Opinion filed August 31, 2017

In The

Eleventh Court of Appeals

No. 11-14-00239-CV

BARBARA FAIRCLOTH ET AL., Appellants

V.

BORDERLANDS, A SOUTHWEST GRILL, INC. D/B/A LYTLE LAND & CATTLE COMPANY, Appellee

On Appeal from the 350th District Court
Taylor County, Texas
Trial Court Cause No. 8,597-D

M E M O R A N D U M O P I N I O N

Barbara Faircloth, individually and as personal representative of the Estate of Heather Marie Ince, and Shannon Ince, individually and as parent and next friend of Kayce Ince, Kimberly Rene Ince, and Dustin Ince, minors (Faircloth), sued several parties[1] including Borderlands, a Southwest Grill, Inc. d/b/a Lytle Land & Cattle

[1]Some defendants were also granted summary judgment in their favor, and Faircloth either nonsuited, dismissed or settled with other defendants, but did not do so with Borderlands.

Company (Lytle), for the wrongful death of Heather Marie Ince.[2] After Lytle answered and moved for summary judgment on no-evidence and traditional grounds, the trial court held a hearing. Afterward, the trial court granted summary judgment in Lytle's favor.

On appeal, Faircloth asserts two issues. First, Faircloth asserts that a genuine issue of material fact existed that Jeanette Lynn O'Fallon was served alcohol at Lytle, when she was already intoxicated, and afterward, drove a pickup and struck and killed Heather. Second, Faircloth asserts that genuine issues of material fact existed as to whether (1) all of Lytle's servers were certified by the Texas Alcoholic Beverage Commission and (2) whether Lytle encouraged its servers to serve intoxicated patrons. We affirm.

I. *Background Facts*

Around midnight, O'Fallon drove a pickup on Judge Ely Road in Abilene and struck and killed Heather. Earlier that evening, O'Fallon had celebrated her birthday. O'Fallon first went to celebrate at Firehouse Bar & Grill where she drank beer, and she left there feeling "buzzed," "feeling good." Her next stop was at Legacy Bar and Grill, where she had additional drinks. She denied that servers eventually refused her additional service. Between 9:30 p.m. and 10:00 p.m., O'Fallon left Legacy and went to another bar, Western Edge, where she had a beer and a shot of Tequila. She was there less than 30 minutes. O'Fallon claimed that she next went to get cash at an ATM and then went to Lytle Land & Cattle Company. She claimed that, while she was there, she had two "Patron shots" and a couple of beers, paid cash, and was served by a male in a white cowboy hat. She called a friend, Ray Thompson, at 10:15 p.m. and asked him to meet her at Lytle.

[2]Faircloth's live pleading was the Sixth Amended Petition.

Thompson had first seen O'Fallon at Firehouse earlier that evening, as she celebrated her birthday, and she wanted to go for a ride on his motorcycle. Later, after she called him at 10:15 p.m., he went to pick her up at Lytle. Thompson drove his motorcycle to Lytle because he thought he might "get lucky" and have sex with her. Once he was at the parking lot at Lytle, he called her. He said she "slurred" her words when she talked during the call. Thompson claimed that he saw her leave Lytle; that she was "wobbly," "staggering," and "pretty lit"; and that she "slurred" her words. He said that he had to grab her because she almost fell. Thompson would not let her ride his motorcycle. Thompson said he put her into her pickup to let her pass out and sleep it off. O'Fallon claimed that she left Lytle between 11:30 p.m. and midnight. Shortly after midnight, as Heather was riding her bicycle on Judge Ely Road, O'Fallon ran over her and killed her.

II. *Standard of Review*

We review summary judgment motions under a well-settled, multifaceted standard of review. *Kemp v. Jensen*, 329 S.W.3d 866, 868 (Tex. App.—Eastland 2010, pet. denied). Summary judgments are reviewed de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). A defendant who moves for traditional summary judgment must either negate at least one essential element of the nonmovant's cause of action or prove all essential elements of an affirmative defense. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). To determine if a fact question exists, we must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 823, 827 (Tex. 2005). If differing inferences may reasonably be drawn from the summary judgment evidence, a summary judgment should not be granted. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

When the trial court's summary judgment order does not specify the grounds upon which it relied for its ruling, the judgment must be affirmed if any of the theories advanced are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989); *Barker v. Roelke*, 105 S.W.3d 75, 82 (Tex. App.—Eastland 2003, pet. denied).

III. *Analysis*

Lytle challenged Faircloth's Dram Shop Act claim on traditional grounds. Lytle claimed that O'Fallon was not at Lytle and could not have been served alcohol there because it was closed at the time that she claimed to have been there.

A. The elements required to prove a Dram Shop Act claim.

Under Texas law, a provider of alcoholic beverages can be held liable for damages sustained by third parties resulting from a patron's intoxication. TEX. ALCO. BEV. CODE ANN. § 2.02 (West 2007). "The Texas Dram Shop Act is generally the exclusive means for recovery against a provider of alcohol." *Biaggi v. Patrizio Rest. Inc.*, 149 S.W.3d 300, 304 (Tex. App.—Dallas 2004, pet. denied) (citing *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 412 (Tex. 2000)).

The elements of Faircloth's dram shop cause of action were (1) that O'Fallon was sold, served, or provided an alcoholic beverage at Lytle; (2) that, at the time the provision occurred, it was apparent to the provider, Lytle, that O'Fallon was obviously intoxicated to the extent that she presented a clear danger to herself and others; and (3) that O'Fallon's intoxication was a proximate cause of the damages suffered by Appellants. *See* ALCO. BEV. § 2.02(b); *20801, Inc. v. Parker*, 249 S.W.3d 392, 395 n.4 (Tex. 2008); *Smith v. Sewell*, 858 S.W.2d 350, 353–54 (Tex. 1993). Because Lytle asserted as a matter of law that Lytle did not serve O'Fallon because O'Fallon was not at Lytle, we address that element of Faircloth's dram shop claim first.

B. The trial court did not err when it granted Lytle's traditional motion for summary judgment because Lytle established as a matter of law that O'Fallon could not have been at Lytle.

In support of its traditional motion, Lytle attached the affidavit of Monte Ball, Operations Support Team Manager for ADT Security Services and the records custodian for ADT. Attached to Bell's affidavit were supporting business records. His affidavit and the business records established that Lytle's security system was armed at 22:40:47 on February 9, 2009, as reflected with a "closed" event, and was not deactivated until an "open" event at 07:38:25 on February 10, 2009. The security system report references for "open" and "close" events are automatic and cannot be manually altered or changed as to dates and times. Lytle also adduced evidence that all of its employees had clocked out before the manager, Telitha Ford, who clocked out at 10:41 p.m. on February 9, 2009.

A court may grant a summary judgment on the basis of uncontroverted testimonial evidence of an interested witness if that evidence "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c); *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). In response to Lytle's evidence, Faircloth attached O'Fallon's testimony that she was at Lytle and bought two "Patron drinks" and a couple of beers. Faircloth also attached Thompson's deposition, in which he stated that he saw O'Fallon exit Lytle after 11:00 p.m. A plaintiff may raise a material fact question with either direct or circumstantial evidence. *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001). We view evidence in a light most favorable to the nonmovant and resolve doubts in its favor, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mayes*, 236 S.W.3d at 756; *Nixon*, 690 S.W.2d at 548–49.

A Texas Alcoholic Beverage Commission report indicated that the last place that O'Fallon had been that evening was Western Edge. O'Fallon had no answer for

why the TABC report could not place her anywhere after she had been at Western Edge that night. Thompson could not explain why the records from Lytle and ADT reflected that the restaurant was closed. Thompson also had no explanation when told that Lytle had closed at 9:45 p.m. Faircloth produced no evidence that O'Fallon actually bought drinks at Lytle, and Thompson admitted that he never saw any employees at Lytle, never saw O'Fallon in the restaurant, and never saw her purchase drinks there. Thompson said that he could have been mistaken about the time and that, if he was, O'Fallon had to be at Lytle prior to 10:00 p.m.

A plaintiff produces more than a scintilla of evidence if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). But to raise a genuine issue of material fact, the evidence must transcend mere suspicion. *Id.* If the plaintiff's evidence does nothing more "than create a mere surmise or suspicion of its existence, then the evidence is no more than a scintilla and, in legal effect, is no evidence." *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

Lytle established that it was closed at 10:00 p.m.; that employees had clocked out before the manager, Ford, who had clocked out at 10:41 p.m.; and that the security system was armed at 22:40:47 on February 9, 2009. ADT's records also indicated that the alarm was deactivated the next morning at 07:38:25. Given the summary judgment evidence in this case, additional independent evidence was necessary to raise a question of material fact on O'Fallon's presence at Lytle. *See Casso*, 776 S.W.2d at 558. "We believe that 'could have been readily controverted' does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted." *Id.* Instead, the standard means that the testimony at issue is of a nature that can be effectively countered by opposing evidence. *Id.*

"[I]f the non-movant must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof." *Id.*

The testimony of O'Fallon and Thompson did not explain how O'Fallon could be at a restaurant that was in fact closed. In fact, the testimony of both O'Fallon and Thompson is insufficient to create a material fact question because reasonable people could not differ in their view of her presence there in light of the TABC report and ADT security records. We also note that O'Fallon wrote an apology letter to Lytle in which she indicated that Lytle was not involved in the events of February 9, 2009. If an inference is a guess because the evidence is so slight, then there is no evidence. *Ford*, 135 S.W.3d at 601 (citing *Lozano*, 52 S.W.3d at 148; *Browning–Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). After a review of the record, and in taking all of the evidence in a light most favorable to Faircloth, we hold that Faircloth has not raised a genuine issue of material fact that O'Fallon was at Lytle and had been served alcohol there. We overrule Faircloth's first issue on appeal. In light of that resolution, we need not address her second issue.

IV. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

August 31, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.