STATE OF MICHIGAN

COURT OF APPEALS

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and MASON JAR PUB & GRUB,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 21, 2009

No. 277391
Ingham Circuit Court
LC No. 05-000060-NS

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

No. 277392
Ingham Circuit Court
LC No. 05-000161-NI

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277393
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

QUALITY DAIRY COMPANY,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277400
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

PIXIE, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277402
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277404
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB, and QUALITY DAIRY COMPANY,

Defendants,

and

SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendant-Appellant.

BARBARA LYNN SALT, Personal Representative of the Estate of ALYSHA LYNN SALT, Deceased,

Plaintiff-Appellee,

v

No. 277434
Ingham Circuit Court
LC No. 05-000060-NS

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, PIXIE, INC., d/b/a BENNIGAN'S, and

QUALITY DAIRY COMPANY,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

JOSEPH BOLANOWSKI, Personal Representative of the Estate of ROBERT M. BOLANOWSKI, Deceased, BRENDA J. BOLANOWSKI, and TERRANCE D. HALL,

Plaintiffs-Appellees,

v

No. 277435
Ingham Circuit Court
LC No. 05-000161-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a MASON JAR PUB & GRUB,

Defendant-Appellant.

STEPHEN ANCONA,

Plaintiff-Appellee,

v

No. 277436
Ingham Circuit Court
LC No. 05-000297-NI

ANDREW C. GILLESPIE, GERALDINE LYNN IRVINE, f/k/a GERALDINE LYNN GATHMAN, QUALITY DAIRY COMPANY, and SWEET ONION, INC., d/b/a BENNIGAN'S,

Defendants,

and

RONALD SHEELE ENTERPRISES, L.L.C., d/b/a
MASON JAR PUB & GRUB,

Defendant-Appellant.

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority's reversal of the lower court's denial of summary disposition as to the Mason Jar. I agree that a trier of fact could not reasonably conclude that Gillespie, the striking driver, was visibly intoxicated when he was served at that establishment. Multiple witnesses stated that they observed Gillespie at the Mason Jar and that he did not appear intoxicated prior to being served. Most important, the sole witness who did observe signs of Gillespie's intoxication as he departed the bar, and whose testimony might have created a question of material fact, also testified that she saw Gillespie prior to service and that he did not appear visibly intoxicated at that time. A witness's observation of the allegedly intoxicated person shortly after service is relevant to the inquiry as it constitutes circumstantial evidence of visible intoxication prior to service. Further, such evidence of contemporaneous observations may be used as a basis for expert toxicological testimony. However, given that in this case the very same witness testified that she personally observed Gillespie prior to service and that he did not appear intoxicated at that time, I do not believe that her testimony concerning his later appearance is sufficient to allow for a reasonable conclusion that Gillespie was visibly intoxicated at the time of service.

As to Quality Dairy, given the majority's holding, as a matter of law, that Gillespie was not served at Bennigan's on the evening in question, I agree with its conclusion that upon remand, Quality Dairy is not entitled to the presumption of non-liability under MCL 436.1801(8).[1] I also concur that there is a question of material fact as to whether Quality Dairy served Gillespie at a time he was visibly intoxicated.

I dissent, however, from the majority's acceptance of the trial court's conclusion that a fact-finder could not reasonably conclude that Gillespie was served at Bennigan's when he was visibly intoxicated. To find such a reasonable conclusion would require a question of material fact (created by evidence or reasonable inferences derived therefrom) that: (a) Gillespie was

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[1] The requirement of clear and convincing evidence to overcome the statutory presumption set forth in MCL 436.1801(8) was adopted by our Supreme Court in *Reed v Breton*, 475 Mich 531; 718 NW2d 770 (2006). Despite the fact that the statute's plain language contains no reference to the clear and convincing standard, the *Reed* Court recognized the Legislature's underlying intent and went beyond the statute's literal text to define a rational judicial mechanism that would be consistent with that intent.

present at Bennigan's; (b) while there he was visibly intoxicated; and (c) he was served a drink while in that state. Based on the record, I would conclude that such a reasonable conclusion exists.

The first requirement, i.e., that there be a reasonable question of material fact that Gillespie was present at Bennigan's that evening, is straightforward. Although the majority attempts to cast doubt on the issue, there is clearly a question of fact. First, Bennigan's conceded, for purposes of its motion for summary disposition and for this appeal, that there is a reasonable question of material fact on this issue. Even if this were not the case, Gillespie's testimony clearly creates such a question. Gillespie testified in his deposition that he specifically recalled walking in the front door of Bennigan's after he stopped at the Quality Dairy and that he recalled sitting on a stool at the bar in Bennigan's, remaining there for as much as two hours, ordering at least one drink while there and being told while there that he was being too loud. The majority seems to equivocate on this issue, noting that his presence at Bennigan's is inconsistent with the chronology constructed by Bennigan's counsel and characterizing his testimony as "vague." However, the chronologies put forward by other parties allow for Gillespie's presence at Bennigan's and the majority's view of the relevant testimony as "vague" is both incorrect and irrelevant. Gillespie's recollection of being at Bennigan's is clear.[2] More important, it is not for this Court to determine the credibility of a witness. The "vagueness" of testimony, unless it is devoid of foundation, goes to the weight, not the admissibility of the testimony and it is not for this Court to determine what weight to give it. That is the most essential role of the finder of fact. For a court to grant summary disposition because it does not find a particular witness convincing undercuts the core role of the fact-finder. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences"). In any event, as already noted, Bennigan's has conceded, at least at this time, that there is a reasonable basis for a jury to find that Gillespie was there that night.

The second requirement, i.e., that there be a reasonable question of material fact that Gillespie was visibly intoxicated while at Bennigan's, is also straightforward. As noted by the majority in its discussion concerning Quality Dairy, a reasonable trier of fact could conclude that Gillespie was visibly intoxicated following his alcohol consumption at the Mason Jar. This would include the time at which he is alleged to have been at Bennigan's. In addition, the Bennigan's stop is alleged to have occurred after the consumption of at least some of the Quality Dairy liquor. Finally, Gillespie testified that while at Bennigan's he was told that he was being too loud and to quiet down. Thus, there is a question of fact whether Gillespie was visibly intoxicated at the time he claimed to have been at Bennigan's.

The last requirement, i.e., that there be a reasonable question of material fact that Gillespie was served alcohol at Bennigan's, is also met. First, defendant Bennigan's concedes for purposes of its summary disposition motion that Gillespie did order a drink. Second, Gillespie testified that he ordered a drink and when asked if the bartender served him he

[2] It is also consistent with subsequent statements he made to his wife, although no determination has yet has been made as to the admissibility of those statements.

answered, "Yeah, he would have given it to me." He was also asked whether it was true that "he have no recollection of consuming alcohol at Bennigan's," to which he responded that it was not true. He was then asked by counsel for Bennigan's if it was possible that, given that he was loud, the bartender might have refused him service and he answered, "I don't think so." When asked the same question again, he did concede that such a scenario was possible.

If a fact-finder chose to believe Gillespie's testimony, it could conclude, based on direct evidence that he was served at Bennigan's. Moreover, even if a jury doubted some of Gillespie's testimony, it could reasonably infer that an individual who sits at a bar and orders a drink will be served. There certainly is no evidence to suggest that anyone at Bennigan's that evening was denied service at the bar. None of the Bennigan's employees testified to such an event and Bennigan's manager conceded that such an "out of the ordinary occurrence" would typically be noted in the shift log and that no such notation was made. If a jury accepts Gillespie's testimony that he ordered a drink at Bennigan's and there is no evidence that anyone was refused a drink that evening, it is a reasonable inference that Gillespie was served.[3]

This is not to say that plaintiffs should or will prevail against Bennigan's at trial. There are sharp questions of fact, which a jury may very well resolve in favor of Bennigan's, and there are good reasons to question whether a jury will accept Gillespie's testimony.[4] However, the role of this Court, and of the trial court in a (C)(10) motion, is clearly circumscribed.

Under MCR 2.116(C)(10), plaintiffs, as the nonmoving party, are not only entitled to have all conflicting evidence viewed in their favor, but also "reasonable inferences" as well. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000). I believe that the majority has wrongly blurred the line between a "reasonable inference" and "mere speculation or conjecture." It would have been mere conjecture and Bennigan's would have been entitled to summary disposition if Gillespie had testified simply that it was "possible" that he went Bennigan's and consumed alcohol there. But that is not his testimony. He testified that he went to Bennigan's, that he sat at the bar, that he ordered a drink, and that he remained there for two hours. Moreover, there is no evidence that anyone was refused service that evening at Bennigan's. A conclusion that he was served is not mere speculation or conjecture but instead "a reasonable inference" based upon the evidence taken in light most favorable to plaintiff.

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[3] Although this is a negative inference, it is still sufficient to create a question of fact to overcome summary disposition. See *Chiles v Machine Shop, Inc*, 238 Mich App 462, 476; 606 NW2d 398 (1999) (concluding that a negative inference created by a witness's testimony was sufficient, when viewed in the light most favorable to the plaintiff, to support the conclusion that the defendant questioned whether the plaintiff had a physical impairment even after work restrictions were lifted).

[4] For example, Gillespie testified that he ordered a vodka and orange juice while the bar records show that no such drink was poured at the bar that night. This testimony weighs in favor of Bennigan's. However, contrary to the majority's view, it is not dispositive for two reasons. First, a jury may choose to believe part of a witness's testimony and not others. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Second, Gillespie also testified that he did not always order vodka and orange juice and that instead he sometimes ordered beer.

The majority seems to suggest that absent someone actually witnessing the service, no reasonable juror could find it occurred. In my view, this negates the principle that reasonable inferences as well as disputed evidence is to be taken in the light most favorable to the non-moving party. Ironically, the majority appears to rely on Gillespie's testimony that being refused service was something that "could [have] happen[ed]," ignoring his immediately preceding statement that he did not think that was what actually happened. Relying on a statement that something "could have happened" is exactly the type of speculation and conjecture which the majority criticizes, yet it is what it relies upon here.

For these reasons, I respectfully dissent from the majority's affirmance of the grant of summary disposition as to Bennigan's. In all other respects, I concur with the majority.

/s/ Douglas B. Shapiro