IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 23, 2006 Session

ALEC J. TEMLOCK v. ROBERT M. MCGINNIS, ET AL.

Appeal from the Circuit Court for Knox County
No. 1-753-01 Dale C. Workman, Judge

No. E2005-02646-COA-R3-CV - FILED JULY 20, 2006

Alec J. Temlock ("Plaintiff") sued Robert M. McGinnis ("McGinnis") and Pub Ventures of S.C., Inc., d/b/a Barley's Taproom & Pizzeria ("Barley's") for injuries Plaintiff received when he was hit by a vehicle driven by McGinnis. Barley's filed a motion for summary judgment arguing, in part, that at no time on the evening of the accident did it sell alcoholic beverages to McGinnis and, therefore, it could not be held liable for the accident and Plaintiff's injuries. The Trial Court granted Barley's motion for summary judgment. Plaintiff appeals. We vacate the grant of summary judgment to Barley's.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Lawrence P. Leibowitz and Rebecca G. Bond, Knoxville, Tennessee for the Appellant, Alec J. Temlock.

Kenneth W. Ward, Knoxville, Tennessee for the Appellee, Pub Ventures of S.C., Inc., d/b/a Barley's Taproom & Pizzeria.

OPINION

Background

On December 15, 2000, at approximately 1:15 a.m., Plaintiff was walking across private property when a vehicle driven by McGinnis left the roadway, crossed over the sidewalk on to the private property, and struck and injured Plaintiff. From the record before us, McGinnis earlier had consumed alcoholic beverages, specifically beer, at Barley's prior to operating the vehicle. When tested by police at the accident scene, McGinnis registered a Breathalyzer blood alcohol level of .20. McGinnis was arrested at the scene and charged with driving under the influence and vehicular assault. McGinnis later pled guilty to vehicular assault, and his plea was accepted by the Criminal Court for Knox County.

Plaintiff sued McGinnis and Barley's. Barley's filed a motion for summary judgment claiming only that there is no evidence it sold alcoholic beverages to McGinnis on the night in question because McGinnis did not pay for the beer he ordered and drank. Plaintiff opposed Barley's motion for summary judgment, in part, by filing McGinnis' affidavit, which stated, as pertinent to this appeal:

> 7. While at Barley's Taproom as a customer, I continued to drink beer. I may have had something to eat there but do not specifically remember. I ordered beer by the glass from the Barley's Taproom wait staff, as did others at my table. The wait staff at Barley's Taproom served the beer to me and my companions as it was ordered.
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> 8. Taylor S. Griswold and I stayed at Barley's Taproom and continued to drink beer until we decided to leave. I do not know how many beers I drank at Barley's Taproom.
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> 9. The waiters and waitresses at Barley's Taproom served me beer during the entire time I was at Barley's Taproom. I did not drink beer at any other place that evening other than the original beers I drank at Taylor S. Griswold's house.

The Trial Court heard argument and granted Barley's motion for summary judgment by order entered September 27, 2005. The Trial Court pursuant to Tenn. R. Civ. P. 54.02 directed the entry of this judgment be a final judgment. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises one issue on appeal: whether the Trial Court erred in granting summary judgment to Barley's.

In *Blair v. West Town Mall,* our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall,* 130 S.W.3d 761 (Tenn. 2004). In *Blair,* the Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South,* 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples,* 15 S.W.3d at 88.
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> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
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> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W. 3d at 88-89) (citations omitted)).

Our Supreme Court has also provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable

> inferences in the nonmoving party's favor. *See Robinson v. Omer,* 952 S.W.2d at 426; *Byrd v. Hall,* 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder,* 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

The Trial Court's grant of summary judgment to Barley's does not specifically state that the Trial Court found that no sale to McGinnis had occurred. However, from the record before us, the briefs on appeal, and the parties' arguments during oral argument before this Court, it is clear that the issue of whether summary judgment was proper revolves around the question of whether, under Tenn. Code Ann. § 57-10-102, Barley's sold beer to McGinnis on the night of the accident.

Two statutes pertaining to alcohol-related injuries are relevant to this appeal, Tenn. Code Ann. § 57-10-101 and Tenn. Code Ann. § 57-10-102. Tenn. Code Ann. § 57-10-101 provides:

> **57-10-101. Proximate cause. –** The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.

Tenn. Code Ann. § 57-10-101 (2002). In pertinent part, Tenn. Code Ann. § 57-10-102 provides:

> **57-10-102. Standard of proof. –** Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:
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> (2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

Tenn. Code Ann. § 57-10-102 (2002).

Our Supreme Court discussed Tenn. Code Ann. §§ 57-10-101 and 57-10-102 in *Biscan v. Brown,* 160 S.W.3d 462 (Tenn. 2004). The *Biscan* Opinion stated:

> The effect of [Tenn. Code Ann. § 57-10-101] is to make it impossible for one who has been injured by an intoxicated person to state a claim for negligence against the person or entity who furnished the alcoholic beverage or beer because the statute removes, as a matter of law, the required element of legal causation. *See, e.g., Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997) (a claim for negligence requires a duty of care owed by the defendant to the plaintiff; a breach of that duty; an injury or loss; causation in fact; and legal, or proximate, causation.) In other words, there can be no cause of action resting on the allegation that one person "furnished" alcohol to another because it is impossible to prove proximate cause. The statute does not merely provide immunity from suit where one has furnished alcohol to another; rather, the statute constitutes the legislative determination that persons who furnish alcohol are not at fault for injuries inflicted by an intoxicated person.
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> The second part of the statute carves out an exception to the first part. It provides that a seller of alcohol may be liable to a third party for injuries if the seller sold alcohol to a minor or if the seller sold alcohol to an obviously intoxicated person and the sale was a proximate cause of the injuries suffered by the third party:
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> The clear language of the statute admits of only one conclusion: that the legislature intended to shield persons … who "furnish" alcohol in a social setting.
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> Moreover, as the Court of Appeals discussed, the legislative history of sections 101 and 102 reveals that the statute was intended to codify the common-law rule that an individual who furnishes alcohol to another is not liable for any damages resulting from the other's intoxication, even if those damages are foreseeable. *See, e.g., Cecil*, 575 S.W.2d at 271. Thus, although the legislative history reflects much debate and concern over the extent to which sellers of alcoholic beverages and beers should be covered, the starting point was that the mere furnishing of alcohol, whether gratuitously or for commercial gain, is not a basis for liability. *See Worley v. Weigel's*, 919 S.W.2d at 593-94.

Biscan, 160 S.W.3d at 472-73.

McGinnis' affidavit shows: (1) that he was a customer at Barley's on the night of the accident; (2) that he directly ordered beer by the glass from Barley's wait staff; (3) that Barley's wait staff brought to McGinnis the beer he ordered and served it directly to him; (4) and that McGinnis while still at Barley's consumed the beer that he had ordered. Barley's does not argue that it intended no sale of this beer or that it was giving beer away that night. Barley's instead argues that the individual it sold the beer to was McGinnis' friend, Taylor Griswold, who paid for the beer.

Barley's argues on appeal that the facts of this case are similar to the facts of *Worley v. Weigel's, Inc.*, wherein our Supreme Court held: "Since the purchaser in this case did not consume the beverage purchased, the accident was not caused by the purchaser's consumption of the beverage. Therefore, there is no liability on the seller." *Worley v. Weigel's, Inc.*, 919 S.W.2d 589, 593 (Tenn. 1996). In *Worley*, two young men both under the age of 21 entered a store owned by the defendant where one of the young men purchased "a substantial quantity of beer." *Id*. at 591. A third young man also under the age of 21 consumed the beer, became intoxicated, and lost control of his vehicle resulting in a collision that caused injuries to a passenger. *Id*. Barley's argues, in part, that it "sold the beer to Taylor Griswold in return for payment by credit card," and that "McGinnis did not pay for or purchase any beer at Barley's on the night in question…," and, therefore, Barley's has no liability for the accident in question.

Worley, however, clearly is distinguishable from the case at hand. In *Worley*, the third young man who drank the beer, became intoxicated, and lost control of his vehicle was not in defendant's store when his friends purchased the beer. *Id*. Clearly the young man in *Worley* did not directly order the beer from the Weigel's, Inc., did not have the beer delivered directly into his hands by Weigel's, Inc., and did not consume the beer while in the Weigel's store. In the case now on appeal, McGinnis was a customer at Barley's on the night in question, McGinnis directly ordered beer by the glass from Barley's wait staff, Barley's wait staff brought the beer to McGinnis and served it directly to him, and McGinnis while still in Barley's drank each beer that he had ordered and which had been delivered to him.

Our Legislature clearly intended to shield sellers from liability in situations such as in *Worley* where the intoxicated person was not even in the seller's establishment when the sale of the alcoholic beverages occurred, did not order the beer from the seller, did not have the seller deliver the beer directly to him, and did not consume the beer while in the seller's place of business. In such a situation, the seller has no control over who consumes the alcoholic beverage after the product leaves the store premises. The facts in *Worley* are very different from those in the instant case. In the case now on appeal, McGinnis not only was present when the sale occurred, but he was the one who ordered the beer from Barley's wait staff, the beer was delivered directly to him by Barley's wait staff with the expectation of payment in return, and McGinnis consumed the beer while in Barley's.

As our Supreme Court stated in *Stewart v. State*, an appellate court's "primary goal in interpreting statutes is 'to ascertain and give effect to the intention and purpose of the legislature.'" *Stewart v. State*, 33 S.W.3d 785, 791 (Tenn. 2000) (quoting *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 802 (Tenn. 2000)).

Whether McGinnis was the individual who paid for the beer that he ordered, that was served directly to him, and that he consumed on site, or whether one of his friends paid or even whether McGinnis walked out without paying is not dispositive of the question of whether a "sale" occurred pursuant to Tenn. Code Ann. § 57-10-102(2) making this statute applicable. In making this determination, all relevant circumstances must be considered. McGinnis was in Barley's, an

establishment in the business of selling beer. McGinnis ordered beer directly from Barley's wait staff, and Barley's wait staff served the beer ordered by McGinnis directly to McGinnis with the expectation by Barley's that it would be paid for the beer as Barley's has never contended it was giving away beer. McGinnis drank this beer while on Barley's premises. We hold these facts are sufficient to constitute a sale to McGinnis for purposes of Tenn. Code Ann. § 57-10-102. Under the facts of this case, we hold Barley's sold McGinnis the beer under Tenn. Code Ann. § 57-10-102, regardless of who actually ended up paying for it or even if Barley's customers skipped out on the beer tab altogether and no one paid for it.

It was the clear intent and purpose of our Legislature that a fact situation such as the one now before us constitutes a sale under the provisions of Tenn. Code Ann. § 57-10-102. We hold that when a customer enters an establishment that sells alcoholic beverages such as beer, places his own alcohol order, has the alcohol he ordered delivered directly to him by the seller with the seller's expectation of payment in return, and the customer who ordered the alcohol consumes that alcohol on the seller's premises, there is a sale to that customer under Tenn. Code Ann. § 57-10-102. To hold otherwise would mean that a business could adopt a policy that in serving any group of more than one individual, only one person in the group is to be allowed to "pay" for the alcohol ordered and consumed by all other members in that party even though those other individuals directly ordered the alcohol from the seller's wait staff, had the alcohol delivered by the seller's wait staff directly to them, and they consumed the alcohol on the seller's premises, and, the seller then would have no potential liability under Tenn. Code. Ann. § 57-10-102 except as to the one person who paid. Such a decision would be directly contrary to the clear intent and purpose of the Legislature to hold such a seller liable if it sells "alcohol to a minor or if the seller sold alcohol to an obviously intoxicated person and the sale was the proximate cause of the injuries suffered by the third party…." *Biscan*, 160 S.W.3d at 472. Our holding is required by the clear intent and purpose of the Legislature in enacting Tenn. Code Ann. § 57-10-102, and is limited to the application of that statute.

As Barley's did sell beer to McGinnis on the night in question, it neither affirmatively negated an essential element of Plaintiff's claim nor conclusively established an affirmative defense. We, therefore, vacate the grant of summary judgment to Barley's.

Conclusion

The judgment of the Trial Court is vacated as to the grant of summary judgment to Barley's, and this cause is remanded to the Trial Court. The costs on appeal are assessed against the Appellee, Pub Ventures of S.C., Inc., d/b/a Barley's Taproom & Pizzeria.

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D. MICHAEL SWINEY, JUDGE