[Cite as *Bailey v. Topline Restaurants, Inc.*, 2012-Ohio-1759.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kristi A. Bailey,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-359 (C.P.C. No. 07 CVC 8712)
Topline Restaurants, Inc., dba Lucky's Grille & Billiards et al.,	:	
Defendants-Appellees,	:	(REGULAR CALENDAR)
Mid-Continent Insurance Company,	:	
Interventor-Appellee.	:	

D E C I S I O N

Rendered on April 19, 2012

Blumenstiel, Evans & Falvo, LLC, James B. Blumenstiel, and *Aaron Falvo*, for Kristi A. Bailey.

Glowacki & Imbrigiotta, LPA, James L. Glowacki, James J. Imbrigiotta, and *William H. Kotar*, for Mid-Continent Insurance Company.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Kristi A. Bailey, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Mid-Continent Insurance Company ("Mid-Continent"), intervenor-appellee.

{¶ 2} On the evening of July 2, 2006, James Doty drank alcohol at Lucky's Grille & Billiards, which is a bar owned by Topline Restaurants, Inc., dba Lucky's Grille & Billiards, defendant-appellee (hereafter, "Lucky's" will refer to either the establishment or the party to this action, depending upon the context in which it is used). It is disputed whether, upon leaving Lucky's in his automobile, Doty was visibly intoxicated, struck another vehicle in the parking lot, and was approached by a Lucky's employee. Notwithstanding, Doty left Lucky's and proceeded onto Interstate 270 in Columbus, Ohio, traveling in the wrong direction. He subsequently struck a vehicle being driven by Bailey, who sustained serious injury. It is undisputed that Doty's blood alcohol level was over the legal limit under Ohio law.

{¶ 3} Lucky's had in place a commercial general liability insurance policy with Mid-Continent that provided coverage for "bodily injury." The insurance policy also contained a "liquor liability exclusion," which excluded coverage for any bodily injury or property damage for which the insured may be held liable by reason of (1) causing or contributing to the intoxication of any person, (2) the furnishing of alcohol to a person under the influence of alcohol, or (3) any statute, ordinance, or regulation regulating the sale, gift, distribution, or use of alcohol.

{¶ 4} On July 2, 2007, Bailey filed a negligence action against Lucky's. Mid-Continent defended Lucky's under a reservation of rights, claiming there to be no coverage under the policy due to the liquor liability exclusion. Lucky's maintained that the policy covered its conduct leading up to the accident. Mid-Continent then filed an intervenor complaint in the action, claiming there was no coverage for the incident based upon the liquor liability exclusion. Lucky's then refused to accept the legal representation offered by Mid-Continent, claiming a conflict of interest existed, and hired its own counsel.

{¶ 5} Subsequently, Lucky's and Bailey entered into a settlement agreement, in which Lucky's admitted liability, Lucky's confessed judgment in favor of Bailey in the amount of $1,500,000, Bailey released her claims against Lucky's, and Lucky's assigned its rights under the Mid-Continent insurance policy to Bailey. Mid-Continent did not participate in the negotiations regarding the settlement agreement and was unaware of any negotiations until after the agreement was entered into. The consent judgment was

filed on January 19, 2010. Thereafter, Bailey sought to recover from Mid-Continent the amount obtained in the consent judgment under a negligence theory.

{¶ 6} On July 1, 2010, Mid-Continent filed a motion for summary judgment, arguing that there was no coverage for the accident due to the liquor liability exclusion. Mid-Continent also argued that Bailey could not recover under the policy because Lucky's entered into the settlement agreement without Mid-Continent's knowledge, in violation of the cooperation and consent to settlement provisions in the policy. Bailey countered that the policy applied despite the liquor liability exclusion because Lucky's had a duty to prevent intoxicated drivers from driving, and it breached that duty when it had notice of Doty's intoxication after he was in the accident in Lucky's parking lot while he was visibly intoxicated.

{¶ 7} On January 19, 2011, the trial court granted Mid-Continent's motion for summary judgment, finding Lucky's was not negligent, and the liquor liability exclusion otherwise precluded coverage. Bailey appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The Trial [C]ourt erred in holding there was no evidence that any employee of Lucky's confronted Doty after he struck a car in Lucky's parking lot and failed to act with reasonable care to prevent foreseeable harm to Doty and the general public.
>
> [II.] The Trial Court erred in holding there was no admissible evidence that any employee of Lucky's was negligent in failing to prevent the accident.
>
> [III.] The Trial Court erred in holding there was no coverage under the Commercial General Liability section of Mid-Continent's policy.
>
> [IV.] The Trial Court erred in holding that Plaintiff-Appellant's claim for breach of contract and bad faith were moot due to no coverage and without merit.

{¶ 8} Bailey argues in her assignments of error that the trial court erred when it granted Mid-Continent summary judgment. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the

evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id*. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 9} Bailey argues in her first assignment of error that the trial court erred when it held there was no evidence that an employee of Lucky's confronted Doty after he struck a car in Lucky's parking lot and failed to act with reasonable care to prevent foreseeable harm to Doty and the general public. In seeking to find Lucky's negligent, Bailey relies heavily upon *Prince v. Buckeye Union Ins. Co.*, 5th Dist. No. 92-CA-6 (Dec. 2, 1992). In *Prince*, Prince was a passenger in a car driven by Gibson and was injured in an accident. Gibson had been drinking alcoholic beverages at a nightclub prior to the accident. Prince filed a complaint against the nightclub, and subsequently the nightclub's insurer, alleging that employees of the nightclub negligently served alcohol to Gibson knowing that he was intoxicated and that, after Gibson's car keys had been confiscated, the nightclub negligently returned his keys or allowed others to do so, and failed to notify authorities or take other actions to protect the public. The nightclub's insurance policy had a liquor liability exclusion similar to the one in the present case.

{¶ 10} The court of appeals in *Prince* adopted the trial court's finding that the policy did not exclude coverage for all liability against a person engaged in the business of

selling or serving alcoholic beverages, because to read the exclusion so broadly would exclude any coverage at all. The court found that liability was excluded only for those acts that were explicitly identified in the exclusion language. The court then held that the count of Prince's complaint that contained the allegation that the nightclub was negligent in allowing the return of Gibson's car keys, and knowing that Gibson was too drunk to drive, was independent of the sale or service of alcohol.

{¶ 11} Bailey also argues that, by permitting Doty to flee the scene of the accident in the parking lot while intoxicated, Lucky's aided and abetted Doty in violating R.C. 4549.02, which requires drivers involved in an accident to stop and exchange information; R.C. 4549.03, which requires a driver involved in an accident to stop and take reasonable steps to locate and notify the owner of the other vehicle; R.C. 4511.19, which prohibits the operation of any vehicle while under the influence of alcohol; and R.C. 2923.03, which prohibits one from aiding and abetting another in committing an offense.

{¶ 12} Furthermore, Bailey argues that Lucky's employee handbook directs staff to make sure an intoxicated patron does not leave the bar in such state, to try to find someone to take an intoxicated patron home, to provide cab fare for an intoxicated patron, to request an intoxicated patron stay and sober up before he or she leaves, to ask the intoxicated patron to give staff his or her car keys, to always involve a manger, and to stop a "situation" from escalating.

{¶ 13} Pursuant to *Prince*, the above Ohio Revised Code sections, and the employee handbook, what Bailey sought to prove below was that Lucky's knew of Doty's intoxication but negligently failed to call police, failed to take Doty's keys, failed to notify a manager, failed to assist him in becoming sober, and allowed him to leave the premises in his vehicle. To demonstrate Lucky's knowledge of Doty's intoxication, Bailey claimed Doty was slurring his words, was stumbling, had urinated on himself, had struck a car in the parking lot, and was confronted by a Lucky's waitress in the parking lot. On appeal, to establish these claims, Bailey cites to Doty's deposition, Doty's affidavit, and the deposition of Mark Lince, a bartender at Lucky's.

{¶ 14} We first note that, because we find under Bailey's second assignment of error that Doty's affidavit could not create an issue of fact due to its inconsistencies with his deposition testimony, we will examine only Doty's deposition testimony and Lince's

deposition testimony under this assignment of error. We also note that, for purposes of addressing Bailey's assignment of error, we will assume that Lucky's owed a duty to Bailey consistent with her negligence claim.

{¶ 15} Doty's pertinent deposition testimony was as follows. Doty testified that he did not have a clear recollection of the entire evening in question. He said he had a "blackout" during certain periods due to his alcohol intake. He defined a "blackout" as a total loss of memory, but he did not know how he specifically acted during one. He said by the time he blacks out, he is already slurring his speech and stumbling while walking. He admitted that he did not do anything inside of Lucky's to draw attention to himself, although he might have begun to talk louder immediately prior to blacking out. He testified that he had a blackout while leaving Lucky's restroom, and the next memory he had was at the scene of the accident after it had occurred. He remembered slurring his speech and stumbling prior to his blackout. He said he remembered being at the bar in that condition for "a while." He also testified that, during the period where he was slurring his speech and stumbling, no employees or management at Lucky's tried to stop him from drinking, he continued to drink alcohol after that point, no employees refused to sell him alcohol, no employees attempted to stop him from leaving the bar, and no employees tried to contact a taxi or get him a ride home from someone else. He believed he was noticeably intoxicated at Lucky's, and he "would think" that his intoxication should have been obvious to any sober person, bartender, or waitress. However, he recalled no conversations with any employees at Lucky's during the time that he thought his speech was slurred. He admitted that he did not know how he appeared to others after the blackout.

{¶ 16} Doty also testified that, as he left the restroom, he noticed something wet on the front of his pants, and then he blacked out after he left the restroom. He did not know what had caused the wetness. He said he had a "[v]ery vague recollection" of "an incident" in Lucky's parking lot. Doty said that, when he regained his memory at the hospital, he believed that the accident involving Bailey happened in the parking lot at Lucky's because he "vaguely remember[ed] something of an accident and a young lady coming up to me and that's about all I remember and I don't know what gave me the impression it was a parking lot but something did." He continued, "[i]t kind of meshes in with the accident

itself that happened later on so, I mean in my memory, so I guess I assumed it was all the same place." When he was asked whether he had reason to believe that he might have hit another car while leaving Lucky's, he responded, "Not to my knowledge, no." As for what he remembered about the woman who approached him in the parking lot, he said, "Not much. It looked like she had blondish hair. I don't remember if she said anything to me. I can't recall any exchange of words."

{¶ 17} Mark Lince, a bartender at Lucky's on the night in question, testified in his deposition that he remembered one woman that night was visibly intoxicated, so he and the other employees "cut her off," offered her water, and gave her a food menu. He said he did not deal with any intoxicated male patrons on the night in question. He said he never observed any type of accident in Lucky's parking lot on the night in question, but he "had heard something about one, but never saw the car or any part of it." He heard someone might have backed into someone's car in the parking lot, but he did not know if it was a customer or employee who told him. He was not informed of any description of the car or driver or any other details of the car accident. He never went outside to the parking lot to investigate. He thought Matt Pope, the manager on duty that night, might have already heard about the car accident or was nearby when he had been told about it. Lince did not know if any employees were outside when this accident occurred, and no employee told him that he or she witnessed it. He said he scanned the parking lot through a window, but nothing was unusual in the parking lot by the time he looked. He said he took no further actions with regard to the accident. He could never confirm that an accident happened in the parking lot, and no customer ever complained that his or her car had been struck that evening. He also said it was common that employees of Lucky's wore short sleeved t-shirts. He said Lucky's also sells Lucky's t-shirts to customers, and they also raffle them for free, so that someone wearing a Lucky's t-shirt would not necessarily be an employee.

{¶ 18} After reviewing the above testimony, we can find no genuine issues of material fact. Bailey contends that there was ample evidence from Lince and Doty that there was an accident in the parking lot, Doty was confronted, Lucky's was on notice, and no reasonable care was exercised by Lucky's. We disagree. To be sure, Doty's testimony was uncertain and unreliable in several respects. He admitted at the start of his testimony that he did not have a clear recollection of the evening due to his alcohol intake. He also

admitted early in his testimony that he had a complete blackout period starting after he exited the restroom until he was in the hospital; yet, he then went on to later testify about memories from the parking lot, which raises a question about the reliability of the testimony. Even so, he called the memories from the parking lot "very vague." Doty also admitted that he did not know how he acted during his blackouts, leaving a total void in his argument that he was acting in such a way that Lucky's should have known he was intoxicated. Accordingly, from the outset, even Doty admits his testimony should be viewed cautiously.

{¶ 19} Notwithstanding, even if we were to believe Doty's testimony, a careful review of Doty's actual testimony reveals that he fails to establish any requisite knowledge on Lucky's behalf. Although Doty testified that he was slurring his speech and stumbling while walking, and that any Lucky's employee would have been able to recognize his intoxication, he never testified that any Lucky's employee ever actually witnessed his alleged condition. He admitted that he remembered no interaction with any Lucky's employee during the period his speech was slurred, outside of his ordering drinks. Furthermore, although Bailey claims that Doty had urinated on the front of his pants, and apparently seeks to use this description to support her assertion that someone at Lucky's should have noticed his intoxication, Doty's testimony actually was that he did not know what had caused the wetness, and Doty never described the size of the wet spot. Therefore, none of this testimony aids Bailey.

{¶ 20} As for Doty's testimony about the alleged car accident in the parking lot, as mentioned above, Doty said his recollection of it was "very vague." He explicitly admitted that he had no reason to believe that he might have hit another car in the parking lot while leaving Lucky's. In addition, he vaguely remembered a young lady coming up to him in the parking lot, but he in no way testified that she was an employee of Lucky's. He said he did not remember "much" about the lady, except her hair color, and he did not remember her saying anything to him. This testimony entirely fails to establish that Doty was in an accident in the parking lot and does not establish that any employee of Lucky's saw him in the parking lot.

{¶ 21} Lince's testimony is equally lacking. Lince did not witness any male who was intoxicated at Lucky's on the night in question. Lince did not witness any car accident

in the parking lot, and he knew of no employee who witnessed any car accident. Although he did testify that he "heard something" about an accident in the parking lot, he never testified that he heard it involved any intoxicated persons, and he was never given any description of those involved or any details of the accident. He glanced out a window after hearing about the accident in the parking lot, but he saw nothing in the parking lot. Also, no customer ever complained about a damaged vehicle. For all of these reasons, we find neither Lince's nor Doty's testimony raises any genuine issue of material fact demonstrating any knowledge on behalf of Lucky's as to Doty's intoxication on the night in question. Therefore, we find the trial court did not err when it granted summary judgment. Bailey's first assignment of error is overruled.

{¶ 22} Bailey argues in her second assignment of error that the trial court erred when it held there was no admissible evidence that any employee of Lucky's was negligent in failing to prevent the accident. Bailey presents two arguments. Bailey first contends under this assignment of error that the trial court erred when it would not consider Doty's affidavit based upon its inconsistency with Doty's prior deposition testimony. The Supreme Court of Ohio has held that "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28. When a party opposing summary judgment presents an affidavit inconsistent with the affiant's prior deposition testimony, the trial court must consider whether the affidavit contradicts or merely supplements prior testimony. *Id*. at ¶ 29. "A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created." *Id*.

{¶ 23} In the present case, the trial court found that it could not consider Doty's affidavit because it contradicted his deposition testimony with respect to whether he urinated on his pants, his memory after blacking out, and his memory of the accident in the parking lot. We agree. As mentioned before, Doty explicitly stated in his deposition that he did not know what the wetness was on the front of his pants after leaving the restroom, but in his affidavit he said conclusively that he had urinated in his pants. This is a contradiction. Also, Doty testified clearly in his deposition that he blacked out as he left

the restroom, but in his affidavit, Doty averred numerous new facts occurring after the time he had said in his deposition that he had blacked out, including that he had returned to the patio, he drank several more drinks, he was served by the same waitress on the patio and inside the bar, any Lucky's employee would have noticed that he was stumbling and slurring while on the patio, any Lucky's employee would have noticed he urinated on himself, and any employee taking a drink order from him would have seen he was intoxicated and smelled of urine. That Doty claimed in his deposition to have blacked out is in complete contradiction to these statements from his affidavit.

{¶ 24} Furthermore, Doty testified in his deposition that he had no reason to believe that he might have hit another car in the parking lot while leaving Lucky's, he had only a vague recollection of the parking lot, and he remembered only that a "young lady" with blondish hair came up to him in the parking lot, although he did not remember her saying anything to him. To the contrary, he averred in his affidavit that the "girl" was of medium build; her hair was shoulder length; she wore a short sleeved t-shirt; the shirt was similar to the ones worn by waitresses at Lucky's; the shirt resembled the t-shirts in a photographic exhibit depicting Lucky's waitresses; the parking lot was well lit; his car was angled outside of a designated parking slot; the car looked as if it had already been moved; neither police nor a manger appeared while he was in the parking lot; the girl with blonde hair was not friendly; the girl spoke to him; she spoke with a tone of urgency; the conversation could have been short; the conversation was no more than a minute or two; he did not recall the girl with blonde hair asking him for his keys, offering him to call a cab, offering him to have a friend drive him home, offering him coffee, bringing out a manager, or calling the police; and the girl then returned to the bar after his confrontation with her. Clearly, Doty's deposition testimony that he had only a vague recollection of the parking lot, his minimal description of the girl, and his testimony that there was nothing that made him believe he had been in a car accident in the parking lot was completely contradicted by the extremely detailed account given in his affidavit.

{¶ 25} For the above reasons, Doty's statements in his affidavit cannot be considered merely supplemental to his deposition testimony. His affidavit statements completely contradict his deposition testimony. Although Doty could have created a genuine issue of material fact by sufficiently explaining in his affidavit these

contradictions, *Byrd* at ¶ 29, he failed to do so. Therefore, we find the trial court did not err when it failed to consider Doty's affidavit.

{¶ 26} Bailey also argues under this assignment of error that the trial court erred when it failed to consider the information contained in Lucky's responses to Bailey's requests for admissions. Mid-Continent objected to the trial court's consideration of Lucky's responses to Bailey's requests for admissions, claiming that Lucky's admissions were not binding upon Mid-Continent because it never agreed to the admissions, and the admissions were a "sham" lacking in factual basis. The trial court agreed, finding that Lucky's admissions were not binding upon Mid-Continent because Civ.R. 36 admissions constitute stipulations between opposing parties that may not be used against a party who has refused to agree.

{¶ 27} Bailey argues here that it did not seek to have Lucky's admissions be "binding" upon Mid-Continent. Instead, Bailey argues that the two owners of Lucky's, John Lince and Michael Holland, testified in their depositions that they participated in the responses and would not withdraw any of the admissions as inaccurate, and the responses were then incorporated by reference and attached as an exhibit to their depositions. In support of her claim that the trial court should have considered the responses, Bailey cites the following: "The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Skidmore & Assoc. Co., L.P.A. v. Southerland*, 89 Ohio App.3d 177, 179 (9th Dist.1993).

{¶ 28} We find Bailey's argument not well-taken. Apparently, Bailey is conceding that the admissions are not specifically authorized by Civ.R. 56(C) because they are not binding upon Mid-Continent. Thus, to utilize Civ.R. 56(E), as Bailey urges, the evidentiary material must be incorporated by reference in a properly framed affidavit. However, Lucky's responses to Bailey's requests for admissions were not incorporated by reference in a properly framed affidavit. Rather, the responses were incorporated by reference in depositions, which Civ.R. 56(E) does not mention. Bailey cites no authority that this rule in Civ.R. 56(E) applies equally to depositions, as well as to affidavits. Therefore, this argument must be rejected. For these reasons, Bailey's second assignment of error is overruled.

{¶ 29} Bailey argues in her third assignment of error that the trial court erred when it held there was no coverage under the commercial general liability section of Mid-Continent's policy. Bailey indicates that her argument is based upon the same arguments set forth in her first assignment of error, which we have already rejected. Therefore, we must overrule Bailey's third assignment of error.

{¶ 30} Bailey argues in her fourth assignment of error that the trial court erred when it held that her claims for breach of contract and bad faith were moot. The trial court found that Bailey's claims against Mid-Continent for breach of contract and bad faith were premised upon the notion that there was coverage for negligence under the policy. The court then concluded that, having already established there was no admissible evidence that Lucky's was negligent in failing to prevent the accident with Bailey, and, thus, there was no coverage under the insurance policy, the claims against Mid-Continent for breach of contract and bad faith were moot because Mid-Continent had no duty to defend claims not covered by the policy.

{¶ 31} Bailey contends under this assignment of error that, if this court reverses the trial court's ruling that there was no coverage under the insurance policy, then the issues of breach of contract and bad faith are not moot. However, given our determinations under Bailey's other assignments of error, and therefore our same conclusion as the trial court that there was no coverage under the insurance policy, we must also find the claims for breach of contract and bad faith are moot. Therefore, Bailey's fourth assignment of error is overruled.

{¶ 32} Accordingly, Bailey's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and DORRIAN, JJ., concur.

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