

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 O'NEILL, dissenting.

The proportionate-responsibility statute directs its application to all tort-based causes of action. TEX. CIV. PRAC. & REM. CODE § 33.002. At the same time, the Dram Shop Act directs that alcohol providers who serve customers so obviously intoxicated that they present a clear danger to themselves and others are liable “for the actions of their [intoxicated] customers” TEX. ALCO. BEV. CODE § 2.03.¹ Over two years ago, this Court issued an opinion giving effect to both statutes; when a customer who has been served in violation of the Dram Shop Act injures an innocent third party, the intoxicated customer’s percentage of responsibility must be apportioned so that the

¹ The Dram Shop Act has since been amended in a manner that does not affect my analysis. All citations in this dissent refer to the version applicable to the present case. 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).

provider may seek reimbursement from the customer, but the innocent third party may recover from the provider “for the actions of [its] customer[.]” TEX. ALCO. BEV. CODE § 2.03. Unlike today’s decision, our holding honored both the statutory-apportionment directive and the Dram Shop Act’s derivative-liability component. Rather than reiterate the original opinion’s exhaustive analysis here, I attach the Court’s decision as an appendix to this dissent. A few additional points, though, are worthy of note.

First, between the time the Court issued its original decision in this case and the date rehearing was granted, more than seven months passed and three members of the former majority left the Court. F.F.P.’s motion for rehearing raised no new issues; every point was thoroughly considered by the Court in its prior decision. While F.F.P.’s motion for rehearing was pending, the Legislature convened without taking any action to alter this Court’s original interpretation. Nevertheless, the Court withdrew the prior opinion, reached the opposite result, and accomplished judicially what the Legislature itself declined to do.

More substantively, while the Court parrots the statutory construction rule favoring interpretations that harmonize different statutes, it makes no effort whatsoever to reconcile the Dram Shop Act’s specific language with the more general proportionate-responsibility statute, giving effect only to the latter. The Court reasons that holding the dram shop liable for the actions of its intoxicated customer could, in some cases, impose joint and several liability on the dram shop if the jury found it less than fifty-one percent responsible, which would be contrary to Chapter 33’s provisions. *See* ___ S.W.3d at ___ (citing TEX. CIV. PRAC. & REM. CODE § 33.013(a), (b)(1)). I believe this is precisely what the Legislature intended if a provider serves alcohol in violation of the

Dram Shop Act. To avoid this potential result, the Court simply ignores the Dram Shop Act's derivative-liability component, *i.e.*, the provider's liability "for the actions of [its] customers." TEX. ALCO. BEV. CODE § 2.03. By ignoring the very language that imbues the Dram Shop Act with deterrent effect, the Court undermines the legislative policy underlying the entire Alcoholic Beverage Code, which is to "protect[] the welfare, health, peace, temperance, and safety of the people of the state," and to "liberally construe [the Code] to accomplish this purpose." TEX. ALCO. BEV. CODE § 1.03. The Dram Shop Act's derivative-liability component, designed to deter providers from selling alcohol to obviously intoxicated and clearly dangerous persons, can and should be reconciled with the proportionate-responsibility statute rather than selectively ignored.

To support its selective view, the Court today finds arguments convincing that the prior Court did not. Specifically, the Court interprets section 2.03 of the Dram Shop Act to signal nothing more than the exclusivity of the statutory remedy, marginalizing the specific language used. But as the prior Court noted:

[i]f that had been the statutory purpose, [the statute] 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, section 2.03 clearly says:

[t]he 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.

TEX. ALCO. BEV. CODE § 2.03 (emphasis added).

___ S.W.3d ___. The Court today also picks up the prior dissents’ refrain that the Legislature specifically carved out exceptions to the proportionate-responsibility scheme for a number of criminal acts, like the manufacture of methamphetamine, yet did not make exceptions for alcohol providers. But the Dram Shop Act, with its express derivative-liability component, came out of the same legislative session that enacted comparative responsibility; being by its own terms a limited exception to comparative responsibility, there was no need to create a separate one. 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); 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. CIV. PRAC. & REM. CODE § 33.003).

In sum, the disagreement in this case is, and has always been, over what the Legislature meant in the Dram Shop Act when it referred to “*the liability of providers under this chapter for the actions of their customers . . . who are or become intoxicated.*” TEX. ALCO. BEV. CODE § 2.03. Over two years ago, the Court considered this language significant and straightforward, and afforded the Legislature deference in choosing it. F.F.P. raised no new arguments on rehearing, and the Legislature proposed no new legislation in light of our prior interpretation. Today the Court usurps the legislative function and dilutes the deterrent protections the Dram Shop Act was designed to afford. For the reasons expressed in the original Court’s opinion, I would affirm the court of appeals’ judgment.

Harriet O’Neill
Justice

OPINION DELIVERED: May 11, 2007