 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [Williams v. McCollister](#), S.D. Tex., September 22, 2009  
237 S.W.3d 680  
Supreme Court of Texas.

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.

No. 02–0381.

|

Argued Nov. 30, 2005.

|

Decided May 11, 2007.

#### Synopsis

**Background:** Motorists injured in collision with intoxicated driver brought action under the Dram Shop Act against owner of a convenience store which had provided alcoholic beverages to driver. The County Court at Law No. 1, Calhoun County, [Alex R. Hernandez, J.](#), severed store owner's cross-action against driver, and rendered judgment on jury verdict awarding motorists \$35 million. Store owner appealed. The Corpus Christi-Edinburg Court of Appeals, [69 S.W.3d 800](#), affirmed. Review was granted.

**Holdings:** On denial of rehearing, the Supreme Court, [Wainwright, J.](#), held that:

[1] Proportionate Responsibility Act applies to all claims under Dram Shop Act, including third-party claims, and


[2] store owner's cross-action against driver was not severable.

Reversed and remanded.

[Jefferson, C.J.](#), and [O'Neill, J.](#), dissented and filed opinions.

West Headnotes (16)

[1] **Appeal and Error**  Statutory or legislative law

**Statutes**  Plain Language; Plain, Ordinary, or Common Meaning

Statutory construction is a legal question that Supreme Court reviews de novo, ascertaining and giving effect to the legislature's intent as expressed by the plain and common meaning of the statute's words.

[87 Cases that cite this headnote](#)

[2] **Alcoholic Beverages**  Legal or proximate cause

**Alcoholic Beverages**  Presumptions, Inferences, and Burden of Proof

If a plaintiff meets the onerous burden of proof imposed by the Dram Shop Act, then the provider of alcoholic beverages is liable for damages proximately caused by its employees or patrons. [V.T.C.A., Alcoholic Beverage Code § 2.02](#).

[9 Cases that cite this headnote](#)

[3] **Alcoholic Beverages**  Constitutional and Statutory Provisions

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. [V.T.C.A., Alcoholic Beverage Code §§ 2.02, 2.03](#).

[10 Cases that cite this headnote](#)

[4] **Alcoholic Beverages**  Concurrent and conflicting laws and remedies

**Alcoholic Beverages**  Comparative negligence

Section of Dram Shop Act setting forth the exclusivity of statutory remedy against an alcohol provider for damages caused by an

intoxicated patron does not make an alcohol provider responsible, without regard to fault, for 100% of the damages caused by an intoxicated patron. V.T.C.A., Alcoholic Beverage Code § 2.03.

3 Cases that cite this headnote

[5] **Labor and Employment** 🔑 Nature of liability in general

**Principal and Agent** 🔑 Rights and liabilities of principal

Generally, the doctrine of “vicarious liability,” or respondeat superior, makes a principal liable for the conduct of his employee or agent.

31 Cases that cite this headnote

[6] **Principal and Agent** 🔑 Rights and liabilities of principal

Vicarious liability is based on the principal's control or right to control the agent's actions undertaken to further the principal's objectives.

14 Cases that cite this headnote

[7] **Negligence** 🔑 Control over object

Basis for imposing liability on the owner of the thing entrusted to another, under theory of negligent entrustment, is that ownership of the thing gives the right of control over its use.

4 Cases that cite this headnote

[8] **Alcoholic Beverages** 🔑 Vicarious liability and respondeat superior

**Alcoholic Beverages** 🔑 Comparative negligence

Apportionment of responsibility, under Proportionate Responsibility Act, applies to all claims under Dram Shop Act, including third-party claims; neither the purpose nor the language of Dram Shop 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, and imposing

vicarious liability in dram-shop cases would conflict with Proportionate Responsibility Act. V.T.C.A., Alcoholic Beverage Code §§ 2.02, 2.03; V.T.C.A., Civil Practice & Remedies Code §§ 33.002, 33.003(a), 33.013; § 33.001(a)(2003).

32 Cases that cite this headnote

[9] **Constitutional Law** 🔑 Inquiry Into Legislative Judgment

**Constitutional Law** 🔑 Policy

**Statutes** 🔑 Intent

Supreme Court's role is not to second-guess the policy choices that inform statutes or to weigh the effectiveness of their results; rather, Court's task is to interpret those statutes in a manner that effectuates the legislature's intent.

5 Cases that cite this headnote

[10] **Statutes** 🔑 Prior construction

Legislature must be regarded as intending statutes, when repeatedly reenacted, to be given that interpretation which has been settled by the courts.

3 Cases that cite this headnote

[11] **Action** 🔑 Severance of actions

**Contribution** 🔑 Automobile cases

**Indemnity** 🔑 Nature of obligation

Convenience store owner's claim against intoxicated driver who purchased beer and then had automobile accident was not an indemnification claim that could be properly severed from injured motorist's and passenger's action against store owner under Dram Shop Act; store owner's claim was one of contribution for proportionate share of damages for which driver was responsible. V.T.C.A., Alcoholic Beverage Code §§ 2.02, 2.03; V.T.C.A., Civil Practice & Remedies Code §§ 33.002, 33.003; Vernon's Ann.Texas Rules Civ.Proc., Rule 41.

5 Cases that cite this headnote

**[12] Appeal and Error** 🔑 Consolidation and severance

7 Cases that cite this headnote

Supreme Court will not reverse a trial court's order severing a claim unless the trial court abused its discretion. [Vernon's Ann.Texas Rules Civ.Proc., Rule 41.](#)

9 Cases that cite this headnote

**[13] Action** 🔑 Severance of actions

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. [Vernon's Ann.Texas Rules Civ.Proc., Rule 41.](#)

47 Cases that cite this headnote

**[14] Action** 🔑 Severance of actions

Avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow severance of a claim. [Vernon's Ann.Texas Rules Civ.Proc., Rule 41.](#)

37 Cases that cite this headnote

**[15] Alcoholic Beverages** 🔑 Vicarious liability and respondeat superior

Dram Shop Act does not make a provider of alcoholic beverages vicariously liable to a third party for the conduct of an intoxicated patron; provider's liability arises from the actions of its employees and agents, and not through the actions of patron. [V.T.C.A., Alcoholic Beverage Code §§ 2.02, 2.03.](#)

11 Cases that cite this headnote

**[16] Appeal and Error** 🔑 Construction, Interpretation, or Application of Law

A trial court's failure to correctly apply the law is an abuse of discretion.

**Attorneys and Law Firms**

\***681** [Oscar H. Villarreal](#), Villarreal Moreno & Ruiz, San Antonio, [Gregory J. Lensing](#), Cowles Thompson, Dallas, [Arthur C. Reyna Jr.](#), San Antonio, [Glen Garey](#), Austin, [James E. Rensimer](#), Markle & Ramos, \***682** Houston, TX, [Victor E. Schwartz](#), [Emily J. Laird](#), [Manuel Lopez](#), Shook, Hardy & Bacon L.L.P., Washington, DC, [Edward J. Murphy](#), Beirne, Maynard & Parsons, L.L.P., Houston, [E. Lee Parsley](#), E. Lee Parsley, P.C., Austin, [Grant E. Adami III](#), Adami Goldman & Shuffield, San Antonio, TX, for Amicus Curiae.

[Russell H. McMains](#), Law Offices of Russell H. McMains, Corpus Christi, [Reagan W. Simpson](#), King & Spalding LLP, Houston, [Mike A. Hatchell](#), Locke Liddell & Sapp, LLP, Austin, TX, for Petitioner.

[David Roberts](#), [Wanda Roberts](#), Garner, Roberts & Roberts, L.L.P., Port Lavaca, [Christa Brown](#), Austin, [Cynthia T. Sheppard](#), Attorney At Law, Cuero, [David C. Griffin](#), [John W. Griffin Jr.](#), Houston, [Marek & Griffin](#), L.L.P., Victoria, TX, for Respondent.

**Opinion**

Justice WAINWRIGHT delivered the opinion of the Court, in which Justice [HECHT](#), Justice [BRISTER](#), Justice [MEDINA](#), Justice [GREEN](#), Justice [JOHNSON](#) and Justice [WILLETT](#) joined.

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, reargued 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

Also available as part of the eCourse

[2023 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the  
30<sup>th</sup> Annual Labor and Employment Law Conference session

"War Stories, Trial Tips, and Trial Skills Comparison: New vs. Established"