Opinion issued December 15, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00863-CV

VERONICA VIERA AND MARIA ESTRADA, Appellants

V.

LITTLE CAESAR ENTERPRISES, INC., D/B/A LITTLE CAESAR'S PIZZA, Appellee

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 0855128

MEMORANDUM OPINION

In this premises liability case, Veronica Viera and Maria Estrada appeal a summary judgment granted in favor of Little Caesar Enterprises, Inc., d/b/a Little Caesar's Pizza. Viera and Estrada were in a Little Caesar's restaurant when an

armed robbery was committed. One of the robbers shot Viera after she and Estrada exited through the back door of the pizzeria, and Estrada witnessed the shooting. They sued for negligent security. Little Caesar's moved for traditional and no-evidence summary judgment on several grounds, including that the armed robbery that injured Viera and Estrada was not sufficiently foreseeable to impose a legal duty on Little Caesar to protect them against third-party criminal acts. The trial court granted summary judgment in favor of Little Caesar's. Viera and Estrada appealed. We hold that the risk of the armed robbery that resulted in Viera and Estrada's injuries was not sufficiently foreseeable to impose a duty on Little Caesar's. We affirm the trial court's judgment on this ground and do not reach the other grounds upon which the trial court may have granted summary judgment.[1]

Factual Background

On a summer evening in 2008, two sisters, Veronica Viera and Maria Estrada, entered the Little Caesar's pizzeria in their neighborhood to pick up pizza they had ordered. Two masked men entered the pizzeria through the rear door, brandished guns, threatened the patrons, and told everyone to get on the floor. According to Estrada, the robbers were wearing Little Caesar's uniforms. The

[1] Viera and Estrada also contend that the trial court erred in implicitly overruling their objections to certain of Little Caesar's evidence. Because we affirm the trial court's judgment on grounds not referable to that evidence, we need not decide whether the trial court implicitly ruled on these objections or whether the trial court erred in its implicit rulings, if any.

incident report indicates that the robbers took two shots at the store manager, missing him both times, and the manager gave them the money in the cash register. The gunmen then ordered everyone to the back of the restaurant.

According to witnesses, the gunmen instructed the customers to "run." A number of customers, including the two sisters, fled through the open back door and down a fenced alley behind the pizzeria. Estrada exited the building ahead of Viera. When she looked back, she saw one of the gunmen come out the back door of the building and take three shots in the direction of Viera. Viera sustained two gunshot wounds as she fled.

The police investigation determined that the incident "appeared to have been an inside job" conducted with the assistance of a restaurant employee, who appeared to have opened, or left open, the back door through which the robbers entered the building.

Procedural Background

A few months after the incident, Viera and Estrada sued Little Caesar's. Viera and Estrada claimed that Little Caesar's was negligent in failing to provide adequate security and that it was foreseeable that an "assault" might occur on the premises. In addition to Viera's personal injuries suffered from the shooting, they sought mental anguish damages, including damages for post-traumatic stress disorder.

Little Caesar's moved for traditional and no-evidence summary judgment on the grounds that: (1) the shooting occurred outside of the Little Caesar's, on property neither owned nor operated by Little Caesar's; (2) there was no evidence that Little Caesar's owed a duty to Viera and Estrada; (3) there was no evidence of causation; (4) there was no evidence that the armed robbery was foreseeable; and (5) in the alternative, Viera and Estrada's claims were barred by the statute of limitations. Viera and Estrada filed a response, to which they attached affidavits from Viera, Estrada, Dr. Edward Charlesworth, and Thomas Swanson, a security consultant.[2] The trial court granted summary judgment in favor of Little Caesar's without specifying the basis for its judgment.

Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The motion must state the specific grounds relied upon for summary judgment. *See* TEX. R. CIV. P. 166a(c), (i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). When reviewing a summary judgment motion, we must (1)

[2] They also attached an affidavit from their former attorney, George Neely, relating to service of process issues.

take as true all evidence favorable to the nonmovant and (2) indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request under the traditional standard. *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004). To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524.

In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for traditional summary judgment must conclusively negate at least one

essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Premises Liability Claims

Little Caesar's contends that it did not owe a duty to protect or warn Viera and Estrada against the possibility of an armed robbery because it was not a foreseeable danger. Viera and Estrada counter that they presented evidence of prior criminal activity in and around Little Caesar's premises that rendered the armed robbery in which they were injured foreseeable.

A. Duty to Protect Invitees from Foreseeable Third-Party Criminal Acts

Viera and Estrada's claims against Little Caesar's based on its failure to provide adequate security are premises liability claims.[3] *See Timberwalk Apts. Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998) (noting that claim that landowner failed to provide adequate security against criminal conduct by third parties is ordinarily premises defect claim); *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 909 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (same). To prevail on their premises liability claims, Viera and Estrada must establish that Little Caesar's owed a duty to warn or protect them against the armed robbery. *Timberwalk*, 972 S.W.2d at 756; *Trammell Crow Cent. Tex., Ltd. v.*

[3] Viera and Estrada have not asserted any claims based on any alleged concurrent negligent activity on the part of Little Caesar's.

Gutierrez, 267 S.W.3d 9, 12 (Tex. 2008). The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question, including "the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant." *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008).

Generally, a person has no legal duty to protect others from the criminal acts of third parties. *Trammel Crow*, 267 S.W.3d at 12; *Timberwalk*, 972 S.W.2d at 756; *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). There is, however, an exception to this rule: an owner or operator of premises has a duty to use ordinary care to protect invitees from criminal acts of third parties if it knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. *Trammel Crow*, 267 S.W.3d at 12; *Timberwalk*, 972 S.W.2d at 756. It is undisputed that Viera and Estrada were invitees of Little Caesar's. But Little Caesar's disputes that the danger that harmed them—the armed robbery—was foreseeable under the circumstances. Unless the risk that Viera and Estrada would be harmed by criminal conduct was so great that it was both unreasonable and foreseeable, Little Caesar's did not owe them a duty. *Timberwalk*, 972 S.W.2d at 756.

"Crime may be visited upon virtually anyone at any time or place," but this alone does not make third party criminal acts foreseeable. *Timberwalk*, 972 S.W.2d at 756 (quoting *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 56 (Tex. 1997) (Owen,

J., concurring)). Instead, foreseeability is established through evidence of "specific previous crimes on or near the premises." *Trammell Crow*, 267 S.W.3d at 12 (quoting *Timberwalk*, 972 S.W.2d at 756, which in turn quotes *Walker*, 924 S.W.2d at 377). In reviewing evidence of previous crimes, we consider five parameters: proximity, publicity, recency, frequency, and similarity.[4] *Trammell Crow*, 267 S.W.3d at 15; *Timberwalk*, 972 S.W.2d at 757. These factors are considered together, and the evidence must be weighed in light of all factors. *Timberwalk*, 972 S.W.2d at 759. Also, the evidence should not be viewed with the benefit of hindsight, but rather, in light of what Little Caesar's knew or should have known before the armed robbery. *Id.* at 757.

B. Evidence of Prior Criminal Acts

Viera and Estrada rely on the affidavit of their expert, Swanson, to support their contention that the shooting was foreseeable to Little Caesar's. In his affidavit, Swanson testified that Little Caesar's had been in the leased premises for four years at the time of the June 2008 armed robbery involving Viera and Estrada and that a "similar" crime had occurred at that location less than six months earlier.

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[4] A danger may also be foreseeable to a premises owner or operator because of events that put the premises operator on notice of the specific danger in question. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 768–69 (Tex. 2010). In *Del Lago*, the owner was put on notice of the risk of injury to customers from a bar fight when the owner witnessed over an hour of verbal and physical hostility leading up to the fight. *Id.* at 769. No similar evidence was presented here.

Swanson then asserts his opinion that the prior robbery is sufficient to impose a duty on Little Caesar's under *Timberwalk*.

The existence of a legal duty is matter for the court, rather than an expert witness, to decide. *See Pouncy-Pittman v. Pappadeaux Seafood Kitchen*, No. 01-07-00575-CV, 2008 WL 2930183, at *6 (Tex. App.—Houston [1st Dist.] July 31, 2008, no pet.) (mem. op.) (reviewing expert testimony about foreseeability of criminal conduct and recognizing that "because the question of duty is a question of law for the court, an expert cannot properly opine regarding the existence of a duty.") (citing *Drennan v. Cmty. Health Inv. Corp.*, 905 S.W.2d 811, 824 (Tex. App.—Amarillo 1995, writ denied)); *see also Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224, 228 n.3 (Tex. App.—Dallas 2008, no pet.) (recognizing same principle). An expert's conclusory statement as to whether a duty existed is no evidence of such duty. *See Pouncy-Pittman*, 2008 WL 2930183, at *6; *Boren*, 258 S.W.3d at 228 n.3. Therefore, we review Viera and Estrada's evidence to determine whether the prior criminal activity evidenced therein demonstrates an unreasonable and foreseeable risk to Little Caesar's customers of which Little Caesar's was or should have been aware at the time of the incident in question. *Timberwalk*, 972 S.W.2d at 756.

Attached as an exhibit to Swanson's affidavit are records from the Houston Police Department. In addition to documents relating to the armed robbery at issue

here, the police department records included records relating to five incidents.[5] Of the five incidents in the police files, two events occurred in or near the strip center in question but not on Little Caesar's premises: in January 2008, a fight broke out between two men at a washateria; in May 2007, an armed man in a vehicle reportedly attempted to rob three individuals walking down the sidewalk near the strip center. The remaining three of the incidents occurred in or directly outside of Little Caesar's: two of these incidents took place in 2006 and one in 2007. On the morning of September 3, 2006, one of Little Caesar's employees exited the store with a bag of money to be deposited at the bank. A man standing outside the store wrested the bag from her arm and fled on foot. No weapons were used, but the complainant indicated that her arm was injured when the man forcibly took the bag

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[5] The police records also contain a service call inquiry indicating a phone call on March 28, 2008 reporting an armed robbery at Little Caesar's. But there are no records relating to this event other than the service call inquiry. The call was "cleared" three hours later and no incident report was created. Viera and Estrada do not rely on this service call as evidence of prior criminal activity in their briefing. We therefore will not, without invitation, infer from this service call that a criminal act actually occurred, particularly in light of the police department's detailed records of other reported incidents—including the theft of two bottles of coke. *Cf. Maurer v. 8539, Inc.*, No. 01-09-00709-CV, 2010 WL 5464160, at *4–5 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, no pet.) (mem. op.) (holding that service call logs that did not indicate whether incident reports were made or whether any actual crimes similar to aggravated robbery in question occurred were not probative of actual similar crimes). The evidence is equally consistent with the possibility of an erroneous report, a "prank" call, or a premeditated effort to determine police response time to a reported robbery at the Little Caesar's, as it is with the commission of a crime that was reported to the police but "cleared" without investigation.

from her. On December 5, 2006, one Little Caesar's employee accused another of stealing two bottles of coke. No weapons were used, and no injuries were reported. On December 29, 2007, Little Caesar's was robbed by a single, armed man. No shots were fired, but the robber struck a Little Caesar's employee on the head with his gun.

C. Application of the *Timberwalk* Factors

1. Proximity

Each of the five incidents in the police records relied on by Viera and Estrada occurred near the shopping center in which Little Caesar's is located. Three of them occurred inside or directly outside of the pizzeria.

2. Publicity

There is no evidence that any of the incidents received any publicity or that Little Caesar's was otherwise aware of the fight in the washateria or the attempted robbery on the sidewalk near the shopping center. Presumably, Little Caesar's was aware of the three events that occurred inside or directly outside of its premises, as Little Caesar's employees were complainants in those incidents.

3. Recency and Frequency

Although separate factors, courts generally address recency and frequency together. *See Trammell Crow*, 267 S.W.3d at 15. Within this analysis, courts often look at such evidence as crime statistics for crime on or near the premises at issue

compared to the statistics for the city (or an area within the city) to compare whether the odds of crime on the premises were so great as to make the risk of crime more foreseeable. *See Trammell Crow*, 267 S.W.3d at 15. "[N]o one ratio or odds calculation conclusively resolves the frequency analysis," but the calculations "serve as data points a court may rely on in determining the frequency of a crime in a certain location." *Id.* at 16.

The record indicates that the Little Caesar's store was open seven days a week for at least ten hours per day, and that Little Caesar's had been open at that location for approximately four years at the time of the robbery. The evidence demonstrates three incidents of criminal conduct—excluding the armed robbery involving Viera and Estrada—during that four-year period. The most recent incident was in December 2007, approximately six months prior to the crime at issue here. Viera and Estrada did not provide the court with any crime statistics from the city or from the area surrounding the restaurant.

4. Similarity

Two of the three prior criminal incidents at Little Caesar's are largely dissimilar to the armed robbery in which Viera and Estrada were involved. An employee allegedly stealing two bottles of coke does not put a property owner on notice of a danger of armed robbery. While the grabbing of the money bag from a Little Caesar's employee on the way to deposit money in the bank is similar to the

armed robbery in that it involved stealing cash from Little Caesar's, it is different in three key aspects: it occurred outside of the Little Caesar's property; it occurred during the day; and, most importantly, it did not involve a weapon or any threat of deadly force. But the armed robbery in December of 2007 bears several significant similarities to the armed robbery involving Viera and Estrada: both involved the use of guns, were aimed at stealing the cash in the pizzeria's cash register, and occurred at night, inside the Little Caesar's. In the previous robbery, however, no shots were fired, and the robber seems to have focused exclusively on the employee working the cash register, without threat to the pizzeria patrons.

C. Conclusion

There is no evidence indicating that Little Caesar's knew or should have known about the fight in the washateria or the attempted robbery on the sidewalk near the shopping center. *See Timberwalk*, 972 S.W.2d at 759 ("Previous similar incidents cannot make future crime foreseeable if nobody knows or should have known that those incidents occurred. Property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area. On the other hand, when the occurrence of criminal activity is widely publicized, a landlord can be expected to have knowledge of such crimes."). Little Caesar's knew or should have known about the three incidents that occurred in or directly outside of its property and involved its employees. But one of these incidents—the coke bottles

incident—is not sufficiently similar to the armed robbery to be meaningful to this analysis. *See Timberwalk*, 972 S.W.2d at 758 (stating that, although the previous crimes need not be identical, they "must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger.").

Thus, we focus on the two violent crimes of which Little Caesar's knew or should have known: (1) the unarmed robbery of the Little Caesar's employee outside the store when she was taking cash to the bank for deposit on the afternoon of September 3, 2006 and (2) the armed robbery of the Little Caesar's on the evening of December 29, 2007. *Cf. Trammel Crow*, 267 S.W.3d at 13 (distinguishing 217 nonviolent crimes on premises in past two years and focusing on 10 prior violent crimes). As noted above, the unarmed robbery—which occurred during the day, outside the Little Caesar's, and was aimed exclusively at the Little Caesar's employee who carried money for deposit at the bank—bears little similarity to the armed robbery in question, and it occurred nearly two years earlier.

The December robbery, however, is sufficiently similar to provide some support for Viera and Estrada's claim that the crime in question was foreseeable. Although no shots were fired in the prior robbery, the fact that an armed man entered Little Caesar's and robbed the store in December 2007 makes it more plausible that an armed robbery in which shots are fired could occur in the future.

Cf. Timberwalk, 972 S.W.2d at 758. But the occurrence of only one significantly similar event over a four-year period undermines Viera and Estrada's foreseeability allegation. *See Timberwalk*, 972 S.W.2d at 758.

Considering the five *Timberwalk* factors together, we conclude that Little Caesar's did not owe a duty to Viera and Estrada. While "the difficulty in assessing foreseeability lies in the inability to quantify how many prior crimes make a particular attack predictable,"[6] we conclude that one significantly similar event in which no shots were fired and no person was injured is not sufficient. We particularly find instructive the Texas Supreme Court's holding in *Trammel Crow*. There, the evidence showed 227 criminal incidents on the premises within a two-year period, ten of which were violent crimes. *Trammell Crow*, 267 S.W.3d at 16. Three of the violent crimes involved deadly weapons. *Id.* The court observed, however, that a weapon had not been fired in any of these crimes. *Id.* Additionally, three of the robberies were perpetrated on businesses rather than individual patrons. *Id.* at 17. The other robberies were also distinguishable from the attack in which the *Trammell Crow* plaintiff was injured because he had been shot at from a distance without any prior demand for money, while the other injuries had generally resulted in connection with the victims' resistance to relinquishing their property. The Texas Supreme Court concluded, "Nothing about the previous

[6] *Trammell Crow*, 267 S.W.3d at 18 (Jefferson, C.J., concurring).

robberies committed at the [premises] put [the landowner] on notice that a patron would be murdered as part of a robbery on its premises." *Id.* Thus, the plaintiff's death was not foreseeable, and the property owner had no duty to prevent the attack. *Id.*

The analysis in *Trammell Crow* indicates that the attack in question here was also not foreseeable. The evidence demonstrates only two prior robberies, unlike the ten at issue in *Trammell Crow*, and only one involved a deadly weapon, unlike the three involving a deadly weapon in *Trammell Crow*. *See id.* at 16. Like in *Trammell Crow*, there is no evidence of a prior crime in which a gun was actually discharged nor of a serious injury in a prior crime. *See id.* Similarly, while an employee was struck on the head in the December 2007 robbery while dealing with the robber's demand for money, Viera was shot at from a distance without any contemporaneous demand for money. *See id.* at 17. Finally, while the other robberies were focused on stealing Little Caesar's money from Little Caesar's employees, there were no prior attacks on customers. *See id.*

We therefore conclude that it was not foreseeable to Little Caesar's that there was an unreasonable risk of the armed robbery that resulted in injury to Viera and Estrada, and Little Caesar's therefore had no duty to protect Viera and Estrada against such an attack. *See id.*; *Timberwalk*, 972 S.W.2d at 756 (holding that "[t]he foreseeability of an unreasonable risk of criminal conduct is a prerequisite to

imposing a duty of care" on a premises operator); *see also Perez v. DNT Global Star, L.L.C.*, 339 S.W.3d 692, 702–05 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding that jury could have concluded that plaintiff's shooting was not foreseeable to property owner when evidence showed five crimes on premises in preceding two years, three of which were violent crimes, two of which involved discharge of gun, but none of which involved injury from gun shots); *Mayer*, 278 S.W.3d at 919 (affirming summary judgment based on *Timberwalk* factors when evidence showed two violent crimes and one potentially violent crime occurred at shopping center during sixteen months preceding shooting of plaintiff in after-hours altercation); *Ronk v. Parking Concepts of Tex., Inc.*, 711 S.W.2d 409, 418 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e) (holding plaintiff's assault was not foreseeable when evidence demonstrated ten prior incidents of theft on or near premises in preceding two years, one assault, two burglaries, one unlawful carrying of a weapon, and one criminal trespass); *cf. Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 657 (Tex. 1999) (holding some evidence of foreseeability of rape when evidence showed 190 violent crime in two years prior to sexual assault—one violent crime every four days). Because duty is a necessary element to Viera and Estrada's premises liability claims against Little Caesar's, the trial court correctly entered summary judgment on those claims in favor of Little Caesar's.

Breach of Contract Claim

According to the appellate record, Viera and Estrada's live pleading is their third amended petition,[7] filed before Little Caesar's original or amended motion for summary judgment. In addition to Viera and Estrada's premises liability claims, this pleading contains a breach of contract claim against Little Caesar's based on an alleged violation of a Rule 11 agreement. Neither party addresses the breach of contract claim in the motions for summary judgment, responses to motions for summary judgment, or briefing on appeal. Nor does the trial court's summary judgment award expressly address the breach of contract claim.

With the exception of certain statutorily-authorized interlocutory appeals not at issue here,[8] this Court has jurisdiction over judgments only if they are final and appealable—i.e., only if they dispose of all claims between all parties. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 191-204 (Tex. 2001); *see also In re Daredia*, 317 S.W.3d 247, 248–49 (Tex. 2010); *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 830 (Tex. 2005). Neither party challenged jurisdiction over this appeal, but we nonetheless ascertained that we

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[7] The record contains, as an exhibit to an affidavit filed in support of a motion but not as an official court filing, a fourth amended petition. There is no explanation as to why the fourth amended petition is not included in the clerk's record as the plaintiffs' live pleading, but neither party asserts that it should be. Regardless, this petition also contains a breach of contract claim.

[8] Neither party has asserted any basis for interlocutory jurisdiction over this case.

had jurisdiction to hear this case before proceeding to this opinion. Specifically, we had to determine whether the trial court's order actually granted summary judgment on the breach of contract claim or whether that claim remained pending. We concluded that the trial court's judgment disposed of Viera and Estrada's breach of contract claim, whether or not the trial court so intended, and was therefore final and appealable.[9]

Generally, it is error for a trial court to grant summary judgment on a claim that is not addressed in the summary judgment briefing. *See Lehmann*, 39 S.W.3d at 200 (observing that, if defendant moves for summary judgment on less than all claims asserted, but trial court renders judgment that plaintiff take nothing on all claims, judgment is final but erroneous). But Viera and Estrada do not challenge the trial court's judgment with respect to their breach of contract claim. They have thus waived any error by the trial court in granting summary judgment on the breach of contract claim, and we must affirm the trial court's judgment with respect to those claims. *See Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001); *see also Harris v. Ebby Halliday Real Estate, Inc.*, 345 S.W.3d 756, 759

[9] A judgment that disposes of all claims and parties is final whether it so states or not. *Lehmann*, 39 S.W.3d at at 200. Here, the trial court's order expressly states that it is final and dismisses all of Viera and Estrada's claims against Little Caesar's and Pro Venture. These are the only claims in the case demonstrated by the record. The judgment therefore expressly disposes of all claims, including Viera and Estrada's breach of contract claim. It is thus a final judgment over which we have jurisdiction. *See id.*

(Tex. App.—El Paso 2011, no pet.) (affirming summary judgment on breach of contract claim automatically when appellant had negligence and breach of contract claims pending at time of summary judgment and appellant appealed summary judgment in its entirety but did not raise issue or argue error with respect to summary judgment on breach of contract claim).

Conclusion

We affirm the trial court's summary judgment in all respects. Because we affirm the trial court's summary judgment on Viera and Estrada's tort claims on the ground that Little Caesar's did not owe Viere and Estrada a legal duty, we do not reach the other grounds on which the trial court may have granted summary judgment on those claims.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Sharp, J., dissenting. Dissent to follow.