Section 2.03 simply means that the Dram Shop Act provides the exclusive remedy against an alcohol provider for damages caused by an intoxicated patron at least 18 years of age—i.e., common law remedies are no longer available. *See Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 412 (Tex. 2000). We do not read Section 2.03 to say that a provider of alcohol is responsible, without regard to fault, for one hundred percent of the damages caused by an intoxicated patron.

CHIEF JUSTICE JEFFERSON seeks to support his position with an analogy to reasoning in vicarious liability theory for negligent entrustment cases. __ S.W.3d __. Generally in Texas, the doctrine of vicarious liability, or respondeat superior, makes a principal liable for the conduct of his employee or agent. *See Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). This liability is based on the principal's control or right to control the agent's actions undertaken to further the principal's objectives. *See Wingfoot v. Alvarado*, 111 S.W.3d 134, 136 (Tex. 2003); PROSSER & KEETON ON THE LAW OF TORTS, § 69-70 (W. Page Keeton et al. eds., 5th ed. 1984). Should an innocent third party suffer injury at the hands of the agent or employee, the theory is that

[7] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2003).

the enterprise itself, not only the agent, should be held accountable. *See Wingfoot*, 111 S.W.3d at 146; KEETON ET AL., § 69; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (2000). Here, the patron is not the agent or employee of the dram shop, the provider has no control or right to control the patron, and the patron's actions causing the accident are not in furtherance of the provider's business. The analogy to negligent entrustment, a form of vicarious liability, suffers from similar deficiencies. As the late Dean Prosser explained, the basis for imposing liability on the owner of the thing entrusted to another is that ownership of the thing gives the right of control over its use. KEETON ET AL., § 73; *see Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987) (proving negligence by a theory of negligent entrustment requires establishment of ownership). Hence, an owner may have to answer in damages for negligently exercising her control by entrusting an item to a person who the owner knew or should have known would act in a reckless or incompetent manner. *Schneider*, 744 S.W.2d at 596. Because there is no ownership by the dram shop of the object used by a patron to cause the accident, the vicarious liability doctrine does not support—and the Dram Shop Act does not create—the indemnification scheme proposed by JUSTICE O'NEILL or the vicarious liability scheme that CHIEF JUSTICE JEFFERSON would create. Their positions expand the theory of vicarious liability beyond its traditional boundaries.

B. Chapter 33

Chapter 33 of the Texas Civil Practice and Remedies Code governs the apportionment of responsibility in cases within its scope. The 1995 version of the proportionate responsibility scheme applies to this case because the collision that injured the Duenezes 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 exceeded fifty percent. TEX. CIV. PRAC. & REM. CODE § 33.013.[8] If a defendant's percentage of responsibility exceeded fifty percent, that defendant was jointly and severally liable for all of the claimant's recoverable damages. *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. TEX. CIV. PRAC. & REM. CODE § 33.003.[9] The statute required the trier of fact to 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, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these . . . .

Id. § 33.003(a).

Chapter 33 applied to a broad range of cases, including "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" and actions brought under the Texas Deceptive Trade

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[8] 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, § 2.09, 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, *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 (current version at TEX. CIV. PRAC. & REM. CODE § 33.013).

[9] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37,41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE § 33.003).

Practices-Consumer Protection Act. *Id.* §§ 33.002(a),[10] (h).[11] Section 33.002(c) expressly excluded from its coverage actions to collect workers' compensation benefits, actions against an employer for exemplary damages arising out of the death of an employee, and claims for exemplary damages included in an action to which this chapter otherwise applies.[12] Section 33.002(b) excluded application of Chapter 33 to actions for damages caused by a list of intentional criminal acts committed in concert with another person by imposing joint and several liability.[13] Chapter 33 does not specifically exclude the Dram Shop Act.

C. *Smith v. Sewell*

This Court addressed the applicability of Chapter 33 to the Dram Shop Act in *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993). 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." TEX. CIV. PRAC. & REM. CODE § 33.001(a).[14] The Court held that the essential

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[10] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41, *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 971,971-72, *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., R.S., ch. 204, § 4, 2003 Tex. Gen. Laws 847, 858-59 (current version at TEX. CIV. PRAC. & REM. CODE § 33.002).

[11] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, repealed 2003).

[12] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, 2003).

[13] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, repealed 2003).

[14] 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, 1987 Tex. Gen. Laws 37, 40, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971 (current version at TEX. CIV. PRAC. & REM. CODE § 33.002). Section 33.001 grounded the applicability of the statute in negligence. However, Section 33.002, added to the code in 1987, is specifically devoted to the applicability of the chapter and is rooted in torts, giving the current law a broader application

elements of a dram-shop action replicated those of a negligence claim, hence Chapter 33 applied to the Act. *Sewell*, 858 S.W.2d at 355-56.

In *Sewell*, the plaintiff became intoxicated at a bar. *Id.* at 351. 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 explicitly recognized that a cause of action against a provider of alcohol is a direct action for the wrongful conduct of the provider: "[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." *Id.* at 355. The Court reasoned this is true "regardless of whether the intoxicated individual injures himself or a third party." *Id.* 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. *Id.* at 356. The Court identified the Legislature's intent, expressed under Chapter 33, as "requir[ing] the trier of fact to determine the percentage of responsibility attributable to *each* of the parties involved in causing the injury." *Id.* (emphasis added). Under the combined effect of both statutes, an 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 any recovery must be reduced by the percentage of the intoxicated individual's responsibility. *Id.* The Court recognized that this interpretation of the statutes ensured a consistent and equitable approach to dram-shop liability, whether the case involved first or third person liability. *Id.*

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than that at the time of *Sewell*.

In this case, the court of appeals held that *Sewell* did not apply to third-party Dram Shop claims like this one. 69 S.W.3d at 805. The court interpreted *Sewell* as limiting an intoxicated patron's recovery against a provider according to the intoxicated person's percentage of responsibility but not imposing similar limitations when a third party seeks recovery against a provider for damages caused by an intoxicated patron's actions. *Id.* Instead, the court of appeals concluded that a provider is vicariously liable for the damages caused by an intoxicated employee or patron in third party actions in which there are no allegations of negligence of the third party. *Id.* The court reasoned that this interpretation is consistent with the Dram Shop Act because the Act imposes liability on the provider for the actions of the intoxicated person, "just as an employer is liable for the damages caused by an employee in the course and scope of the employment." *Id.* at 806 (citations omitted). Thus, the court concluded, "a division of liability would be meaningless: the vicariously liable party is liable for the other party's actions, as though those actions were its own." *Id.*

This is contrary to our opinion in *Sewell*, and rebutted by the deterrent effects of the Act, discussed above. This Court has interpreted the Dram Shop Act to create liability based "on the conduct of the provider of the alcoholic beverages—not the conduct of the recipient or a third party." *Sewell*, 858 S.W.2d at 355. The conduct for which the provider may be held liable is the same conduct "whether the intoxicated individual injures himself or a third party." *Id.* Thus, the premise of the court of appeals' vicarious liability holding—that the provider's liability stems from the conduct of the intoxicated individual instead of the provider's own conduct—runs contrary to both

the Dram Shop Act and our interpretation of the Act in *Sewell*. *Compare Sewell*, 858 S.W.2d at 355, *with* 69 S.W.3d at 806.

The dissents likewise recognize significant problems with their approaches in light of this precedent. They approach the problem of *Sewell* differently. CHIEF JUSTICE JEFFERSON argues that *Sewell* was wrongly decided but nevertheless would keep the holding intact as to first–party claims and create a different rule for third–party claims. __ S.W.3d __. Similarly, JUSTICE O'NEILL would limit *Sewell*'s holding to first–party claims thereby distinguishing it from the instant case. __ S.W.3d __. Nothing in the statute supports a different rule in this regard for first– versus third– party claims. In fact, the statute anticipates the existence of both types of claims by describing the "person bringing the suit" broadly and referring to the danger created by the intoxicated person as impacting "himself and others." TEX. ALCO. BEV. CODE § 2.02.[15] Contrary to CHIEF JUSTICE JEFFERSON'S dissent, nothing in the Dram Shop Act prevents a provider from "lessen[ing] or escap[ing] liability altogether" if a jury determined that the intoxicated patron was completely responsible for the damages and injuries suffered by a third–party. *See* __ S.W.3d __. Refusing to apply *Sewell*'s rule of law to cases in which a third party is injured as a result of an intoxicated person's actions is contrary to the language of the Dram Shop Act, to the premise of *Sewell*, and to the purpose of the Dram Shop Act: the provider's liability stems from its own conduct. *See Borneman*, 22 S.W.3d at 413 (correctly holding that a jury question that was inconsistent with the language of the Dram Shop Act for establishing liability was erroneous).

[15] Act of June 1, 1987, 70th Leg., R.S., ch. 303, § 3, 1987 Tex. Gen. Laws 1673, 1674 (amended 2005).

D. Legislative Intent

Our review is confined to identifying the expressed legislative intent and applying it. Even if this Court were to agree with the court of appeals that holding a provider vicariously liable for a patron's intoxication may be a legitimate public policy, we would still be constrained to faithfully apply the Legislature's statutory proportionate responsibility scheme. Imposing vicarious liability in dram-shop cases conflicts with the Proportionate Responsibility Act. The court of appeals suggested that the Legislature did not intend for an innocent third party to bear the risk of an intoxicated patron's insolvency. But, by enacting Chapter 33, the Legislature made the policy decision that an innocent third party, suing the intoxicated patron and the dram shop, could be burdened with the risk of a joint tortfeasor's insolvency. A tortfeasor who was found less than fifty-one percent responsible does not have to pay the entire amount of damages, only his or her proportionate share. TEX. CIV. PRAC. & REM. CODE §§ 33.013(a), (b)(1).[16]

We recognize that there may be a greater incentive to avoid conduct that leads to responsibility for higher damages than to avoid conduct that leads to responsibility for lower damages. Accordingly, a statute that makes providers liable for all the damages caused by an intoxicated patron could be a greater deterrent to serving that patron. That may influence the drafting of a statute, but it says little about how to interpret the words of the Dram Shop and Proportionate Responsibility Acts. The statutes only hold providers responsible for their own conduct causing injury. This is consistent with a fundamental tenet of tort law that an entity's liability arises from

[16] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271 (amended 1987, 1995, 2003).

its own injury-causing conduct. Under the dissenters' positions, the provider would be responsible for all the damages caused by an inebriated patron even if he never drank any of the product purchased from the provider. The same would occur if an inebriated patron drank a bit of the dram shop's alcohol but evidence established that it did not contribute any further to the deterioration of the patron's ability to drive safely. We recognize some of the alternatives the Legislature considered as it drafted the statutes; however, we do not pick and choose among policy options on which the Legislature has spoken. "Our role . . . is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent." *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003). Upon a finding of liability, the statutes make dram shops responsible for the proportionate share of the injuries their conduct caused.

The broad coverage of the proportionate responsibility statute to tort claims is persuasive. The Chapter 33 proportionate responsibility scheme includes exceptions for certain torts, but claims against providers of alcohol are not among those exceptions. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 33.002(b),[17] (c).[18] For example, the Legislature 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

[17] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, repealed 2003).

[18] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, 2003).

another. *Id.* § 33.002.[19] 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." TEX. CIV. PRAC. & REM. CODE § 33.002(b)(13).[20] Section 33.002(c) expressly excluded from its coverage actions to collect workers' compensation benefits, actions against an employer for exemplary damages arising out of the death of an employee, and claims for exemplary damages included in an action to which this chapter otherwise applies.[21] When the Legislature has chosen to impose joint and several liability rather than proportionate liability, it has clearly said so.

The Legislature created a strict liability cause of action against a person who manufactures methamphetamine for injuries, damages, or death arising from the manufacture or exposure to the manufacturing process of that drug. TEX. CIV. PRAC. & REM. CODE §§ 99.002–.003. The Legislature declared that a person who manufactures methamphetamine and 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. *Id.* § 99.004. In both the statute that created the cause of action against such manufacturers and in amendments to the Proportionate Responsibility Act, the Legislature specifically said that the proportionate responsibility scheme "does not apply in an action for damages arising from the manufacture of methamphetamine." *Id.*

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[19] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, 2003).

[20] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, repealed 2003).

[21] Act of June 3, 1987, 70th Leg., 1st C. S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 37,41 (amended 1989, 1995, 2001, 2003).

§ 99.005; *see also id.* § 33.002(c)(3). The Legislature did not carve out an exclusion for alcohol providers in either the Proportionate Responsibility Act or the Dram Shop Act.

Both dissents struggle to conclude that an injured third party may recover his damages entirely from the alcohol provider under the Dram Shop Act. CHIEF JUSTICE JEFFERSON argues that the Act creates "a form of vicarious liability," while JUSTICE O'NEILL allows a jury to apportion liability but ultimately holds the provider liable for the full amount of damages, regardless of the jury's determination. The stated public policy behind the Alcoholic Beverage Code, including the Dram Shop Act, is "the protection of the welfare, health, peace, temperance, and safety of the people of the state." TEX. ALCO. BEV. CODE § 1.03. More specifically, the Dram Shop Act codifies the exclusive action against an alcohol provider for injuries or damages resulting from the intoxication of a patron. *Id.* § 2.02. The legislative intent to protect the public and provide a potential remedy against an alcohol provider does not equate to a guarantee of recovery against a provider by an injured party. The Act simply supplants in a single codified action all prior common law theories that previously could have been employed by the injured party (either a third party or the intoxicated patron himself) against a provider. *See id.* § 2.03. While the dissents' positions might express sound public policy, we are constrained to conclude that neither correctly applies the Legislature's statutory proportionate responsibility scheme. Both read more into the Dram Shop Act than the words chosen by the Legislature can bear.

At the time of the Duenezes' 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 fifty percent.

TEX. CIV. PRAC. & REM. CODE § 33.013(c).[22] In such cases, liability was not limited by proportionate responsibility. In 2003, the Legislature revisited that exclusion and repealed it in its entirety.[23] Now, defendants found liable for these tortious acts are subject to the general proportionate responsibility scheme. The Legislature seemed intent on creating a general scheme of proportionate responsibility for tort claims, subject to specific statutory exclusions.

Finally, our controlling interpretation of that statutory scheme has remained in place since our 1993 decision in *Smith v. Sewell*. 858 S.W.2d at 356 (holding 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"). In the thirteen 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 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. "'The 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.'" *Wich v. Fleming*, 652 S.W.2d 353, 355 (Tex. 1983) (quoting

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[22] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271 (amended 1987, 1995, 2003).

[23] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.10(5), 2003 Tex. Gen. Laws 847, 859.

Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968)); *Coastal Indus. Water Auth. v. Trinity Portland Cement Div., Gen. Portland Cement Co.*, 563 S.W.2d 916, 918 (Tex. 1978).

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

The dissenters suggest that the Court's opinion exonerates dram shops from liability. They draw a stark distinction between excusing a dram shop from liability for its conduct that violates the Act, which they assert to be the Court's opinion, and making the provider liable for all the injuries caused by an inebriated patron, which is the dissenters' position. For several reasons, our interpretation does not excuse dram shops from liability for their conduct. First, it is simply inaccurate to describe the Court's holding as allowing dram shops to escape liability. The central issue in this case is the apportionment of damages among liable parties. Dram shops are liable if they provide alcoholic beverages to an individual that is obviously intoxicated to the extent that he presents a clear danger to himself and others, and the intoxication of the patron was a proximate cause of the injuries. TEX. ALCO. BEV. CODE § 2.02(b). These requirements were promulgated by the passage of the Act in 1987. In this case, we hold that dram shops are responsible for the proportion of damages they cause or contribute to cause, as set forth in the Proportionate

Responsibility Act. TEX. CIV. PRAC. & REM. CODE § 33.003.[24] Second, we follow the Legislature's guidance in the language of the statute, as explained above. Third, it is not true that juries will always assign most of the responsibility for injury, as between a provider and an inebriated patron, to the patron. Juries have found the dram shop equally or more responsible than the patron for injuries proximately caused by the intoxication of the patron. *See, e.g.*, *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 837 (Tex. App.— Fort Worth 1995, writ denied) (jury found that the dram shop proximately caused fifty-one percent of the injuries); *Venetoulias v. O'Brien*, 909 S.W.2d 236, 239 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd by agr.) (trial court found that the patron proximately caused thirty-three percent of the injuries and the dram shop thirty-three percent). Unlike CHIEF JUSTICE JEFFERSON's position, which would take the question of apportioning responsibility away from the jury, we leave this determination to the fact-finder imbued with "constitutional authority to weigh conflicting evidence." *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.2d 897, 913–14 (Tex. 2004) (Jefferson, C.J., dissenting).

III. Severance

The trial court severed F.F.P.'s cross-claim against Ruiz and then tried the case with F.F.P. as the only defendant. The court of appeals affirmed the trial court's severance order, concluding that because F.F.P. was vicariously liable for Ruiz's conduct, F.F.P.'s right of recovery, if any, was through an indemnification action only. 69 S.W.3d at 807. The court of appeals held that any indemnity claim F.F.P. might have against Ruiz would not accrue until F.F.P.'s liability to the

[24] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37,41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE § 33.003).

Duenezes' was "fixed and certain." *Id.* at 807-08. By this reasoning, F.F.P.'s claim for indemnification against Ruiz would not become actionable until an adverse judgment was taken. *Id.* The court rejected F.F.P.'s request to include Ruiz as a responsible third party under Chapter 33, reasoning that F.F.P.'s vicarious liability puts F.F.P. in the same position as Ruiz would have been. *Id.* at 808. Because Ruiz's actions are imputed to F.F.P., the court continued, Ruiz is not a responsible third party who may be included in a proportionate responsibility question. *Id.*

Rule 41 of the Texas Rules of Civil Procedure provides that "[a]ny claim against a party may be severed and proceeded with separately." We will not reverse a trial court's order severing a claim unless the trial court abused its discretion. *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

> A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.

Id. We have explained that avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow a severance. *See id.*

As already explained, the Dram Shop Act does not make a provider vicariously liable for the conduct of an intoxicated patron. F.F.P.'s liability arises from the actions of its employees and agents—not through the actions of Ruiz. *See Sewell*, 858 S.W.2d at 355. Thus, F.F.P.'s claim against Ruiz is not one for indemnification that could be properly severed; it is one of contribution for Ruiz's proportionate share of the damages for which he is responsible. F.F.P.'s claim against Ruiz is "interwoven with the remaining action": it involves the same facts and issues to be litigated

in the Duenezes' action against F.F.P. In fact, to succeed in a claim against F.F.P., the Duenezes had to prove that Ruiz was obviously intoxicated and that his conduct proximately caused damages—the same facts and issues that would be litigated in a separate suit by F.F.P. against Ruiz. The trial court abused its discretion in severing F.F.P.'s claim against Ruiz.

Chapter 33 requires "[t]he trier of fact, as to each cause of action asserted, [to] determine the percentage of responsibility . . . for [each claimant, defendant, settling person, and responsible third party who has been joined under Section 33.004] with respect to each person's causing or contributing cause in any way the harm for which recovery of damages is sought . . . ." TEX. CIV. PRAC. & REM. CODE § 33.003. This statutory mandate is not discretionary; failing to correctly apply the law is an abuse of discretion. *In re Kuntz,* 124 S.W.3d 179, 181 (Tex. 2003). Therefore, F.F.P. was entitled to a charge that included a question to allow the trier of fact in a single trial to determine Ruiz's proportionate share of responsibility. The trial court's severance constituted reversible error.

IV. Conclusion

The trial court abused its discretion by severing F.F.P.'s claim against Ruiz, proceeding to trial with F.F.P. as the only defendant, and refusing to submit jury questions for determination of Ruiz's negligence and proportion of responsibility. We reverse the court of appeals judgment and remand the case to the trial court for a new trial.

J. Dale Wainwright
Justice

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