ORAL ARGUMENT – 11/30/2005
02-0381
F.F.P. OPERATING PARTNERS V. DUENEZ

McMAINS: I still represent F.F.P. Operating Partners, a convenience store, sellers of the 12-pack of beer that ultimately resulted in the liability that was imposed upon and through what is commonly referred to as the Dram Shop Act and the refusal of the TC and the CA to acknowledge the applicability of the proportional responsibility statute, the dram shop actions as this court had earlier recognized in Smith v. Sewell in 1992.

We contended that all of those were error and that they were harmful error, and the court basically agreed on the first point in the court's prior opinion. But the majority opinion had disagreed with the notion that it was harmful error suggesting that somehow it didn't affect the judgment as to the non-submission of the intoxicated driver; whereas we contended that clearly it would affect the judgment under the clear holdings and requirement of the statute known as proportional responsibility statute, ch. 33 of the Tex. Civ. Pract. & Rem. Code.

O'NEILL: Are you aware of any bill being introduced in the legislature after our opinion came out during any of the sessions that would clarify or straighten out what you - I mean obviously the court was divided on interpretation of the statute. Do you read anything into the fact that the legislature didn't...

McMAINS: No. I really don't for a number of reasons. First of all because the lobby as it were of the liquor industry were very heavily engaged in petitioning the court for rehearing, all of which I think was well known basically to the legislature. Two, I think that this court has frequently held the legislative inaction doesn't per se necessarily establish anything. But three, and even more importantly, I think that the policy that has continued to evolve from the legislature from the enactments in 1987 forward in the tort reform area in particular indicated by a number of the amicus briefs that have been filed by the Texas Civil Justice League and the American Tort Reform Association, the Texas Lawsuit Reform groups has been to require entities to be responsible only for their own percentage of causation except in very limited circumstances.

O'NEILL: But you would agree the legislature didn't make any attempt to clarify the language.

McMAINS: Are you talking about in the dram shop statute?

O'NEILL: Anywhere.

McMAINS: That's correct. Rather what they did was once again they further expanded the reach of the proportionate responsibility statute, ch. 33. They did in fact make the one alteration with regards to the settlement issue, that was one issue that we had raised, and that there used to be

only a percentage reduction that was required when the changes were made in 2003. They went back and fixed that and restored basically a credit notion...

O'NEILL: But did not fix the issue that we divided up on at the court?

McMAINS: Correct in terms of if you're arguing that there is a conflict. My suggestion is, and we suggested all along that there is not a conflict in reality between these two statutes. Because the subject matter of the one statute deals with the creation of a cause of action, which is the dram shop statute; the other deals with the apportionment of responsibility, which is generally applicable and specifically applicable. And this court recognized, your honor recognized in her prior opinion, that the proportionate responsibility statute was applicable, and the lower courts erred holding that it wasn't applicable, that the liability was not totally derivative. But the refusal to apply the remainder of the statute, ch. 33.013 with regards to defining the liability is what we are complaining about.

O'NEILL: It all depends on what we divided up over was what does the language mean, the liability of providers under this chapter for this actions of their customers who are or become intoxicated? And that's what this case boils down to. In all the amicus briefs, I never saw that language mentioned.

McMAINS: I do not believe that it is solely the question of looking at an isolated portion of the statute. This court has consistently recognized you look at the totality of the statute, and the creation of the right is not in that section. It's in the previous section of the statute. That's simply an exclusivity provision. There is no mention of proportionate responsibility. There is no mention of derivative liability. There is no mention certainly of anything approaching indemnity, and there is no justification for suggesting in my judgment and the judgment of most of the amicus, as well as the dissenters, that you can ignore the rest of the provisions of ch. 33 as to how it works.

MEDINA: What does the legislature's failure to expand or discuss this issue after the case was decided? What impact does it have or should it have on this court...

McMAINS: I don't think it has any impact whatsoever. Again because it's purely legislative inaction at this juncture. The fact of the matter is the legislature was well aware during the session that motion for rehearing was pending on this case and had been granted. While there was still ample opportunity to fix the problem if in fact the motion for rehearing were not reconsidered. The fact of the matter is, I don't think that there is any significance that can be given to the legislative history. To the contrary.

JEFFERSON: Assume with me it was proved conclusively that Ruiz didn't consume any of the alcohol that he purchased, and the beer that he purchased. And I know there is kind of a fact issue on that. But let's just take it for granted that he didn't consume any, just got in the car and caused the accident. Under ch. 33, we're looking at each person's causing or contributing to cause the harm. How would the dram shop provider have caused or contributed to causing the harm if Ruiz didn't

consume any of the beer in the first place?

McMAINS: Because there is a statutory directive in the dram shop statute. What the dram shop statute does, it does not impute liability. It imputes causation. So the causation notion and the causation hook as it were is supplied by selling to an intoxicated person.

JEFFERSON: How is it that causing? I mean is it simply a matter of imputing cause or creating cause out of a vacuum?

McMAINS: This court in Borneman v. Steak & Ale said it's an imputation of causation. That's all it is.

JEFFERSON: How is that that causes the harm? In what way does that - I mean were we right in Borneman?

McMAINS: I think you were right.

JEFFERSON: Then explain to me how is there causation there? What is it about the dram shop provider's conduct if the alcohol was not consumed by the customer that causes the injury?

McMAINS: This is a policy decision that has been made by the legislature in the creation of the notion or the action for dram shop liability. And that is, that we're going to impute the causation insofar as if there is intoxication and the intoxication of the patron is a cause, then that part of the causation link we're going to say is made. And the reason for that quite simply is the situation where you have a person who is bar hopping, where a person goes into one bar he's served repeatedly, goes into another bar and he's served repeatedly, and so on. Basically all of those people had potential liability without the necessity of trying to establish that the intoxication was much more severe from the one verses the other.

JEFFERSON: But the way the dram shop act works is if there is just one visit to one convenience store and the person is intoxicated when they walk in, they purchase the alcohol, put it in the trunk and drive off and create an accident, then there is still the imputation of causation in that instance. Is that right?

McMAINS: Technically speaking under the statute there is. Unfortunately of course that's not our facts in terms of there is some argument as to whether or not there was some consumption of some of the alcohol that was purchased, and the one beer that was open and it was in his lap. There is a dispute as to whether or not he drank any of it or not.

We, of course would have argued, did argue in the CA against the great weight point unsuccessfully that there was insufficient evidence that there was any causal link anywhere. But those are basic arguments that are related more to the constitutionality of the policy choices the legislature made in my judgment, and not as to whether or not that they clearly did in fact make the

choice, to make the causation hook the intoxication of the individual. The conduct that is involved and implicated, however, is the conduct of the provider. And the proportionate responsibility statute specifically discusses the proportional responsibility, what used to be originally comparative responsibility, not a question of the causation that is imputed but of just responsibility.

JEFFERSON: So if we were to submit in the hypothetical that I mentioned where there the alcohol goes directly into the trunk and is never consumed, and the apportionment question is submitted to a jury. How can a jury conclude that anything other than 100% of the cause of this accident was the patron's rather than the provider's?

McMAINS: It can , has. The fact of the matter is that in every case in which there has been any submissions of the alcohol provider and the intoxicated person, contrary to the assumptions in the prior majority opinion, the fact of the matter is there has been an apportionment between the providers and/or providers, and the intoxicated individual as well as with the plaintiff in some of the cases. Borneman itself is a ⅓, ⅓, ⅓. There are several other ones that are 80/20. The point is, what the effect of the court's prior opinion has done is to take the 20% finding for instance in once of those cases, the ⅓ in the other, and refuse to apply the section of the comparative responsibility statute that says you're only going to be liable for the percentage that you are responsible for as determined by the answer to the jury. And rather than being ________ for ⅓ or for 20%, there is an imposition of joint and several liability and there is absolutely no legislative history and no language in the dram shop statute to support the notion that it had anything to do with an imposition of joint and several liability. It was not intended to expand joint and several liability, and it was not intended to repudiate the notions that were existent at the very time with the passage of the tort reform statute. First in 1987, and then it's changed in 1995, which is the applicable statute to our particular cause of action.

There is simply no justification that I can find in any kind of notions of statutory construction that would allow you to apply one sentence of the statute and ignore the rest of it. And that's exactly what was essentially done by the effect of the court's prior opinion.

WAINWRIGHT: If an individual drinks to intoxication and is home, leaves, buys a beer at a convenience store, puts it in the trunk, never drinks any of it and that's undisputed, then runs into a tree after leaving the convenience store. In the lawsuit between this first party lawsuit what's the result?

McMAINS: Under Smith v. Sewell and taking the literal language of the statute, there is a comparative responsibility issue submitted between the convenience store and the individual. And if the individual that is injured is more than 50%, then he doesn't recover anything. On the other hand if he runs into somebody else, then you don't apply those provisions of the comparative responsibility statute based on the prior opinion that had been rendered.

WAINWRIGHT: Take the same factual scenario and instead of the intoxicated individual running into a tree, he runs into someone else. Then there is a lawsuit. And all three parties are in

the lawsuit. Assume no severance. Then what's the results?

McMAINS: Once again you must submit the intoxicated - if the intoxicated driver is suing for his injuries against the dram shop defendant, then as to that claim then there is a percentage submission between those two. There is also a percentage submission assuming that the third party is suing the dram shop whether or not he's suing the intoxicated driver...

WAINWRIGHT: Focus on the third party suing the driver and the dram shop.

McMAINS: Under this court's prior opinion as well and both the majority and the dissent there is actually a percentage determination made between all of the parties who are potentially responsible for any of the liability. And that would include the dram shop defendant, the intoxicated defendant, and the plaintiff driver, if in fact, there was a plaintiff driver if there was any possibility of contrib. On the other hand, this principal of aggregation that arises out of the court's prior opinion basically ignores the application of the other portion of the statute in ch. 33, which says that you only owe that percentage that you have caused once that submission occurs.

O'NEILL: Of course you can argue it's square or round. You can also say that the proportionate responsibility statute ignores the language of the dram shop act about liability of the customers. It just depends on which part you want to ignore.

McMAINS: The comparative responsibility statute has exceptions to its applications. There is a further exception done with regards to methamphetamines that have been acknowledged in the court's prior dissent. There has never been any exception on the basis of dram shop liability being exempted from the application in full of the comparative responsibility statute.

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RESPONDENT

GRIFFIN: There is a disconnect that's apparent in the questioning that just took place. Back in 1987 when the dram shop statute was passed, it was the very same year that comparative responsibility came out of the legislature. And what has been apparent in these questions and answers is this inability of Mr. Cut Rate to wrap its mind around the concept that our legislature at the same time enacted tort reform and apportionment of responsibility then called comparative responsibility, broadened liability for alcohol sellers and made them liable for the actions of their customers. This idea that a legislature can't on the one hand enact tort reform and on the other hand broaden liability so as to deter the disastrous consequences of alcohol sellers selling to people who are already drunk or who are minors. That was a policy decision our legislature had a right to make.

WILLETT: Lawmakers also made a specific exception for certain torts in the comparative fault act, but did not make an exception for alcohol providers. What do you make of that?

GRIFFIN: That's because the dram shop statute itself provides that dram shops, or

alcohol provides are liable for the actions of their customers. There doesn't need to be a listed exception for a statutory cause of action created during the very same legislature.

The question that was asked by J. Medina and J. O'Neill was the question about well what has the legislature done about the opinion of this court that was issued on Sept. 3, 2004? Mr. McMains said, oh we're not worried about that. All the amicus have filed briefs in this case. We are just going to wait and see. Well their argument - and my brother has been arguing with me on this case for 5 years. While El Chico v. Poole was at every stage of litigation, the legislature was trying to get ________. They were trying to figure out their own rules. They didn't want a plain, old ordinary negligence standard. They set down at the table with TML, with MADD, with alcohol providers and got themselves a statute that they liked. A statute that says as long as they send their clerks to TABC school and don't encourage this illegal sale of alcohol to minors and drunks, they are off the hook no matter how drunk he was, no matter how many drinks they served him. That was a carefully created legislative enactment for the benefit of the people of this state. And this court said in Smith v. Sewell it was to deter the disastrous consequences of alcohol permit holders selling to people, either minors or people who are already obviously dangerously intoxicated, then going out on the roadways and hurting people.

MEDINA: Is it your position then that ch. 33 doesn't apply in the sense of apportioning responsibility because of the exclusive remedy portion of the dram shop statute? Is that the only place where you get that?

GRIFFIN: No. We have never contended that ch. 33 doesn't apply to any personal injury case. But here the legislature has used "for the actions of their customers."

BRISTER: Well it doesn't actually say dram shop providers are liable for the actions of their customers in so many words. You are implying that into the phrase that it's in lieu of other common law.

GRIFFIN: It says liability under this subchapter for the actions of their customers. Now you can take the position that they didn't really mean that in their own description of their own law that they passed in 2002 doesn't really mean it. But when you look at the imputed causation and the chief's questions, it would never work...

BRISTER: It's just like saying did the negligence of A, B, and C proximately cause the accident? If you don't put an "if any" in there, that doesn't mean you're implying that there was negligence. It may or it may not. But generally when you say does the negligence of the defendant proximately cause, we're not asking the jury and we understand that normal, ordinary people understand that sentence. It has no implication that that means there was negligence. Why is this any different? Why is this such a clear implication that the liability of providers for everybody in the world is in lieu of other common law. Does that mean they are liable for everybody in the world?

GRIFFIN: You made an assumption for everybody in the world. This is a permit holder

under Texas law.

BRISTER: If it said for everybody in the world. Assume it said everybody in the world. Instead of employees, customers, liability will be provided under this chapter for the actions of everybody in the world is in lieu of common law or other statutory warranties. That would not imply that they are liable for everybody in the world.

GRIFFIN: The legislature had social host, and if they wanted to apply it to everybody in the world and make them liable for the actions of those they serve alcohol, that would be the legislature's prerogative not this court. That's exactly right. This is not rocket science and what happened in 1987. The words of this statute while they are in the exclusivity provision, it is the legislature describing their own ______, and it's not for us, it's not Mr. McMains, it's not for this court to second-guess the legislature's own enactment. But make no mistake, even if this language were not plain "for the actions of their customers", their argument is we're liable for our own acts and not the acts of our customers.

When this bill was introduced in the Pizza amicus, they cite for the legislative debate the language of the statute when it was first introduced, which did have a cause and fact requirement. The plaintiffs are going to have to show which bar he got drunk in, which bar contributed to his intoxication, have all this onerous proof that the injured third party is going to have to prove. Now during the legislative session all that was taken out of the statute. I think it's on Tab 2 of our brief on the merits, we've got the legislative history, where all this cause and fact business, last known contributor, the last bar he got drunk in, was taken out in favor of the plain language we now have. So there are two problems with their attempt to have this court rewrite the statute. One, it flies in the face of the words used by the legislature. This court would actually have to veto that part in the statute and say no, the liability under this subchapter is not for their own customers, but only for their own acts.

O'NEILL: What was the provider's liability under the common law prior to this statute?

GRIFFIN: Zero. Zero. And that's why the chief's questions are so important. Because as a matter of law in this country for the first 150 years of its existence, alcohol providers were never liable to innocent third parties because the sale was never as a matter of law the cause or the proximate cause of the injury when the drunk goes off and hurts somebody on the highway. It's too attenuated. He was already drunk when he got the beer. How would somebody never unscramble the egg and say it was that last beer that pushed him over when he was already obviously and apparently intoxicated.

And make no mistake. This argument seeks to suck the life out of a carefully created legislative enactment to benefit the public of this state. There is no good faith argument against the plain words of the statute.

HECHT: Then why is the court struggling so. Are we just idiots or what?

GRIFFIN: There is this tide, that what the legislature must do is to enact more tort reform. That's what we do. We're trying to get rid of Duncan v. Cessna.

BRISTER: This case would be easy if the dram shop statute says the dram shop is vicariously liable for what its customer does. We wouldn't be here. Mr. McMains wouldn't be making this argument. The statute does not say that. You're arguing that the statute which says nothing about vicarious liability explicit. It says nothing about responsibility. It trumps irresponsibility statute. So now that's a reasonable argument, but don't tell me this is so easy because the - the plain words don't say that. Help us put together two statutes that don't seem to me to have reference to each other.

GRIFFIN: If I can't persuade you that liability for the actions of their customers is the opposite of being liable for their own act, I don't know how I can convince a court...

HECHT: But if that's the case, then what really is there left of the application in ch. 33?

GRIFFIN: The statement made in the dissent here is that always the dram shop will be liable. That's not true.

HECHT: What is there left?

GRIFFIN: When there's a car wreck involving a drunk, another driver, everybody who caused or contributed to cause the injuries complained of are going to be submitted under ch. 33, and the courts faithfully will apply that.

WAINWRIGHT: Assume the third party has no liability. Did everything right. So you're just looking at the drunkard and the dram shop, then answer this question.

GRIFFIN: The liability of the customer is imputed to the dram shop. 2.02 says there is no causation link between the sale and the injury. In other words, the only causation that's imputed liability is for the actions of their customers. The argument as I basically hear it today is the legislature instead of saying it was vicarious or derivative only used the words "liable for the actions of their customers" which is the definition of derivative or imputed or aggregated or vicarious.

HECHT: It seems to me that if that's true there really is nothing left in ch. 33, which would be a reasonable conclusion in this case, that it just doesn't apply. But to say it applies and doesn't do anything doesn't seem to me to be very reasonable. And I wonder what do you think it does?

GRIFFIN: I say ch. 33 is going to apply in every case where there is more than one cause of the occurrence in question.

HECHT: To sort out of as between the dram shop and the driver.

GRIFFIN: No. To sort out under ch. 33 all those who have caused or contributed to cause the injuries complained of. That's what faithfully implemented the statute does. That's all it does.

HECHT: I was wondering how that's going to be done in light of your argument a few minutes ago. I thought you argued essentially it can't be done, that which beer caused it? Was it the last beer? the first beer? the middle beer? If you can't do, you can't do it whether as between the plaintiff and the rest of them or as between the rest of them themselves.

GRIFFIN: That's why ch. 33 allows the jury to consider things that Borneman will not allow them to consider. If the first six drinks the bar serves somebody, those are legal drinks. Under 2.03 you cannot hold that against the bar. They carefully got a legislation that says the first five drinks are legal, you cannot use that against us. You can only use that sale as the liability under the alcoholic beverage code. And you take 33.002 in ch. 33 it says everything anybody did to cause or contribute to cause. So the bar that lathered him up, if they were going to be submitted under ch. 33 and not limited by the language in 2.03 in Borneman, then it's all up in the air for the jury to consider: he could have called a cab; could have called a TABC hotline.

JEFFERSON: Did you argue there is separate conduct here on the part of the driver in reaching for the CD? Was that related to the intoxication or is that something different?

GRIFFIN: There's an argument made at trial that it really wasn't because he was drunk. He was just fooling with the CD. That's an argument at various times during the trial. But the jury answered the question: Was his intoxication the cause of the wreck? And the jury of course on overwhelming evidence answered, yes. Because his friend said he was drunk, went over the centerline twice.

No. We observed Borneman carefully and didn't blame Mr. Cut Rate for all of the other things that they could have and did not do. The fact is here we were limited by Borneman and what we could prove liability, and that is only the sale. This court in Borneman says nothing else we could use against that dram shop.

BRISTER: Obviously undrunk people sometimes have wrecks because they are reaching under their seat for a CD. So somebody who is not drunk that does that their name is submitted, but somebody who is drunk and does that their name is not submitted because the dram shop trumps everything?

GRIFFIN: I think everybody is submitted.

BRISTER: It's not going to count. In other words when you submit their name, if they injure a third party if not drunk, if they reach under the seat looking for a CD, we submit their name and we compare plaintiff and third party plaintiff that had nothing to do with it. But if there's also a dram shop party there, then there is no purpose in comparing the plaintiff and the drunk defendant, so that theory just is not submitted.

GRIFFIN: That dram shop is off the hook in your hypothetical. Because it wasn't his intoxication that caused the wreck. It was his inattentiveness.

BRISTER: I bet that's not what the plaintiff is going to say. The plaintiff is going to say, especially if the guy doesn't have much money, no it was the dram shop. And we're not going to be able to really tell. The jury is going to have to decide was this because he was reaching under the seat, just like a nondrunk person or was it because he was drunk that he reached under the seat. But we're never going to try to separate those if there is any evidence he's drunk.

GRIFFIN: They did make that argument. And the drunk was asked: You don't think you would be reaching under the seat looking for a CD if you weren't stumbling bone and drunk do you? And said, yes. I guess you are right. I wouldn't be putting my head between my legs under the seat unless I was drunk.

BRISTER: So that's what it turns on, whether the drunk admits it was somebody else's fault?

GRIFFIN: What it turns on precisely is whether intoxication caused the injury as opposed to simply inattentiveness.

BRISTER: Not that many defendants get on the stand and say I admit I was inattentive. Has that been your experience that many defendants do that?

GRIFFIN: About three of them we've deposed and after about 1-1/2 hours in the deposition after they are asked all the questions about what they did, they are willed to the proposition that they would not have caused this terrible tragedy and reached under the seat or put their head between their legs unless they were drunk. It's a fundamental logic that people don't do the things Mr. Ruiz did here unless they are obviously intoxicated. But echoing what you are saying, I've read these amicus briefs. Only one of them on rehearing even has in their table of contents a citation to the controlling statute 2.02 and 2..03. What does that tell this court about the seriousness of an argument, about the statutory language liability for the actions of their customers, that only one amicus Conoco even has it in the table of contents, and that is to describe that provision as a descriptive sentence. And that's fair. It can be called a descriptive sentence. It's the legislature's descriptive sentence about the two previous provisions that it has just enacted in art. 2.02.

The idea that they would ask this court to act as a super legislature and blot out that language and put in language - or blot it entirely. I mean the legislature could have said art. 2.02 is the exclusive remedies. We don't need to do anything else. But they didn't.

WAINWRIGHT: There was no percentage questions submitted in the trial of this case. Correct?

GRIFFIN: That's right.

WAINWRIGHT: Is that because of the severance?

GRIFFIN: Yes. The drunk in this case actually...

WAINWRIGHT: So the severance precluded your argument from operating in this case. You said you should get a percentage number from all of the parties, all of the potential parties who caused the injuries.

GRIFFIN: No. It is not precluded. That case is pending in Calhoun County. That case is pending as we sit here. It's been sitting there for years. Mr. Cut Rate and ____ Ruiz whose case is pending down there, they can go divide the judgment in this case, they can get their percentage question and they can allocate whatever rights they have as...

WAINWRIGHT: Here's the facts of a trial: decides liability, and then typically we get a percentage question, apportionment question that says: among these three or four or whatever number of defendants assign their proportion of responsibility. The jury has heard the facts, they've heard the argument as to all the parties, they can compare and contrast and put a number in those blanks all at one time, all with the same jury making that determination. It sounds like you're saying the jury can make just as accurate an apportionment if one or more of those defendants are tried in front of a separate jury.

GRIFFIN: Absolutely. The same evidence is going to come in, the jury will get to answer those questions as between these parties and resolve all their rights.

WAINWRIGHT: You said the jury. You mean two different juries don't you?

GRIFFIN: It would have to be two different juries as in any other case where...

WAINWRIGHT: So the same jury is not making an apportionment decision? You have two different juries making two different apportionment decisions.

GRIFFIN: Precisely. There is no apportionment decision in this case.

WAINWRIGHT: And potentially conflicting answers.

GRIFFIN: No. It cannot be a conflicting answer in their case of contribution, because all they are doing is dividing under ch. 33 of who is responsible for causing or contributing to cause the injuries that occurred in this accident.

WAINWRIGHT: You don't think there's the possibility of conflicting jury answers in that situation?

GRIFFIN: No. I don't. And I can't think of any. But if there were it would be no

different than any two juries trying a case on remand that might give different answers. But clearly there is no error here because the drunk agreed to it and the dram shop will have its day in court to apportion liability with its drunk.

Because the statute means what it says and because the dram shop statute to have any life intended by the Texas legislature, the respondents request this court to affirm the judgment of the TC.

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REBUTTAL

McMAINS: There was no percentage submission in this case. It was blocked because of course of a partial summary judgment that had been granted specifically holding on the basis that ch.33 didn't apply. For the respondent to take the position that they had never taken the position that ch. 33 didn't apply does not comport with either their papers, the rulings of the TC, or the record.

O'NEILL: Do you find that of all the amicus briefs we're received in this case on rehearing only one even mentions the dram shop act?

McMAINS: That's not actually true. There are several that do, and one of the ones that has even more discussion of the legislative history and the statements from the floor by Sen. Glasgow is in fact the Pizza amicus which is a different one altogether. And in that one it's very clear that what the legislature was concerned about was the fact that there was pending in the SC two cases. They had been consolidated for argument. I argued them. One of the cases was a case called Bandies(?), which was a case decided out of the Corpus Christi CA, which had recognized a common law duty on the alcohol provider in that case, and held them responsible. So there were two decisions: El Chico v. Poole and Bandies(?), and both of those cases they had different results. One had said no liability; the other had said liability. The SC took it to resolve that issue specifically. But to say that there was no common law cause of action that had ever been recognized prior to the legislative enactment is simply not true. And the purpose of the legislative enactment and why it was hurried up was to preempt the possibility of a broader based basis of liability coming out of the SC's common law decisions and determinations. That was what was sought to be avoided, that's very clear in the legislative record as to what the purpose of that statute was. It was to limit the liability of the providers not to expand it.

O'NEILL: If that were true, then why doesn't §2.03(a) just say liability of providers under this chapter is in lieu of common law or other statute_______________? That would have been easy to do.

GRIFFIN: I don't think that there is any difference at all in that language and the language that they do use.

O'NEILL: So you see no difference between this is in lieu of common law, and the

liability of providers under this chapter for the actions of their customers who become intoxicated. You see no difference between those two?

GRIFFIN: No. It's intended - the purpose of that language is all intended to limit further attempts at common law and position of common law liability on the providers apart from the provisions of the preceding section. It's a limitation of liability. It's not an expansion. Joint and several liability at that time in that period in the Texas legislative history is an expansion of liability, not a limitation of it. We had joint and several liability up to a point. In terms of a negligence notion obviously if there was negligence on the part of the plaintiff, then they were less negligent than the other party and so on in terms of the pre-1987 legislation. Then there were certain limitations, but very seldom was there a limitation on joint and several liability. It was expanded significantly in 1987. It was expanded again in 1995, and at no time has there ever been any exception for dram shop liability.

The SC in Smith v. Sewell specifically says, it's ch. 2 that sets a standard of legal liability that fits within the definition of that standard of liability for the application of the proportional responsibility statute.

O'NEILL: Are you familiar with our recent decision in Southwest Bank v. Information Support Concepts?

GRIFFIN: Not specifically, but generally. Yes.

O'NEILL: And that says that the UCC provisions on forgery are not subject to the proportional responsibility scheme, although they are not specifically excluded as our Meth manufacturers.

GRIFFIN: Correct. Because in that, and the reasoning that is given in that opinion is I think specifically because there is a specific detailed explanation of the UCC, which among other things is a uniform law, so it also has the additional body of jurisprudence from a nationwide uniform law commissioners. It has its own scheme of apportionment that is basically determined I think by the court to be therefore __________. Proportionate responsibility is not the least bit mentioned, vicarious liability, nothing else in this statute. I simply do not believe any other interpretation is possible.