Reversed, Remanded, and Opinion Filed July 5, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00988-CV

BARRIE MYERS, Appellant
V.
RAOGER CORPORATION D/B/A CADOT RESTAURANT, Appellee

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-21-16136

MEMORANDUM OPINION

Before Justices Partida-Kipness, Nowell, and Kennedy
Opinion by Justice Partida-Kipness

Appellant Barrie Myers appeals the trial court's order granting summary judgment for appellee Raoger Corporation d/b/a Cadot Restaurant (Cadot) on Myers' dram shop claim. We conclude summary judgment was improperly granted because Myers presented sufficient evidence to raise a fact issue on the grounds raised by Raoger Corporation in its no evidence and traditional motions for summary judgment. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

Cadot is a French restaurant in Plano, Texas. On November 29, 2018, Nasar Khan went to Cadot with a friend, Kelly Jones. Khan and Jones arrived at Cadot between 9:45 p.m. and 10:00 p.m. According to Khan, he was "100% sober" when he arrived at Cadot and had no alcoholic beverages before arriving there. He ordered a beer from the bar and, after being seated at a table, the pair ordered four drinks and some food. According to Khan, he had three or four drinks at Cadot and got his food to go. A receipt from Cadot purportedly[1] showed an order for two Stoli vodkas, one Monopolowa vodka, and one Carousel. Dr. Matthew Andrade Cheney, a forensic toxicology consultant, testified by affidavit that the Stoli and Monopolowa vodkas are each 80 proof or 40% alcohol. Khan testified that Jones drank the Carousel. Jones stated in an affidavit that she drank a glass of wine and took a few sips of Khan's "three (3) Vodka drinks." Khan closed his tab by 10:30 p.m.

The record is unclear when the pair left the restaurant. According to Khan, they were at Cadot for "two hours or [sic] hour and 45 minutes, somewhere there." Khan and Jones agreed that Khan drove Jones home and walked her inside. Khan believes he stayed at her place for fifteen minutes. Jones stated that Khan left her home "shortly before midnight." On the way home, Khan was involved in a car accident with Myers. Shortly after midnight on November 30, 2018, Khan rear-

[1] A copy of the receipt is not in the appellate record. The receipt and its contents were referenced by witnesses. That testimony is part of the record.

ended Myers, which caused Myers's vehicle to roll over multiple times. The underlying proceeding arose from that accident.

Officer Jessie Williams of the Plano Police Department was dispatched to the scene. When he arrived at approximately 12:12 a.m., Officer Williams saw Khan sitting on the ground talking to a firefighter. While on scene, Officer Williams smelled a strong odor of cologne on Khan and noted that he looked disheveled. Khan was transported by ambulance to Medical City Plano for treatment of his injuries. Officer Williams decided to follow Khan to the hospital to conduct an additional investigation because his sergeant informed Officer Williams that he "smelled an odor of alcohol from" Khan.

Officer Williams arrived at the hospital at approximately 12:50 a.m. While speaking with Khan, Officer Williams "noticed an odor of alcoholic beverage emanating from his breath." Officer Williams asked Khan how many alcoholic drinks he had consumed earlier in the evening. Khan said that he had "two beers" between 9:30 and 10:30 p.m. Officer Williams administered the Horizontal Gaze Nystagmus (HGN) test to Khan and observed four out of six clues. Khan was lying on a hospital gurney during the test. Officer Williams stated in his deposition and his arrest report that four clues constitute the "decision point" for intoxication. Officer Williams also noted that Khan's clothing was disorderly, he spoke very loudly, and had watering eyes.

Based on "the totality of the circumstances including [Khan's] actions and performance prior to the testing," Officer Williams placed Khan under arrest for suspicion of driving while intoxicated. Officer Williams reported that Khan "was very nonchalant about being arrested." When Khan refused to consent to a blood draw to test his blood alcohol concentration (BAC), Officer Williams obtained a search warrant to draw Khan's blood. In the blood warrant affidavit, Officer Williams stated that Khan's refusal to provide a blood sample "is also an indication to me that [Khan] is attempting to hide evidence of his level of intoxication." Khan's blood was drawn at 3:06 a.m., and testing showed his BAC was 0.139.

Myers was injured in the accident. He sued Khan for negligence and negligence per se. He sued Cadot for violations of the Texas Dram Shop Act. *See* TEX. ALCO. BEV. CODE §§ 2.01, 2.02(b). Myers alleged that Cadot served Khan alcoholic beverages when it was apparent to Cadot that Khan was obviously intoxicated, and that such conduct was a proximate cause of Myers's injuries and damages.

Cadot filed a no evidence motion for summary judgment, an amended no evidence motion for summary judgment, and a traditional motion for summary judgment. In the amended no evidence motion, Cadot argued there was no evidence that "Khan displayed to Cadot obvious signs of intoxication at the time of service by Cadot to the extent that he was an immediate danger to himself and other persons," or that "Khan presented obvious signs of intoxication anytime that evening." In the

traditional motion, Cadot argued "the objective evidence" showed "that Khan was not exhibiting signs of intoxication, much less was any intoxication obvious." In support of the traditional motion, Cadot submitted an affidavit from Jones and excerpts from the depositions of Khan and Officer Williams.

Myers filed a hybrid response to the traditional and no evidence motions. In support, Myers submitted deposition excerpts from Khan, Officer Williams, and Jennifer Hoddy, the bartender who served Khan at Cadot. Myers also submitted the police report, Officer Williams' field report, the search warrant and accompanying documents, Cadot's responses and objections to Myers's interrogatories, an email between counsel regarding Khan's refusal to sign a medical authorization, and the affidavit of Dr. Cheney. Myers also filed a motion for continuance of the summary judgment hearing to allow him to depose Cadot's corporate representative.

The trial court granted Cadot's motion for summary judgment without stating the grounds for the ruling and entered a take nothing judgment against Myers. Myers filed a motion for new trial, which was overruled by operation of law. The trial court granted the parties' amended agreed motion for severance and severed the Cadot judgment from the rest of the underlying proceeding. This appeal followed.

STANDARD OF REVIEW

Orders granting summary judgment are reviewed de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). With respect to a traditional motion for summary judgment, we require the movant to demonstrate the absence of a genuine

issue of material fact and its entitlement to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). If the movant satisfies this burden, to avoid summary judgment the nonmovant then bears the burden of demonstrating a genuine issue of material fact. *Lujan*, 555 S.W.3d at 84. We credit all evidence favoring the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002).

The legal sufficiency standard that governs directed verdicts also governs no evidence summary judgment motions. *RTLC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 829 (Tex. App.—Dallas 2006, no pet.). To defeat a no evidence motion for summary judgment, the non-movant must produce evidence regarding each challenged element of each challenged claim that "would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004); *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *King Ranch*, 118 S.W.3d at 751 (internal quotation omitted). In reviewing a no evidence summary judgment, we consider evidence in the light most favorable to

the non-movant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *De La Cruz*, 526 S.W.3d at 592.

When a party files a hybrid summary judgment motion on both no evidence and traditional grounds, we first review the trial court's judgment under the no evidence standard of review. Should we determine summary judgment was appropriate under the no evidence standard, we need not address issues related to the traditional summary judgment motion. However, if the court is required to affirm the trial court's ruling on traditional grounds, then we only address the traditional grounds. *Regency Dev. & Constr. Services, LLC v. Carrington*, No. 05-18-00564-CV, 2019 WL 4051831, at *3–4 (Tex. App.—Dallas Aug. 28, 2019, no pet.) (internal citations omitted).

ANALYSIS

Myers brought his dram shop claim against Cadot pursuant to section 2.02(b) of the Texas Alcoholic Beverage Code, which provides:

> (b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that:
>
> > (1) **at the time the provision occurred it was apparent to the provider** that the individual being sold, served, or provided with an alcoholic beverage **was obviously intoxicated to the extent that he presented a clear danger to himself and others**; and

> (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

TEX. ALCO. BEV. CODE § 2.02(b) (emphasis added). Cadot's summary judgment motions addressed only the first element of Myers's dram shop claim. *See id.* § 2.02(b)(1).

In the amended no evidence motion, Cadot argued there was no evidence that "Khan displayed to Cadot obvious signs of intoxication at the time of service by Cadot to the extent that he was an immediate danger to himself and other persons," or that "Khan presented obvious signs of intoxication anytime that evening." In the traditional motion, Cadot argued "the objective evidence" showed "that Khan was not exhibiting signs of intoxication, much less was any intoxication obvious."

In support of the traditional motion, Cadot submitted an affidavit from Jones and excerpts from the depositions of Khan and Officer Williams. Cadot relied on Khan's testimony that:

- When he left Cadot, his speech was not slurred, he was not stumbling, he thought he was able to legally drive, and his eyes were not bloodshot or watery.
- He would not have driven if he felt intoxicated, and he did not believe the server thought he was intoxicated.
- He "was acting normal" at Cadot.
- Jones did not mention "any reservations or concerns" about him driving.

Cadot also cited to the following statement by Jones in her affidavit testimony as proof that Khan did not appear to be intoxicated at Cadot or afterward:

> At no time at Cadot or afterward did Nasar appear to be intoxicated. If he did appear intoxicated, I certainly would not have gotten into his car to get home after eating and I certainly would have insisted that he not drive and that he obtain a ride home. If necessary, under such circumstances, I would have driven him home, but I saw no reason for such because he in no way appeared to be intoxicated.

Cadot further relied on the following deposition testimony of Officer Williams:

- At the accident scene, Khan was sitting on the ground in the grass when Officer Williams arrived.

- Officer Williams "had no initial clue to make me think that Khan was intoxicated. I was just having that conversation, making sure he was okay, trying to get his story of how the accident happened."

- Khan looked "pretty disheveled," but Officer Williams "attributed that to the accident" and thought Khan's appearance "seemed normal for the circumstances that I was presented with when I showed up."

- None of the other responding officers said they thought Khan was intoxicated. But Officer Williams's sergeant told Williams that "he smelled an odor of alcohol from Mr. Khan, which is the – which is what prompted me to go to Medical City Plano" and interview Khan.

- Officer Williams agreed that he did not suspect Khan was intoxicated at the accident scene.

- At the hospital, Officer Williams "could not tell from just looking at Mr. Khan that he was intoxicated."

- Officer Williams did not observe Khan walk at the scene of the accident, but noted in his report that Khan's walk was normal.

- Officer Williams believed Khan's speech was normal at the accident scene and at the hospital.

- Officer Williams agreed that smelling alcohol on someone's breath "does not necessarily mean that a person is intoxicated." It just means they consumed alcohol.

- Williams answered "No" when asked if he had any evidence or reason to believe Khan was showing signs of intoxication when he was served drinks at Cadot.

Cadot cited to this testimony to argue that Officer Williams did not observe any signs of intoxication and, therefore, "there certainly could not have been obvious signs for Cadot to observe."[2]

But Section 2.02 does not require evidence that the provider actually witnessed the intoxicated behavior. *Perseus, Inc. v. Canody*, 995 S.W.2d 202, 206–07 (Tex. App.—San Antonio 1999, no pet.). Instead, for the conduct to be apparent to the provider, it must have been "visible, evident, and easily observed." *Id.* at 206. As the court noted in *Perseus*, if courts were to construe the statutory language "apparent to the provider" as a requirement that the plaintiff proffer evidence that the provider actually witnessed the intoxicated behavior, "then a provider of alcohol could always escape liability by merely turning a blind eye to signs of intoxication that are plain, manifest, and open to view." *Id.*; *see Beamers Private Club v. Jackson*, No. 05-19-00698-CV, 2021 WL 1558738, at *4 (Tex. App.—Dallas Apr. 21, 2021, pet. dism'd) (mem. op.) (citing *Perseus* and noting that fact finders can infer what was "apparent" by weighing evidence, assessing the credibility of witnesses, and

[2] On appeal, Cadot also cites its interrogatory responses, which were answered by Cadot's owner, Gerard Ghnassia. In response to Interrogatory No. 11, Cadot answered "Mr. Khan did not appear intoxicated at any point while he was at Cadot. He looked fine when he arrived, he looked fine as he chatted with me (Gerard Ghnassia), and he looked fine when he left Cadot. This is consistent with Mr. Khan's description of the way he appeared when he left Cadot on the evening in question as recited in his deposition."

drawing reasonable inferences from the evidence). Circumstantial evidence may also prove what was "apparent":

> Fact finders are always free to disregard the testimony of witnesses if they find it is not credible or is disproven by circumstantial evidence. *See City of Keller*, 168 S.W.3d at 827 (in legal sufficiency review we disregard contrary evidence unless reasonable jurors could not). In the end, the test for liability under the Act is an objective one. *Steak & Ale of Tex., Inc. v. Borneman*, 62 S.W.3d 898, 902 (Tex. App.—Fort Worth 2001, no pet.).

Beamers Private Club, 2021 WL 1558738, at *4.

In response to Cadot's no evidence and traditional motions, Myers presented evidence to raise a fact question concerning whether it was apparent to Cadot that Khan "was obviously intoxicated to the extent that he presented a clear danger to himself and others." That evidence included additional excerpts from the depositions of Khan, Officer Williams, and the bartender who served Khan at Cadot. For example, Khan stated in his deposition that he believed the server at Cadot should have observed that he was intoxicated at the restaurant:

> Q. (BY MS. RIVAS) Do you believe that the server should have observed that you were intoxicated while you were dining at Cadot Restaurant?
>
> MR. O'DEA: Objection to form.
>
> THE WITNESS: Yes.

He also agreed that the server at Cadot served him too much alcohol, and he was always in plain view of the server who served him at Cadot. But he could not remember exactly how many drinks he had at Cadot. Khan testified that "it was at

least three" but "it could be more" and "it could be four." He further confirmed that he did not eat at Cadot and was drinking on an empty stomach. His prior meal consisted of a protein shake and a sandwich at 6:00 p.m. Khan also agreed that he did not know if he was exhibiting any visible signs of intoxication that night.

Jennifer Hoddy, the bartender who served Khan, stated in her deposition that she did not remember the night in question. However, Hoddy was TABC certified. She testified that a person weighing between 225 and 250 pounds, like Khan, would have to drink eight drinks to have a BAC of 0.139. She also agreed that, based on her training, Khan would have been exhibiting signs of intoxication if he had eight alcoholic drinks that evening.

As for Officer Williams, although he testified that he did not see an obvious sign of intoxication from Khan at the accident scene, he also explained that his interaction with Khan on scene was limited and in the context of seeing if Khan was injured in the accident. Further, Officer Williams' incident/arrest report and deposition testimony included statements that he determined Khan was intoxicated at the hospital:

- At 1:00 a.m., he "detected signs of intoxication" from Khan. Those signs included the odor of "strong alcohol" on Khan's breath, his "watering" eyes and "disorderly" clothing, and that Khan "was very loud when speaking."
- When Officer Williams interviewed Kahn at Medical City Plano, Williams "immediately noticed an odor of alcoholic beverage emanating from his breath."

- Officer Williams administered the HGN test and "observed a total of 4 out of 6 clues." Officer Williams explained that "if you get four out of the six clues, they deem that that [sic] more than likely your subject is, is intoxicated."
- Based on his observations during the HGN test, Officer Williams said he "felt it was very unlikely that he had only had two beers."
- He also testified that he believes Khan would have been showing signs of intoxication at Cadot based on the BAC level when his blood was drawn at 3:06 a.m.
- Officer Williams also said "it's possible" that Cadot overserved Khan when he was showing signs of intoxication.

Myers also submitted the affidavit of Dr. Cheney, a forensic toxicology consultant. Dr. Cheney did not provide an opinion regarding whether Khan would have showed signs of intoxication at Cadot. However, he concluded Khan consumed ten to nineteen standard drinks at Cadot to have a BAC of 0.139 at 3:06 a.m. That testimony conflicted with Jones and Khan's contention that Khan drank a beer and three vodka drinks at Cadot.

Neither party presented conclusive, non-party evidence on the question of Khan's demeanor and conduct at Cadot. Cadot's summary judgment evidence was from interested parties who could be disbelieved by a jury as biased. *See Beamers Private Club*, 2021 WL 1558738, at *6 ("Despite these witnesses' statements that they saw no signs that Brent was intoxicated, jurors could have reasonably concluded that their statements were subject to personal interest and were not credible." (citing *City of Keller*, 168 S.W.3d at 819 (jurors are sole judge of credibility of witnesses)).

Myers, however, presented testimony and circumstantial evidence that contradicted the testimony of Khan, Ghnassia, and Jones presented by Cadot. Central to that evidence is Khan's concessions in his deposition that he was overserved at Cadot and the server at Cadot should have observed he was intoxicated. A reasonable jury could conclude Khan's own concessions establish that it was apparent to Cadot that Khan "was obviously intoxicated to the extent that he presented a clear danger to himself and others" when served at Cadot.

Moreover, Myers offered circumstantial evidence from which a jury could reasonably conclude it was apparent that he was intoxicated when he was served at Cadot. *Cianci v. M. Till, Inc.*, 34 S.W.3d 327, 331 (Tex. App.—Eastland 2000, no pet.) ("Any ultimate fact may be proved by circumstantial evidence."); *Pena v. Neal, Inc.*, 901 S.W.2d 663, 667 (Tex. App.—San Antonio 1995, writ denied) (circumstantial evidence created a fact issue about whether the defendant provided alcohol to an obviously intoxicated person). Myers's evidence included Officer Williams's testimony that Khan had an odor of alcohol on his breath at the hospital, failed the HGN test, and showed signs of intoxication such as watering eyes and loud speech at the hospital. Officer Williams also testified that he believed Khan would have been showing signs of intoxication at Cadot based on his BAC at 3:06 a.m. That testimony, combined with Khan's high BAC hours after leaving Cadot and the number of drinks Dr. Cheney concluded Khan drank at Cadot, was sufficient to raise a fact issue. *See*, *e.g.*, *Bruce v. K.K.B., Inc.*, 52 S.W.3d 250, 256 (Tex. App.—Corpus

Christi–Edinburg 2001, pet. denied) ("Although neither Villarreal nor Spaghetti Works's employees testified that Diosdado exhibited signs of intoxication while at Spaghetti Works, the above evidence is circumstantial evidence tending to prove the same."); *see also Love v. D. Houston, Inc.*, 67 S.W.3d 244, 248 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 92 S.W.3d 450 (Tex. 2002) (conflicting testimony between expert witness for plaintiff and defendant's manager created a fact question concerning whether server was aware of defendant's intoxication).

The evidence found sufficient in *Bruce* included the amount of wine consumed by the party, the driver's high BAC level at the time of the accident, and an expert's testimony that the party "would have been in a state of intoxication that would have been obvious to an ordinary observer, or to anyone who had any interaction with her during the time period from 5:00 to 6:15 p.m." *Bruce*, 52 S.W.3d at 256. There, as here, circumstantial evidence contradicted the testimony of defendant's employees that the plaintiff did not exhibit signs of intoxication. *Id.* That circumstantial evidence established a genuine issue of material fact regarding whether the plaintiff's intoxication was apparent to the provider and rendered the summary judgment improper. *Id.*

Similarly, in *Cianci*, a police officer and an expert on the effect of alcohol on the human body each testified that, based on the defendant's BAC immediately after the collision, the defendant would have been obviously intoxicated when served. *Cianci*, 34 S.W.3d at 331. That testimony constituted more than a scintilla of proof

that the plaintiff was obviously intoxicated and that his intoxication was apparent to the defendant when the defendant provided him with alcohol. *Id.* (reversing no evidence summary judgment); *see also Love*, 67 S.W.3d at 248 ("Because Dr. Leiser's testimony contradicts the testimony given by Donics, there is a fact question as to whether Treasures was aware of Love's intoxication.").

Under this record, we conclude there is evidence from which a jury could find that at the time Khan was served at Cadot it was apparent to Cadot that Khan "was obviously intoxicated to the extent that he presented a clear danger to himself and others." Cadot's summary evidence was insufficient to establish the right to judgment as a matter of law. Myers's evidence established a genuine issue of material fact regarding whether Khan's intoxication was apparent to Cadot. *See Bruce*, 52 S.W.3d at 256. Moreover, by granting summary judgment for Cadot, the trial court required Myers to present evidence that Cadot's employees witnessed Khan displaying intoxicated behavior, which is not the degree of proof required. *See*, *e.g.*, *Beamers Private Club*, 2021 WL 1558738, at *4. The trial court erred in granting Cadot's traditional and no evidence motions for summary judgment. We sustain Myers's first and third issues and do not reach Myers's second issue concerning the denial of his motion for continuance.

CONCLUSION

Myers presented sufficient evidence to raise a genuine issue of material fact and to support a finding that at the time Khan was served at Cadot it was apparent

to Cadot that Khan "was obviously intoxicated to the extent that he presented a clear danger to himself and others." The trial court, therefore, erred by granting summary judgment against Myers on his dram shop claim. Accordingly, we sustain Myers's first and third issues, reverse the trial court's judgment, and remand to the trial court for further proceedings consistent with this opinion.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BARRIE MYERS, Appellant	On Appeal from the 192nd Judicial District Court, Dallas County, Texas
No. 05-21-00988-CV V.	Trial Court Cause No. DC-21-16136. Opinion delivered by Justice Partida-Kipness. Justices Nowell and Kennedy participating.
RAOGER CORPORATION D/B/A CADOT RESTAURANT, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant BARRIE MYERS recover his costs of this appeal from appellee RAOGER CORPORATION D/B/A CADOT RESTAURANT.

Judgment entered this 5th day of July 2023.