This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
20801, Inc., Petitioner,
v.
John L. Parker, Respondent.
No. 06-0574.

September 26, 2007.

Appearances:
David P. Andis, TheWoodlands, Texas, for petitioner.
Barney L. McCoy, Houston, Texas, forrespondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

CONTENTS

CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 06-0574, 20801 Inc. versus John L. Parker.
COURT MARSHALL: Mr. Andis will present argumentfor the Petitioner. Petitioner conserved-- has reserved five minutes forrebuttal.

ORAL ARGUMENT OF DAVID P. ANDIS ON BEHALF OF THE PETITIONER

MR. ANDIS: May it please the Court. The safeharbor provision of the Texas Dram Shop Act according to past Texasjurisprudence is much like the human appendix. We have it, but it serves nouseful function. Further with the precision of a surgeon, the court have openedup the Dram Shop Act and simply excised the safe harbor provision completely outof the Texas Alcoholic Beverage Code at least in practice. To date, no Court ofAppeals has ever found that a retailer, provider of alcoholic beverages has eversatisfied the safe harbor provision. I'm weary of the discussion of legislativehistory that we just heard but I'll be brief on that point and that is to saythat the statute itself as well as the scant legislative history we have,fortunately there's no con--has a-- was designed at least. The safe harborprovision was designed to provide an incentive or encouragement to retailers,that is, it's designed to cut off the vicarious liability of the retailer forthe act of the employee in violating the law. As this Court is well aware,Section 106.14(a) of the Texas Alcoholic BeverageCode states in relevant part thatthe actions of an employee shall not be attributable

to the employer if: (1) theemployer requires its employees to attend a commission-approved seller trainingprogram; (2) the employee has actually attended such a training program; and (3)and this is the one that really is at issue, the employer has not directly orindirectly encouraged the employee to violate such law.

JUSTICE GREEN: So, so all you have to do is to filean affidavit to say that you-- it's your company's policy never to over servecustomers in that behalf.

MR. ANDIS: Well, Justice Green, that a-- thePena [Pena v. Neal, Inc., 901 S.W.2d 663 (Tex.App.-San Antonio 1995, writdenied)], case has decided that that wasn't enough. It was a conclusoryaffidavit, and I would submit to you that a-- that under the, the allocation ofthe burden of which party should bear what burden, which I think is in our briefthat, that actually wouldn't even be reached because of the fact that theplaintiff would come back and say, 'Here's how they violate. Here's how theyencourage violations of the law'.

JUSTICE GREEN: But this is an affirmativedefense.

MR. ANDIS: Well, that's, that's one of thequestions, your Honor. Is, is it, is all three elements an affirmative defense,or simply the affirmative defense could fit within the first two elements, andleave the third element that the employer does not encourage violations of thelaw. But that be a, a, a plaintiff's burden to prove. The employer could showthat it requires all of it's-- well, first of all, it would plead theaffirmative defense which show that it requires all of its employees to attend aTABC-approved training class, that in fact the employee that served the allegedplaintiff or whatever the source of the insider was TABC-certified. If thatburden is met there would been shift to the plaintiff to show how the employerencourages violations of the law. As it stands right now, all three elementsbeing on the retail provider. The retail provider is left trying to prove anegative, and in fact the way that the case law of the date has, has come outit's-- the retailer can't do it simply because he can't think of all the variousways of things that he didn't do that, that we couldn't encouraged to violatethe law. For example, he didn't put in enough video cameras. He didn't say theright magic words in his written policy. Those are of types of acts that theretailers are actually being snared by when they go to prove the safe harbordefense, so in fact because they have to prove a negative, because the courthave considered all three elements to be an affirmative defense.

JUSTICE BRISTER: No. But in the-- I'm just tryingto think of an analogy in the citation cases if you, you know, don't answer andlost the papers. We've said, it's not enough to say 'I lost the papers.' I thinkyou have to give an affidavit from the person whose most likely to have gottenthem and say what your procedures are and what-- you know, what you tried to doto find them and stuff like that. I mean there's a difference between-- and inthis page, this case we've got a what? Seven page affidavit? From the managerwho says, 'I was there. I met this guy, and this is what was happened in thatnight.' I mean that's a little more than just saying, you know, we, we followthe law and what was the response to that?

MR. ANDIS: There was no response.

JUSTICE BRISTER: Well, I mean the plaintiff say,'Well, they over-served, maybe.'

MR. ANDIS: Right.

JUSTICE BRISTER: Anything-- what would theplaintiff do to overcome that on summary judgment in here?

MR. ANDIS: Well, I think that the plaintiff wouldbe responsible

for putting together some discovery product that says, 'Well,despite what he's saying here's evidence that' ...

JUSTICE BRISTER: Talk to former employees say,'They did this and this was my practice'

MR. ANDIS: Right. Or this night in particular hesays that, but we have other witnesses who testified but he said, 'Yeah, goahead and keep serving the guy.' He's, he's falling down, he's falling off the,the chairs that he's sitting on, the manager or another-- the manager tells anemployee or the provider tells the manager, 'Go ahead and keep serving the guy'.That would be one way to overcome an affidavit such as the one we presentedJustice Brister.

JUSTICE GREEN: So maybe it's like an officialimmunity. A kind of a case where the police officer comes in and files anaffidavit showing good faith. And it's good faith in the [inaudible] and the wayhe did and it falls upon the other side to prove bad faith?

MR. ANDIS: Perhaps, your Honor. Again, this is aunique code in that it's, it's statute ...

JUSTICE GREEN: Safe harbor sort of like an immunitylike the way I guess so.

MR. ANDIS: It, it appears that's-- that theintent of the legislature was to provide-- and I believe this Court has even seta relatively easy out for the provider of alcoholic beverages. In that, the ideawas to get education into the front line where the servers are actuallyinteracting with the customers and-- You know, I don't know exactly what thethinking was but if it makes sense that if your front line people are your mosteducated and they were trained by TABC-- I mean these aren't classes that theproviders-- that the retailers do. It's not like they say, 'Come, come on ouroffices and we're going to teach you a few things'. These are classes theretailers don't have a hand in.

CHIEF JUSTICE JEFFERSON: But the legislature ofthe statute showed that the legislature seeing that there's some people-- someowners who despite having put their employees through the classes and havingthem become certified would encourage or allow or met their employees to servesomeone who's obviously intoxicated perhaps for, for an economic reason. Youknow, they make more money when they sell alcohol and so why wouldn't that bepart of the defendant's burden to say, 'No, that's not, that didn't happen' tonegate that, that possibility. You know, summary judgment context.

MR. ANDIS: Right, Justice Jefferson, we've triedthat. We have tried to make it part of the defendant's burden to date and, andthe case law and what has happened is-- it's, it's turned into a, a shell game.There's no definitive definition in any of the courts that gives a provider theguidelines for what we do. And so what ends up happening is providers get nailedby innocent acts, things that, that they could not reasonably foresee. And sowhat, what our proposal is, is to say the legislation didn't create a 'get outof jail free' card entirely without-- So all the provider has to do is send itsemployees to TABC training and keep them certified. That's why they threw in thethird element which is to make sure, I believe, that they don't undermine thatthe-- that the proprietors -- do not undermine the training that the employeeshave received. The question, the first question for the Court, for us is, youknow, how do we allocate that burden and, and what is required to show whatencouragement is or what encouragement is not? And, and at least practicallyspeaking, the way it is worked to date it's a, it's proving a negative which isin my experience in, in a case law is proven hard to do it, well, actuallyimpossible to do. Speaking

of the prior cases, there are I believe, not countingthe case of Fourteenth Court of Appeals, there are five prior cases that discussthe safe harbor provision in Texas. Again, this is not a, a provision that Ibelieve we can look to other states for some guidance on because I'm not goingto able to find any other similar type of law in another state at least withrespect to the provision of alcohol service.

JUSTICE HECHT: If we have to take the summaryjudgment practice is true -

MR. ANDIS: Yes.

JUSTICE HECHT: - and if the respondent were servedten to fifteen drinks, two of them by the manager, all of them in violation ofthe policies, is, is that some evidence that the petitioner indirectlyencouraged violation of the policies?

MR. ANDIS: I don't believe it is, JusticeHecht.

JUSTICE HECHT: Why not?

MR. ANDIS: Well, first of all, that is the veryact that is the, the overservice at issue. Again, the, the idea behind the safeharbors, I understand that it is to shield the, the license provider from theacts of its employee. We dispute that ten to fifteen drinks were served but totaking it as a given for summary judgment purposes, that act was the violationof the policy. There's no evidence that first of all the act of serving ten tofifteen drinks was encouraged by the license provider. And if we can't be-- ifthe provider can't be shielded from the act because the act itself forms thebasis of the either the encouragement or the overservice at issue then, thenthere's no way that the safe harbor ever going to be satisfied.

JUSTICE HECHT: But I suppose-- surely if you hadevidence that night after night this was happening, couldn't you infer thatthere must be direct or indirect encouragement? I mean, surely employees are notacting over and over and over again in the-- against the best interest of theproprietor.

MR. ANDIS: The-- in,in the-- in hypothetical thatyou just proposed Justice Hecht, yes, that may be. It would depend obviously onthe circumstances of the case, but yeah. I repeated ...

JUSTICE BRISTER: In correlation to the testimonyfrom other employees and that they're encouraged to say, turn a blind eye. Youcould've prove there's a pattern of behavior.

MR. ANDIS: Yes, Justice Brister. And I believethat, that is-- that, that goes to what encouragement is as opposed to whatencouragement isn't which is you failed to put up enough video cameras.Currently, is, is the laws that come down, what we've got is-- a--provider-- theretailer find yourself in a position of having to anticipate every possiblething that an expert hired by the plaintiffs could propose after the fact withperfect hind sight and say, 'Why you didn't do this and you didn't do that?'Again, these-- the providers aren't operating in a vacuum, they're operatingunder the laws of, of the civil liability laws and the TABC governance under theadministrative side of the code. And so providers are also operating with, youknow, business of parameters, you know, is to make good business sense to put upone camera, well, gosh, maybe we should put up ten cameras because you know assoon as got to come back and say, one wasn't enough. Part of the problem againis-- it's not just what, what the providers aren't doing, it's how does thatrelate to encouraging the type of, of, of act that's being alleged in, in thiscase ...

CHIEF JUSTICE JEFFERSON: Well, you say it leavesthe, the bar owner exposed to hear because safe harbor provision wouldn't applybut how-- I mean it seems to me this is-- the plaintiff is going to have a hardtime

under our precedent proving that the sale caused the injury in this case, anyway. Right?

MR. ANDIS: Are you talking about the approximatecause that the alcoholic at issue was ...

CHIEF JUSTICE JEFFERSON: Yes, I mean, if the, ifthe sale didn't cause under our precedent, Griffin to punch Parker then youwin.

MR. ANDIS: Right.

CHIEF JUSTICE JEFFERSON: So I mean that in, in alot of these cases, the safe harbor provision is not going to be the court'spoint anyway, it's the-- did the, did the sale approximately cause the injury?

MR. ANDIS: Justice Jefferson, I agree that therecould be some cases where it's, it's pretty clear that you don't even need thesafe harbor because there was no either service to a minor or service to anobviously intoxicated patron. I think though that the benefit of the safe harborprovision also, though comes into play in getting summary judgment without theneed to-- if that is disputed. If you have a case and I have had cases wherethat's disputed whether someone was say certainly or obviously intoxicated tothe extent that present a clear danger to themselves and others. The only way toavoid trial than would be to go to summary judgment and if there is no liabilityfor the provider because it can escape vicarious liability under the safe harborthen that is an encouragement and in incentive and certainly I think the waythat the legislature intended this act to be laid out. I do want to say a thingabout one of the earlier cases and that is the Pena versus Neal case whichwas like this one, a summary judgment case coming out of the Court of Appeals inSan Antonio in '95. That kind of got started I think on the wrong road althoughI don't think without-- with good intention, however. The, the Court said inthat case, it looked at the, the third element and it said, 'You know, theemployers can't sit back and do nothing safe in the assumption that they senttheir employees to class and, and they're done. The employer must do more thensimply require attendance at training class.' And I think from that we've gonefrom where we have today where the employer is literally unable to satisfy thesafe harbor because the an employer can't do enough to do more. And so there--here we need guidance from this Court to finally say once and for all, what doesthe third element of this safe harbor provision mean.

JUSTICE HECHT: What do, what do you think it shouldmean?

MR. ANDIS: Well, Justice Hecht I ...

JUSTICE HECHT: That-- two briefs in this case, oneof them says, 'well, it shouldn't possibly mean this, it shouldn't possibly meanthat.' But now what should it mean?

MR. ANDIS: Right. I think what it should mean isthat we should focus on the word 'encourage.' Encourage is an in-- is an act--it's an intentional act. It is, it is, it is a directive, it is something overt.I think, instead of looking toward what the employer didn't do, we should lookat what the employer did do. And that's ...

JUSTICE BRISTER: Or failed, or failed to do ...

MR. ANDIS: Or-- well, failed to do, JusticeBrister ...

JUSTICE BRISTER: but what if they're deliberatelyindifferent?

MR. ANDIS: I believe there's should be a highenough standard like a conscious indifferent standard so that on, on failures toact, it has to be high enough so that it clearly encouraged an employee orthere's, there's very little doubt that it would have encouraged an employee.Again, not, not putting a sentence in your policy. Right? We don't-- we'll firepeople if they, if they serve minors but we didn't

happen to say anything innext section about firing some of them if they serve obviously intoxicatedpatrons shouldn't be an omission.

JUSTICE BRISTER: how about a, how about a managerthat we were on our operation-- we don't-- do not want the managers out on thefloor. We do not want you to know what's going on. That might be, even thoughit's an-- it's a failure to act, there should be some [inaudible] aspect to yourview, if your position has just got to be intentional.

MR. ANDIS: Well, I believe there's, there's twosides of that, the encouragement coin. One would be in intentional act and overtact, you know, go ahead and serve minors. We're okay with that. Another mightbe, Justice Brister, we don't check ID's. All right. Despite your training atTABC class, we don't check ID's. We don't say anything about it, but we've neverchecked ID's or maybe even employees have been disciplined for checking ID'sbecause you know-- And so we get, we get a reputation in the community as beinga place for minors can come and drink and, and so forth. That would be my, mysubmission, that would be the-- an act of omission.

CHIEF JUSTICE JEFFERSON: Okay. Any furtherquestion? Thank you, Counselor. The Court is now ready to hear argument from therespondent.

COURT MARSHALL: May it please the Court. Mr.McCoy will present argument for the respondent.

ORAL ARGUMENT OF BARNEY L. MCCOY ON BEHALF OF THE RESPONDENT

MR. McCOY: May it please the Court. Essentiallywhat Mr. Andis is asking the Court to do is overturn a couple of hundred yearsTexas jurisprudence. The first issue is a-- an affirmative defense and it quackslike a duck, looks like a duck and it's probably a duck.

JUSTICE HECHT: Well, but even-- it seems to me thatkind of distracts from the point because even if it is an affirmative defense,if he comes in and says, 'We didn't directly or indirectly encourage theemployee to violate the law.', you're not going to say, 'That's enough'.

MR. McCOY: Here-- well, let's look at what theydid have-- what they said in their affidavit and what was actually availableunder -

JUSTICE HECHT: But I'm -

MR. McCOY: - their policies.

JUSTICE HECHT: But I'm just saying, suppose-- ifit's an affirmative defense -

MR. McCOY: Right.

JUSTICE HECHT: - you don't argue, I take it. Thatif the defendant comes in and says, 'We swear to God that we have not directlyor indirectly encouraged employee to violate such law.', that's not would be theend of it.

MR. McCOY: No, it's not because that's aconclusory statement.

JUSTICE HECHT: So there's going to be some shifting...

MR. McCOY: And there's going to be some shiftingand that's why I like to just look at what I actually had available to them.They have a lot of policy that showed in the policy in written form that theywere not encouraging the sale of alcohol, but everybody knows that, 'actionsspeak louder than words'. Every political scientist who's going to look at itwould say that the constitution of the Soviet Union was the most democraticdocument ever written, but we all know the Soviet Union was a dictatorship. Andif you have written policy and you don't

really enforce it, the written policyis meaningless.

JUSTICE O'NEILL: I think everybody would agree withthat. The problem is, why the Court of Appeals' opinion is written?

MR. McCOY: Uh huh.

JUSTICE O'NEILL: It was seemed that you would haveto establish the-- you don't have to answer the liability question to get to asafe harbor offense.

MR. McCOY: No, we really-- we just have to showthat actually only at occasion in question that you weren't encouraging the oversale of alcohol is ...

JUSTICE BRISTER: Is directly or indirectly wouldn'tbe enough. How would you show it?

MR. McCOY: Okay. But let me guess they tell to itthat what's we have available in the Entex [Entex v. Gonzales, 94 S.W.3d 1,10 (Tex.App.- Houston [14th Dist.] 2002, pet. denied)], case and what theycould'tve proved have they done it. First of all, a corporate policy createdrecords of no encouragement. There were the drink slips. They were monitored bytwo different people. There were cup slips as a policy about not given freedrinks except the manager-- only the manager could do it, so there was actuallydocumentation of no encouragement. But in their summary judgment evidence, theydid not introduce any of that evidence that existed. Okay. So they couldactually ...

JUSTICE BRISTER: So if the depos-- so if affidavitwas more detailed?

MR. McCOY: Correct. And talk about facts, aboutwhat occurred that night as opposed to just mere fallacy -

JUSTICE BRISTER: Well, I mean it's just-- it's notthat it's one instance. I mean it's directly or indirectly encouraged ...

MR. McCOY: Correct.

JUSTICE BRISTER: I mean it's ...

MR. McCOY: In it you could actually show apattern or practice if you showed other instances that occurred in the past thatthey ignored ...

JUSTICE BRISTER: In most, most cases-- I'm sure ina lot of cases that manager not going to remember this night.

MR. McCOY: Well, in this case, a guy wasseriously injured and, and this guy was prosecuted and the police came out andinvestigated this and the expenditure was it -

JUSTICE BRISTER: By the standard, by that relied tomake sure -

MR. McCOY: - and that ...

JUSTICE BRISTER: - but I mean in most cases wherethey drive off a lot and kill somebody, the manager may not remember thenight-

MR. McCOY: That is correct.

JUSTICE BRISTER: - so he ...

MR. McCOY: He will have, he will have that-- ifthey have a policy like this, he will have the drinks slips, he will have thecomp slips. He will have written documentation about what occurred that night.

JUSTICE BRISTER: But [inaudible]

MR. McCOY: And if they had a reasonable retentionpolicy like every modern business has ...

JUSTICE BRISTER: So I'm-- but I'm trying to think,you know in the cases-- the stop sign cases where you ensue the county or thecity if they had noticed the stop sign was down.

MR. McCOY: Correct.

JUSTICE BRISTER: Then the rule is the county orcity comes in and says, 'Here's our book when we get notice, we write it down onthis book -

MR. McCOY: Correct.

JUSTICE BRISTER: - and there's nothing in that bookfor that date and that's enough.'

MR. McCOY: I believe it's an evidentiary questionand -

JUSTICE BRISTER: So that would be ...

MR. McCOY: - that would-- then I would-- it wouldbe some evidence that as to whether they conclusively proved it might not be--and I will be arguing it wouldn't be enough.

JUSTICE BRISTER: Well, in other sake, come in andcontradicted if they won't -

MR. McCOY: Correct.

JUSTICE BRISTER: But ...

MR. McCOY: But you know ...

JUSTICE BRISTER: But then haven't we just changedthe sace-- safe harbor ovision-- provision? Now the safe harbor provision says,don't encourage it directly or indirectly, if your rules wrecked, then the factof the matter is you got to keep these tabs and you got to keep them for certainnumber of years then if you don't, then you're out of the safe harbor.

MR. McCOY: Now, it's, it's a matter ofpracticality for the business. If they want to be able-- it's like business is--every business does this. I am involved in litigation with refineries, with allkinds of stuff and they all have a policy about keeping a retention policy,about keeping documents for a certain period of time and especially I guaranteeif they are exculpatory documents, they're going to be keeping them as long asthey need to keep them for potential litigation.

JUSTICE O'NEILL: But I don't see, what would bewrong with the burden shifting analogy because it seems the way it's written or,or the way the Court of Appeals decided it, you would require the provider toprove a negative which is very difficult to do. What would be wrong with, youknow, you, you, you swear that you didn't -

MR. McCOY: Right.

JUSTICE O'NEILL: - directly or indirectly encourageand then if you knew then, then you come back and say, 'Well, the manager servedtwo of the fourteen free drinks that were given out and that raised a fact issuenow'.

MR. McCOY: Well, I think that the, the problemabout proving a negative is kind of, of false logic because we're required a lotof proved negatives all the time. 'Negligence itself is an act or an omission'quote unquote. So the omission is a negative, and so you have to prove anegative in every lawsuit you give practically. And so I don't think that'sreally the big issue. The big issue is, can you merely-- when you have the-- andthis what in an affirmative defense, you have the obligation to conclusivelyprove every element of your affirmative defense and conclusively prove does notmean a conclusory statement.

CHIEF JUSTICE JEFFERSON: So what's-- how do you--how would you conclusively prove that you neither directly or indirectlyencourage violation of the law?

MR. McCOY: I mean, you would actually-- onething, summary judgment may not be available.

CHIEF JUSTICE JEFFERSON: That's the question,that's really what the issue is.

MR. McCOY: And that, and that may, and, and youknow it, sometimes there're just some types of cases that summary judgment isnot available to them by the nature of the case.

JUSTICE BRISTER: Well, the legislature did in thepast is safe harbor provision to the accomplished act, didn't they?

MR. McCOY: No. They-- actually, in context thatit was passed, it was actually passed in-- as a reaction to the Court ofAppeals' decisions in El Chico, [El Chico Corp. v. Poole, 732 S.W.2d 306,Tex.,1987.], in which El Chico created a common law of cause of action, butat the Court of Appeals the case was pending in the Texas Supreme Court and theliquor industry went to the Texas Supreme Court and they-- and the legislaturethen fashioned a restricted Dram Shop Act that was much more restrictive than,you know, what the Court of Appeals had done and-- or what the Supreme Court didtwo days later when they decided El Chico. And at, at the same time, andJustice Spears in his decision cited the fact that there is a tremendous problemwith alcohol and close to a thousand people were killed the previous year, manythousands were male. We have a situation here where these people are actuallyselling one of the most dangerous illegal drugs made. It severely impacts ...

JUSTICE BRISTER: Yeah, but provision didn't work sowe're not going to ...

MR. McCOY: Oh, I understand that and I don't--and I have one glass of red wine every night and I don't want to, you know, Idon't want them closing down Slicks. Okay? But -

JUSTICE GREEN: Counsel, you realize you're on therecord?

MR. McCOY: Well, you know it's been-- actually itwas prescribed by my cardiologist so-- But you know, so that's the framework, sothey're actually have a privilege to sell this legal drug and because they havethis privilege, they have an obligation not to encourage the oversale.

JUSTICE HECHT: But to return to the analysis again,as I asked you earlier, there has to be some burden shifting here just becausethat, that ...

MR. McCOY: Yeah, at some point when they have...

JUSTICE HECHT: One man has to come in and say, 'Wedidn't do anything to encourage this and' ...

MR. McCOY: And he could have chosen a no evidencemotion for summary judgment, your Honor.

JUSTICE HECHT: But at that point, then it'sincumbent on the plaintiff to say, 'Oh yes, you did. You did this, this andthis'.

MR. McCOY: Correct.

JUSTICE HECHT: And then when we get there, are wereally talking about a reasonable provider standard, is that what disposed thatto your-- what-- we need a test. And so are we talking about the things that areasonable provider would do or not do to keep from directly or indirectlyencouraging of violation of the law?

MR. McCOY: I think that's, I think that's-- Ithink that might work and actually, if you look at these cases and what-- ofcourse Mr. Andis is a good lawyer does, he takes the absurd little phrases inthem and, and uses and points that out. Well, ...

JUSTICE HECHT: He says, he says there's no Court ofAppeals' opinion that's ever found a safe harbor. Is that right?

MR. McCOY: Correct. But that's not, that's notevery case that's ever been tried or decided or dealt within the State of Texas.That's of the cases that got up to that level -

JUSTICE BRISTER: Right.

MR. McCOY: - and so you know, there's-- in athousands of cases dealt with-- or dealt with without the Court of Appeals beeninvolved. But what happened in every one of those cases though, were placeswhere

there was a defect and the manner in which the proponent actuallyformulated is summary judgment evidence-- conclusory statements. Statements thatdon't-- meaning don't telling the Court any meaningful thing about what theywere really doing -

JUSTICE BRISTER: [inaudible]

MR. McCOY: - and, and the Court also-- and everyone of those nearly-- I'm sorry. But they also would throw in extra languageabout some other things that occur and it's that extra language that gets us introuble here the day that-- because they ...

JUSTICE BRISTER: I'm, I'm wondering about that thenon summary judgment. I mean in this case, the summary judgment is three yearsafter the night in question.

MR. McCOY: Correct.

JUSTICE BRISTER: And then sometimes as I indicated,you're not going to know which not is a question or-- what kind of details doyou expect other than your mandatory tabs system that person could say otherthan, 'Look, we enforced that. I walk around and check people and' ...

MR. McCOY: But you know, sometimes you're goingto get a case that occurs quickly and summary judgment is going to be an easyway of dealing with it because people's minds are usually suppressed ...

JUSTICE BRISTER: But usually, but usually it'sgoing to be three to four years after.

MR. McCOY: And it's got-- and if you have a goodrecord retention policy and you've, and you have a system that looks good onpaper like there's thus and you have actually followed it and retained thedocuments that you know that exculpate you ...

JUSTICE BRISTER: So they-- so-- but you, you wouldmandate written documents.

MR. McCOY: I would think -

JUSTICE BRISTER: It's not enough ...

MR. McCOY: - I would, I would ...

JUSTICE BRISTER: I don't know cause that-- Let meget a word in edgewise. $AA

MR. McCOY: Sorry, your Honor.

JUSTICE BRISTER: I've been cut off enough timestoday. You would-- It is not enough for the guy to give details. 'I walkedaround every thirty minutes. I looked, I remember this guy', as he says here,'we did not encourage his drinking, not enough.'

MR. McCOY: He didn't say that in this and he, hedidn't say that he had actually followed all of their procedures. He-- if he hadtestified that ...

JUSTICE BRISTER: Managers not don't have to sitwith all of his patrons and watch.

MR. McCOY: Oh, I know.

JUSTICE BRISTER: All of the managers never going tobe able to watch all the patrons, so I'm trying to see, does it have to be inyour view a-- we've going to have a manager walking around, checking people offin the bar?

MR. McCOY: No. I think that if he is ...

JUSTICE BRISTER: Thus he can orally testify.

MR. McCOY: He can orally testify about what hedid that night. Or what he-- and, and what he also ...

JUSTICE BRISTER: And on the other side, can theplaintiff just come in? It's not-- it wouldn't be enough to carry a bur-- oncethe burden is shifted, the plaintiffs to say, well, they got-- the employees gotme drunk because by definition -

MR. McCOY: I don't think ...
JUSTICE BRISTER: - it's got to be the employersacts not the employee.
MR. McCOY: I think he, he has to show that therewas an encouragement. Some act that was an encouragement.
JUSTICE WILLETT: How about the free drink policyand how it was followed or not followed that night?
MR. McCOY: What if ...
JUSTICE WILLETT: The free drink policy?
MR. McCOY: Yes.
JUSTICE WILLETT: And how it was or was not followedthat night?
MR. McCOY: It was not followed. But he had a--they had a one-- they don't give free drinks except unless there's a grandopening. This was only the manager can give a free drink or authorize it.Secondly, that when a free drink is given, there's a comp ticket filled out and,and-- then the manager also checks periodically to make sure that they're notgiven away a bunch of free drinks. And that policy was not followed, at leastthere was no evidence that it was followed on that night.
CHIEF JUSTICE JEFFERSON: You say in your briefthat, that the record said the manager served at least two of the 3 free -
MR. McCOY: Correct.
CHIEF JUSTICE JEFFERSON: - drinks. Does it-- doesthe record reflect whether that the-- he was served those drinks when he wasobviously intoxicated?
MR. McCOY: We don't know that. That, we don'tknow.
JUSTICE BRISTER: That would make a difference,wouldn't it?
MR. McCOY: It might but in the-- on their someevidence rule, I don't think so.
JUSTICE BRISTER: Well, you've got to have someevidence, you've got to have some evidence to take -
MR. McCOY: The managers -
JUSTICE BRISTER: - first -
MR. McCOY: - the managers -
JUSTICE BRISTER: - encourage the policy to servepeople when they're drunk and if it's when he walked in the door and wasobviously sober and you gave him two drinks that's not going to be enough.
MR. McCOY: Well, if, if the policy is to-- not togive-- but one free drink and the, and the manager's actually the one giving himthat showing that, that a-- that they a-- that the corporation-- 'cause themanager is a vice principal in this case. If you look at his sworn testimony, testimony that, that he was the boss at this particular place, he supervised theemployees ...
JUSTICE BRISTER: You've got a higher standard thanthe statute which is one free drink is it which the statute doesn't require.
MR. McCOY: No, I'm just saying that, that -
JUSTICE BRISTER: That statute would allow you togive free drinks until they're drunk.
MR. McCOY: No.
JUSTICE BRISTER: Why not?
MR. McCOY: No, wait. It's free ...
JUSTICE BRISTER: It will allow you to give freedrinks to him until they are obviously intoxicated.
MR. McCOY: That the statute would be the alcolateregu-- the TABC regulations would not. We didn't get into that before youpresent it wasn't.
JUSTICE JOHNSON: Counsel, the opposing counsel saidwe, we need to

look at the word, 'encourage' here. Is the fact that you have aviolation, the fact that you have on this occasion multiple drinks if youassumed an obviously intoxication, the fact that you had that one-- thatviolation on this occasion, is that enough evidence in your view to raise aninference of encouraging, violating a policy or is that simply evidence that thepolicy was violated on this occasion?

MR. McCOY: Right. When you combine the fact, oneof which is outside the scope and the other's within the scope, when you combinethe fact that the man was given ten to fifteen free drinks -

JUSTICE JOHNSON: On this occasion, on thisoccasion?

MR. McCOY: - with, with the fact that the managergave him two of the free drinks which is a violation -

JUSTICE JOHNSON: On this occasion?

MR. McCOY: - on this occasion, and that's-- ifthat is some evidence that the management, cause the manager is the viceprincipal, he represents the corporation, that's the act of the corporation.

JUSTICE JOHNSON: Okay.

MR. McCOY: That's some evidence that, that theywere encouraged.

JUSTICE JOHNSON: So you're saying that evidence ofa violation is evidence of encouraging violating of a policy?

MR. McCOY: No, only-- see the violation itselfwould just what I've said is what's outside the scope that because that byitself would not be an, an act of encouragement. But when you combine it withthe manager giving two of the free drinks which is a violation of the companypolicy, it shows that the manager was in the-- was actually -

JUSTICE JOHNSON: In short the manager violated?

MR. McCOY: - and he has the corporation.

JUSTICE JOHNSON: Okay.

MR. McCOY: Okay, so you don't have a mereemployee violating, you have the manager violating it and the corp-- that meansthe corporation's violating it and the corporation is incurring.

JUSTICE JOHNSON: And so a corporation, a corporateviolation on one occasion in your mind equates to encouraging violation of thepolicy simply one -

MR. McCOY: It could ...

JUSTICE JOHNSON: - [inaudible].

MR. McCOY: It, it would be some evidence thatwould, that would relieve you from summary judgment. It's not probably going toprove your case to the jury.

JUSTICE JOHNSON: So what is encouragement? Whatdoes encouragement mean?

MR. McCOY: Encouragement means that you're participating in the act of employees in this instance given away a lot of free drinks to be.

JUSTICE HECHT: Encouragement does -

MR. McCOY: It can be -

JUSTICE HECHT: I've only been interrupted oncetoday. ...

MR. McCOY: I'm sorry. I'm not interrupting,anymore.

JUSTICE HECHT: Encouragement does seem to have somedeliberate feature to it. I mean it's, it would be an odd thing to say someoneencouraged you and you went to the person and said, 'Did you know you'reencouraging this person to that,' and no idea, I mean it's usually there's somesort of intention that, that happened and why is it not the case here?

MR. McCOY: Well, because of the words before itdirectly or indirectly. Directly encourage is going to require intent andpositive action. The indirect part of it takes the positive action out of it,

soyou cannot just look at the word encouragement all by itself. You have to lookat the two modifiers that the legislature put in there. Other questions?

JUSTICE JOHNSON: So what if the, what if themanager was negligent? The manager went out to eat supper instead of stayingaround there-- around the bar, went to eat supper and stayed for an hour and ahalf to watch the football game or something. Is that one event, while, whilethe extra drinks were served, is that one event that negligence enough to findencouragement?

MR. McCOY: I don't think so because he wasn'tthere at that time encouraging. Now they had a pattern of allowing, you know,free drinks to be served and the manager was constantly leaving, I mean often onleaving when he's supposed to be there. Then you might have a pattern ofencouragement but not on one single event, I don't think.

JUSTICE BRISTER: Does the enforcement have to be onthe night in question? Would it be enough for a defendant to show-- hears allthat policies. Affidavit says, 'We didn't-- we-- I enforced all this policies,on this day I do this and on that day I do that, and I generally do this', butthere's nothing specific about this night. Would that be enough?

MR. McCOY: No, I don't think so.

JUSTICE BRISTER: Why?

MR.McCOY: I think-- well, because I thinkenforcement has to be a constant and ever, you know, it has to always be in aprocess that's occurring because if you give up and don't enforce yourregulations on one night and that's the night that it happens then -

JUSTICE BRISTER: Back to my analogy to citation,we've said, you know the Courts of Appeals were throwing people out cause hesaid, 'I can't find the papers', and this we said, 'When you've lost the papersand you don't know where they went when you were served, what more can you say?"If I knew where they went, I would have them.'

MR.McCOY: Certainly.

JUSTICE BRISTER: So if they say, you know weenforced the policies but this was three or four years ago, that's just toobad.

MR. McCOY: Well, the, the service of papers isunder the Texas Rules of Procedure which are promulgated by the Court and theCourt can change those rules by the way -

JUSTICE BRISTER: You can't change a citation orrules on a hundred years.

MR. McCOY: I understand. In this case you have alegislature, very specifically and they had, you know they actually had-- they--if the time that they pass this, they actually took the word 'knowingly' out ofthe section dealing with-- service to minors. And then in 2005, I put the word'knowingly' back in, so if the legislature wanted knowingly, they would havedone it or they would have amended the statute before it. Thank you, yourHonors.

CHIEF JUSTICE JEFFERSON: Thank you.

JUSTICE WILLETT: I'm a little hung-up on the free,free drinks issue -

ORAL ARGUMENT OF DAVID P. ANDIS ON BEHALF OF THE PETITIONER

MR. ANDIS: Yes, your Honor.

JUSTICE WILLETT: - and why the evidence about thatpoint isn't

sufficient to raise a fact question about the effectiveness of yourclient's policies.

MR. ANDIS: Well, if we-- well, these two issueswith that as I see it, Justice Willett, there's the issue of the manager servingten to fifteen or, or the policy if the guy got ten to fifteen drinks that nightthat's the evidence, the managers serving two drinks. The manager's act in andout itself should not be the basis of the violation of the safe harbor provisionbecause it's also the basis of the alleged act of over service. With respect tothe serve-- what other employees saw there is absolutely no evidence that anyemployee was encouraged to violate the law that night because the manager servedtwo drinks, allegedly served two free drinks to the plaintiff in the case; whichI think is important especially with respect to our case because the lawrequires that the employer indirectly or directly encouraged the employee toviolate the law. And there again, there's no evidence that any employee wasencouraged to violate any law because the manager allegedly served two freedrinks, which I think is an important distinction in this case unless summaryjudgment was proper.

JUSTICE O'NEILL: I mean, would you to havetestimony of that? I mean if, if the manager is not following the policies thatnight in indirect encouragement. I mean I don't how you with ever proved you'dhave somebody file an affidavit and say, 'I knew the manager was violating thepolicy but well sticking to it' I mean that, that these are subtle inquiries andI wonder your opposing counsel raised a good point that maybe that was not thelegislature's intent to allow summary judgments on these type of cases. But youactually-- if, if the employer-- or if the bar is serving obviously intoxicatedpeople to the extent they represent a clear danger to themself and others highliability standard, maybe the intent was to let the facts be developed and comeout as to whether there was direct or indirect of encouragement. I mean what,what legislative indication do we have that this was intended to be somethingthat, that was easily subject to a summary determination?

MR. ANDIS: Justice O'Neill, the only legislativeissue we have is said that was intended to be an encouragement for employers tosend their employees to training classes. I would submit that if the onlybenefit is going to be at the end of the day,i.e the end of the trial. Thatthey're going to prevail on the affirmative defense but that's very littleencouragement at all because as you know that most of these cases are going tobe settled long before that and after, only after the employer's been druggedthrough the litigation process. And, and you know if it's file is exposed allthe evidence, the depositions are taking and what have you. So I think thereally encouragement would come for the employer to know that look-- if we, ifwe know what the rules are, if we know where the goal line is then we can setour policies, we can set our procedures in place and we can focus on the goalknowing that we will at least have a fair shot summary judgment in getting outof these cases early regardless of whether the employee actually violated thelaw.

JUSTICE BRISTER: The affidavit here could be amongmore detail about what I do to enforce, couldn't it?

MR. ANDIS: Justice Brister, at the time theaffidavit was prepared and this case went to summary judgment the, I think themost recent case we had to guide us was the Cianci [Cianci v. M. Till, Inc.,34 S.W.3d 327 (Tex.App.-Eastland 2000, no writ)], case. At that point and, andeven today we're still not sure if, if policies-- having policies in place andgeneral enforcement mechanisms around these policies will be

sufficient. Socertainly weren't sure with that back when we did the affidavit. We had no ideathat there was going to be an emphasis or focus on the event to that night.

JUSTICE BRISTER: To the events.

MR. ANDIS: Right. Which I think part of thequestion that-- the practical question around that ruling from the Fourteenth isthe fact that is, is the court has noted, 'Years go by, people don't rememberwhat happened on that particular night so' ...

JUSTICE BRISTER: And his employees move on.

MR. ANDIS: Boy, do they do move on! The, theother thing too is there's-- what if there is no violation of the law? Then, howis there going to be any evidence of, of enforcement with respect to thatnight.

CHIEF JUSTICE JEFFERSON: Do you raise onaffirmative defense about the third element?

MR. ANDIS: I do not agree that it is anaffirmative defense.

CHIEF JUSTICE JEFFERSON: Okay. Does safe harborprovision as in general is ...

MR. ANDIS: In general, yes, your Honor.

CHIEF JUSTICE JEFFERSON: Do you-- saying parts Aand B -

MR. ANDIS: Right.

CHIEF JUSTICE JEFFERSON: - whether or not safe, Imean an affirmative defense is hard to prove according to statute wouldn't beour concern, would it? It's either hard or it's easy or it's intermediate butthat's legislature has written statute as it has and why can't we just declarethat, you know you got to negate a negative and that's how the statute setsup.

MR. ANDIS: If the, if we understood what it wasto directly, indirectly and encourage employees to violate the law, perhaps the,the focus on the three precede-- and the procedural steps behind the safe harborwouldn't be as key an issue. I'm suggesting that in light of the case law andthe development of, of that statute as we know today, proving a negative isimpossible and until we get some guidance from this Court ...

CHIEF JUSTICE JEFFERSON: I'm not sure it'simpossible, though. What if there's, I mean we have some bars right here in thistown where there's a pattern of drunk drivers leaving in the TABC ultimatelyshuts them down and there may not be evidence that manager told them continue tosell, but it's certainly enough to show there's indirect encouragement for thatsort of sale. And that the, I mean rather easy for the plaintiff to prove andhard-- in that instance for the defendant to distribute. I mean, this is aboutand no deliberate act.

MR. ANDIS: Right. And again with respect to whatthe TABC does, their standards are, are entirely different and certainly not atissue in this case with respect to at least the safe harbor provision.

CHIEF JUSTICE JEFFERSON: Thank you. Are there anyfurther questions?

MR. ANDIS: Thank you.

CHIEF JUSTICE JEFFERSON: The case is submittedand the Court will take another brief recess.

2007 WL 5231245 (Tex.)