CASENOTE: BAR NOT LIABLE UNDER RESPONDEAT SUPERIOR

LAWATYOURFINGERTIPS ®
BY JAMES GRAFTON RANDALL

MSJ in favor of Bar affirmed in case involving wrongful death of employee's girl-friend. The employee's drinking at work was not a customary incident of the employment relationship. The employee, "at the time of the drinking, was not performing any work-related service to [the employer]. The drinking was neither required, nor an incident to his job; it was purely for his own personal benefit, prompted by his own personal motivations.

Filed 10/31/16 Moore v. The Little Rock CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

ROBIN MOORE et al., Plaintiffs and Appellants, v. THE LITTLE ROCK, INC. et al., Defendants and Respondents.	B266221 (Los Angeles County Super. Ct. No. BC529976)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elia Weinbach, Judge. Affirmed.

James R. Noblin, Matthew E. Hess; Donald R. Liddy and David R. Shoop for Plaintiffs and Appellants.

Turner Aubert & Friedman and Jack L. Henningsen for Defendants and Respondents.

Amber Wuebel was killed when her boyfriend, Jorge Jimenez, became intoxicated at the bar in which he worked and subsequently drove into a tree. Amber's parents sued Jimenez's employer, contending he was acting in the course and scope of his employment when he became intoxicated at the bar. The trial court granted summary judgment to the defendants.[1] We affirm the judgment.

FACTS

The Little Rock Bar and Grill (Little Rock) is owned by Nada Popovic and Paul David Jabra. Jimenez worked there part-time as a security guard. Jimenez worked the night of December 12, 2011, but left at midnight to celebrate his birthday with his friends. The next night, Jimenez dropped off a set of keys belonging to Little Rock and stayed to celebrate his birthday with Amber. Jimenez was served six drinks, though it is unclear who paid for them. The staff and patrons at Little Rock sang happy birthday to him and one other customer. Jimenez left with Amber shortly after midnight. On the way home, Jimenez drove the car into a tree. Amber's skull was fractured and she broke her neck. She died a few days later. She was two weeks pregnant. A toxicology report showed Jimenez had a blood alcohol level of 0.12 percent, well above the legal limit. He also tested positive for marijuana and methamphetamine.

Amber's parents sued Little Rock and its owners for negligence and wrongful death. They contend Little Rock was responsible for Jimenez's tortious conduct based on

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[1] The defendants are Little Rock, Inc., Nada Popovic and Paul David Jabra, whom we collectively refer to as Little Rock.

the doctrine of respondeat superior. Amber's parents set forth the following factual allegations. Little Rock's owners have a habit of hiring regular customers who liked to drink. Further, Little Rock encouraged its employees to spend their off-duty time at the bar; each employee was entitled to a free drink after each shift and thereafter could buy as many drinks as they wanted. Little Rock gave out drink tickets to customers and employees for their birthday as well as the bar's anniversary and Popovich's birthday. As a result, Little Rock fostered an atmosphere where its employees often drank and socialized at the bar, thus benefitting the bar by creating loyalty and a tight bond with its customers. Due to this atmosphere, it was foreseeable that Jimenez would become intoxicated at the bar, causing the accident which killed Amber.

Little Rock moved for summary judgment on the ground it could not be civilly liable for serving too much alcohol to Jimenez. Further, Jimenez was not acting in the course and scope of his employment when he was drinking alcohol that night. Both parties agreed Little Rock could not incur liability for serving alcohol to Jimenez if he was only a patron of the bar and not an employee. (Bus. & Prof. Code, § 25602, subd. (b).) The trial court granted summary judgment, finding no evidence Jimenez was acting in the course and scope of his employment at the time of the incident. Amber's parents timely appealed.

DISCUSSION

Amber's parents claim they raised a triable issue about whether Jimenez's drinking at the bar that night was within the course and scope of his employment. Amber's parents urge us to allow a jury to determine whether Little Rock is liable for Amber's death under a theory of respondeat superior. Under that theory, an employer may be liable for an employee's tort if the employee's conduct was foreseeable or if it was required by or incident to his duties. (*Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, 509-513 (*Purton*).)

In support of this argument, Amber's parents contend they presented evidence showing Little Rock's owners encouraged a "party atmosphere" by frequently hiring hard-drinking customers to become employees and providing them with free drinks. As a result, the employees worked for low wages and stayed at the bar to socialize even when they were off-duty, a practice which benefitted the bar and had become a customary incident of employment. Amber's parents also contend Little Rock's owners invited Jimenez to celebrate his birthday at the bar, promising him free food and drink. Indeed, Jimenez was served five Jack Daniels and Coke, plus a shot or more of hard liquor. They contend Jimenez's intoxication that night was foreseeable and incident to his duties. We disagree

I. Standard of Review

When a defendant moves for summary judgment, the defendant "bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the defendant meets its initial burden, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) The plaintiff "'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.) "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (*Id.* at p. 476.)

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material

issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.)

II. California Law Addressing Respondeat Superior Doctrine

"Under the doctrine of respondeat superior, an employer is liable for the torts of his employees committed within the scope of their employment. [Citation.] The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of employment. [Citations.]" (*Harris v. Trojan Fireworks Co.* (1984) 155 Cal.App.3d 830, 835 (*Harris*).) Whether an act is within the scope of employment is often a question of fact. Where the facts are undisputed, however, and no conflicting inferences are possible, the question is one of law. (*Ibid.*)

In cases involving negligent conduct, a tort may be committed within the scope of employment if either (1) the employee's act or conduct was foreseeable, or (2) the employee's act or conduct was required by or incident to his duties. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209; *Purton, supra,* 218 Cal.App.4th at pp. 509-513; Wilcox, California Employment Law, Ch. 30, § 30.05 (Matthew Bender).) In the context of respondeat superior, the conduct is "foreseeable" if it is not so unusual or startling that it would seem unfair to include the resultant loss among the other costs of the employer's business. (*Purton, supra,* at p. 513; *Bailey v. Filco* (1996) 48 Cal.App.4th 1552, 1559.) "Respondeat superior liability demands a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer." (*Bailey, supra,* at p. 1560.) "Yet another way to describe the necessary linkage is the employee's tort must be '*foreseeable in light of [the employee's] duties.*" (*Ibid.*) Moreover, an employer is not responsible for injuries resulting from an employee's social or recreational activities that are not in some way connected to or "'"'"broadly incidental'"'"' to the employer's enterprise. (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003.)

Of particular relevance to this matter are a line of cases which address when an employer may be liable for the tortious conduct of an employee stemming from social or

recreational activities that occur after work hours. In these cases, the employee's conduct has been held to be within the course and scope of employment only if the social or recreational activity: (1) is carried out with the employer's stated or implied permission and (2) it provides a benefit to the employer or has become customary. (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 620 (*Rodgers*); *McCarty v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 677 (*McCarty*), *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792 (*Childers*), *Harris, supra,* 155 Cal.App.3d 830; *Purton, supra,* 218 Cal.App.4th at p. 502; see also CACI No. 3726.)

The leading case in this area is *Rodgers, supra,* 50 Cal.App.3d 608. There, two employees became intoxicated after their shifts and assaulted two victims at a construction site. The jury found the employer liable for the victims' injuries. (*Id.* at p. 620.) In upholding the verdict, the appellate court reasoned, "California has adopted the rationale that the employer's liability should extend beyond his actual or possible control over the employees to include risks inherent in or created by the enterprise because he, rather than the innocent injured party, is best able to spread the risk through prices, rates or liability insurance." (*Id.* at p. 618.) "One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer. [Citation.]" (*Id.* at pp. 618-619, italics omitted.)

The *Rodgers* court then applied the test created by the California Supreme Court in *McCarty, supra,* 12 Cal.3d at p. 680, a workers' compensation case. There, death benefits were ordered to be paid to the wife of an intoxicated employee who was killed when he drove his car into a light pole after attending a company Christmas party. (*Id.* at p. 682.) The *McCarty* court held, "[e]mployee social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, falls within the course of employment if the 'activity was conceivably of some benefit to the employer. . . .' [Citations.]" (*Id* at pp. 681-682, fn. omitted.) The court reasoned the employer permitted recurrent drinking parties on the premises, routinely used company accounts and funds to purchase alcohol, and demonstrated it considered these gatherings to be company activities. (*Id.* at p. 680.) Further, the gatherings served to foster camaraderie and to provide an occasion to discuss company business. (*Id*. at pp. 682-683.)

The *Rodgers* court concluded substantial evidence supported the jury's finding of liability under the *McCarty* test. The evidence showed it was customary for employees to drink beer with their supervisors on the premises after work. Moreover, the employees were allowed to remain on the premises after their shifts in case the employer needed additional workers for overtime, thus benefitting the employer. (*Rodgers, supra,* 50 Cal.App.3d at p. 620.) As a result, the verdict was consistent with the rationale underlying the doctrine of respondeat superior, that is, it was foreseeable in the context of the particular enterprise. (*Id.* at pp. 619-620.)

The *Childers* court applied the *McCarty/Rodgers* test to conclude an employee was acting in the course of her employment when she drove her truck off the road while driving a coworker to her home after work, thus injuring him. (*Childers, supra*, 190 Cal.App.3d at p. 802.) They had been drinking beer and hard liquor provided by the employer at the employer's auction yard after their shifts ended. It was indisputably a regular practice for employees and customers to consume alcoholic beverages in the auction yard both during and after work. The appellate court agreed with the plaintiff's con-

tentions that the negligent coworker "consumed alcohol in the scope of her employment, that [her] consumption created a risk of danger, and that the risk was a proximate cause of the accident and of plaintiff's injuries, so that the employer is properly liable . . . ." (*Id.* at pp. 802-803.) The court observed that alcohol abuse was foreseeable and extremely dangerous, and innocent people may be injured or killed "as a consequence of the negligence of those who have consumed alcohol at events that otherwise benefit a commercial enterprise. . . . We think that if a commercial enterprise chooses to allow its employees to consume alcoholic beverages for the benefit of the enterprise, fairness requires that the enterprise should bear the burden of injuries proximately caused by the employees' consumption." (*Id.* at p. 810.)

In *Harris*, the trial court granted nonsuit to the defendant employer, finding the evidence insufficient to prove the employee was acting within the scope of his employment when he drove his truck over the median divider and struck the plaintiffs' car in a head on collision. The employee had participated in a potluck luncheon at the employer's premises that day. After the potluck ended and the office had closed, he drank beer and whisky with several coworkers in the employer's parking lot for several hours. (*Harris, supra,* 155 Cal.App.3d at pp. 833-834.) The court affirmed the grant of nonsuit, finding as a matter of law that the plaintiffs' injuries did not result from the employee's normal activities as an employee. (*Id.* at p. 836.)

The Harris court held undisputed facts failed to show employer involvement sufficient to bring the employee's conduct within the scope of his employment. In particular, there was no evidence the drinking in the parking place was "conceivably of any benefit to [the employer] or that the drinking at work had become a customary incident of the employment relationship." (*Harris, supra,* at p. 836.) The employee was not performing any work-related service, the drinking was neither required, nor an incident to his job; it was purely for his own personal benefit, prompted by his own personal motivations, and was not remotely connected to his attendance at the potluck luncheon, where liquor was

forbidden. There were no facts to show that the employer furnished the food, required anyone to attend, paid anyone for attending, or served or furnished any alcoholic beverages at the potluck luncheon. (*Id*. at p. 836.)

In *Purton*, an employee consumed alcoholic beverages at a company holiday party and became intoxicated. The employee arrived home safely but then left to drive a co-worker home, when he struck another car and killed its driver. The trial court granted summary judgment for the employer. (*Purton, supra,* 218 Cal.App.4th at p. 502.) The appellate court reversed on the ground that a reasonable trier of fact could find the employee acted negligently by becoming intoxicated at the party, that this act was within the scope of his employment and proximately caused the car accident that resulted in the other driver's death. (*Id.* at p. 506.)

The appellate court noted, "the evidence shows that the [employer] provided alcohol and permitted the consumption of alcohol brought to the party by [the employee]. While [the employer] initially planned to serve only beer and wine at the party, [a supervisor] served guests Jack Daniel's from the [employer's] liquor stock and actually refilled [the employee's] flask from that bottle of Jack Daniel's. [The supervisor] also had a bottle of Fernet Branca under the bar from the Hotel's liquor room that she shared with certain people." (*Purton, supra,* at p. 509.) Witnesses testified the party was held as a "thank you" for its employees and the purpose of the party was "'[c]elebration, employee appreciation, holiday spirit, [and] team building.'" (*Id*. at p. 509.) The court concluded, "the evidence shows that the party and drinking of alcoholic beverages were not only of a conceivable benefit to [the employer], but were also a customary incident to the employment relationship." (*Id*. at p. 509.)

III. Some Proffered Evidence Was Not Admissible or Probative to the Issue

In its moving papers, Little Rock submitted surveillance video along with declarations from Popovic and Jabra, the owners of the bar, and the two bartenders working that night, Aleksandra Kosmala and Michael Fielding. The parties do not dispute Little Rock

met its initial burden to negate a necessary element of Amber's parents' case—whether Jimenez was acting within the course and scope of his employment that night. They further agree the burden then shifted to Amber's parents to show a triable issue of material fact exists. Before turning to whether they fulfilled this burden, we examine the evidence they provided and conclude some was not admissible.

A. The Statements Made to the Police Were Properly Excluded

We first consider the admissibility of statements made to the police which were proferred by Amber's parents in the form of police reports. They contend the trial court improperly excluded the evidence on hearsay grounds. We disagree.

Hearsay "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Except as provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).) We review a challenge to the admission of evidence pursuant to a hearsay exception under the deferential abuse of discretion standard of review. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 787.) A trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Brown* (2003) 31 Cal.4th 518, 540-541.)

The police reports show statements made to police by two Little Rock bartenders during the investigation. Specifically, the police interviewed Jennifer Svastics, a bartender who was working for Little Rock earlier that night. Svastics reported to the police that she worked from 4:00 p.m. to 9:00 p.m. and stayed afterwards because a friend was having a birthday there. She saw Jimenez drink one drink and she bought him a shot. She further told police that generally when people come in for birthdays they get a couple of drink tickets. Another Little Rock bartender, Joli Dutro, told the police she was not at the bar the night of the accident but received information from a different bartender,

"Faryn," who was working that night. Faryn told Dutro that Jimenez was drinking a lot and that a few people offered him a ride home because they felt he had too much to drink. Dutro then reported to the police that "you are only allowed 3 drink tickets on your birthday."

Svastics' statements in the police report were inadmissible hearsay. The statements were not in a declaration from Svastic describing what happened that night. Instead, they were Svastic's unsworn statements to police presented into evidence by a police report. Dutro's statements fare even worse as they are double hearsay -- Dutro was not present at the bar that night. Indeed, Dutro relayed information to police which was told to her by bartender Faryn.

We reject Amber's parents' argument that the statements are admissible for their truth because they constitute a declaration by a party opponent under Evidence Code section 1220 and are declarations against interest under Evidence Code section 1230.[2] While it is true that "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." (Evid. Code, § 1220), neither Dutro nor Svastic are parties. We further acknowledge that, " . . . a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it

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[2] In the reply brief, Plaintiffs add another hearsay exception – the official records exception specified in Evidence Code section 1280 – to argue the police reports were admissible. Courts have admitted a police report under section 1280 if it is based upon the firsthand observations of a public employee who had a duty to observe facts and report and record them correctly. (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 431-432; *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 738.) This is not the case here. The challenged report did not contain firsthand observations, but merely second- and third-hand statements by Little Rock bartenders, which lack the required indicia of trustworthiness.

to be true." (Evid. Code, § 1230.) However, Amber's parents do not contend either of them was unavailable as a witness or that the statements were against their own interests. Indeed, the record plainly shows Svastic was available to and did testify in a deposition, the transcript of which was submitted by Amber's parents in their papers.

B. The Video and Text Message Evidence Was Either Not Accurately Represented or Not Probative

Amber's parents also relied on text messages, video recordings, and certain testimony from Popovic and Jabra to support their contention that Jimenez was acting within the course and scope of his employment that night. We find the evidence was either inaccurately represented—that is, it simply did not show what Amber's parents said it did—or it was not probative.

First, Amber's parents relied on text messages[3] between Popovic and Jimenez on Monday, December 12, 2011. They indicate that at 9:10 p.m., Jimenez asked Popovic, "Hi Nada . . . Sry to bother u . . . I want to order food and cigz and pay for that on weds if thats ok . . . Im broke and need todays 60 for cable bill…Plzzz[.]" Popovic agreed, directing Jimenez to ask Alex, "to write it on the wall that it will be paid Wednesday." Approximately two hours later, at 11:19 p.m., Jimenez asked Popovic whether he could get off work at midnight instead of 2:00 a.m. "cuz it will b my bday and I want to celebrate it with the guys[.]" Popovic agreed, asking him to lock the back door with the key and turn off the alarm. Jimenez then asked, "Can I still get paid 60 and take the diff off on weds for my cable plz.. It will b the best and only bday gift I get . . ." Popovic wished him a happy birthday and stated, "You don't have to pay back on Wednesday and Paul is gonna comp your food and cigs so no tab, show this to Alex" She added, "Hopefully Alex will buy you a drink . . ."

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[3] Due to their informal nature, the text messages are replete with typographical errors, which we do not correct.

The parties provide different interpretations of this series of text messages. According to Amber's parents, Popovic offered to "comp" Jimenez's cigarettes and food for the following night, December 13, 2011, when he was there to celebrate his birthday with Amber. Little Rock disputes that interpretation, arguing the messages relate to events occurring on December 12, 2011, when Jimenez was working.

The interpretation of this series of text messages goes to the crux of Amber's parents' theory that Little Rock invited Jimenez to celebrate his birthday at the bar and contributed free food and cigarettes. Having reviewed the entire record, it is apparent Amber's parents either misinterpreted or misrepresented the meaning of the text messages. The evidence is undisputed that Jimenez was paid in cash every time he worked at the bar. Bartender Kosmala testified she took money—usually $60 or $65—out of the register to pay Jimenez when he worked. It is also undisputed Jimenez was working the night of December 12, 2011.

With that in mind, it is clear Jimenez asked Popovic at 9:10 p.m. whether he could order food and get cigarettes, but pay for them on Wednesday, December 14, 2011, because he needed the $60 he was to be paid for his work on Monday to pay his cable bill. Later, he asked Popovic if he could leave two hours early to celebrate with his friends, but still be paid $60 and take the two hour difference out of his pay on Wednesday, the next night he was to work.

Popovic discussed the text messages in her declaration in support of the motion for summary judgment. In her deposition testimony, which is also relied upon by Amber's parents to show Jimenez was given a free drink the night of his "birthday party" at the bar, Popovic stated:

> "Q. And do you know if he was given drinks in the early morning of December 13th?

A. No, I have no idea.

Q. Would it surprise you if he was given drinks that morning?

A. Would it surprise me? It wouldn't. It wouldn't surprise me."

The text messages are not ambiguous. They relate to events occurring the night before the accident and are not probative to show Little Rock "hosted" a birthday party for Jimenez.

Next, Amber's parents cite to their attorney's declaration stating she observed video footage provided by Little Rock during discovery "and at 22:20:30 [10:20 pm.] and 22:23:28 [10:23 p.m.] Jimenez picks up a free drink from the bar." The video consists of two DVDs which document Jimenez's activities, beginning with his arrival at 8:42 p.m. on December 13, 2011, and ending with his departure at 12:12 a.m. on December 14, 2011. At 10:20 p.m., the video shows Jimenez playing pool when two other men come into the picture with drinks already in their hands, which they place on the bar. Jimenez does not have a drink. At 10:23 p.m., Jimenez approaches the bar, but it is unclear what he does there because his back is to the camera and most of his body is out of the frame. Contrary to what Amber's parent contend, the video does not show Jimenez picking up any drinks during the relevant time period. After its review of the video, the trial court concluded, "There is nothing that appears to be an exchange of drinks, free or otherwise, in the section of the video." We have reviewed the DVDs and agree. The videos are also not probative.

Additionally, Amber's parents quote Jabra's admission in his deposition that he had no idea whether the drinks were paid for by a customer, employee, or by the bar. However, it is undisputed Jabra was not at the bar the night of December 13, 2011, and thus, would not have knowledge of who paid for Jimenez's drinks on the night of the accident. Jabra's admission is irrevelant.

IV. The Remaining Evidence

The remainder of Amber's parents' evidence is supported by the record and is relevant to the contention that there existed a "free and easy" relationship between the bar staff and its customers. Amber's parents cited to Kosmala's deposition, in which she testified Jimenez was served "about" five "Jack and Cokes." Amber's parents also relied on Little Rocks' interrogatory response explaining, "as testified to by Jennifer Svastics in her deposition . . . a bar customer purchased a round of shots for several other bar customers, including Ms. Svastics (who got off her shift nearly three hours earlier at 9:00 p.m.), and Ms. Svastics picked up the shots on a tray from the bar and distributed them to the group of customers, including one for Mr. Jimenez." Amber's parents then quoted from Svastics' admission during deposition that she had in the past given customers free drinks when they presented a drink ticket and that, in the past, she had seen people get a free drink when they presented a drink ticket. They also relied on Svastics' testimony that employees received a free drink after work as a part of their compensation. Amber's parents highlight Popovic's admission that she used to play pool with Jimenez when he was a customer, but she did not play pool with him that night. Popovic testified she often hired regular customers to work at the bar.

To highlight the "free-wheeling" nature of Little Rock, Amber's parent's point to photographs, including one of Jimenez appearing to drink three Jack and Cokes simultaneously on the night of Amber's death and several of Little Rock owners and employees dressed up for parties at the bar. Amber's parents also cite to Svastic's testimony she came in the bar "a few times a week" on her days off to shoot pool and drink beer.

None of this undisputed evidence, however, presents a triable issue of fact, as we discuss below.

A. Jimenez's Negligence Was Not Foreseeable or Incidental to His Work

To create a triable issue, Amber's parents must set forth specific facts to show Jimenez's conduct was foreseeable. In *Perez v. Van Groningen & Sons* (1986) 41 Cal.3d 962 (*Perez*), the California Supreme Court adopted the foreseeability test articulated in *Rodgers*: "A risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. [Citation.]'" (*Perez, supra,* 41 Cal.3d at p. 968, quoting *Rodgers, supra,* 50 Cal.App.3d at p. 619.) The court went on to explain, "Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise. [Citation.] The enterprise in question, we have noted, is the work . . . performed by the employee." (*Perez,* at p. 968.)

Here, the risk inherent in or created by the "enterprise"—the work performed by Jimenez—is not the risk of death as a result of driving while intoxicated. In other words, Amber's parents have failed to fulfill their burden to show the requisite nexus between Jimenez's negligence and his job as a security guard. Jimenez was tasked with monitoring the bar for drunk or unruly guests, escorting them from the premises if necessary, and locking the alarm near the back door on occasion. His conduct on the night of December 13, 2011—becoming intoxicated and causing Amber's death—was unconnected with his employment. As a result, the risk caused by his intoxication was not foreseeable under *Rodgers* and *Perez*. Indeed, it would seem unfair to include liability for Amber's death as a part of the costs to Little Rock's business.

Amber's parents argue Jimenez's intoxication that night was a foreseeable result of Little Rock's invitation to celebrate his birthday there. Amber's parents assert that a reasonable juror could find that it was reasonably foreseeable that one of the Bar's employ-

ees might become intoxicated and drive while under the influence, as Jimenez did on the night that Amber died. As discussed above, foreseeability in respondeat superior caselaw relates to the risk inherent or created by the "enterprise." Here, Amber's parents conveniently conflate Little Rock's enterprise—that is, selling alcohol—with the "enterprise" found in a respondeat superior context—the work Jimenez performed. While it is foreseeable that a car accident caused by intoxication is a risk created by serving alcohol, this foreseeability does not create liability under the doctrine of respondeat superior.

While the accident may be foreseeable in a generic sense, Little Rock would nevertheless be immune from civil liability under Business and Professions Code section 25602, subdivision (b), which specifies, "[n]o person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage."

B. Liability May Not Be Imposed on Little Rock For Jimenez's Social Activity

Neither have Amber's parents fulfilled their burden to show triable issues exist as to the elements of the *McCarty/Rodgers* test. Under that test, liability attaches for an employee's social or recreational activities if 1) Jimenez's celebration received Little Rock's stated or implied permission, and 2) it provided a benefit to Little Rock or had become a customary incident to the job. (*Rodgers*, *supra,* 50 Cal.App.3d at p. 620.) Leaving aside whether the first element of the test has been met, Amber's parents have failed to set forth facts demonstrating a triable issue as to whether Jimenez's intoxication benefitted Little Rock or had become customary to the job.

Amber's parents argue they have fulfilled their burden because the evidence showed Little Rock adopted a number of policies to encourage employees to socialize at the bar, including hiring regular customers as employees, hiring people who liked to

drink, encouraging employees to drink at the Little Rock after hours by providing them with a free drink coupon after their shift and providing drink tickets on certain occasions. In particular, Little Rock invited Jimenez to celebrate his birthday at the bar and Jimenez's drinking that night grew out of the free and easy relationship between the bar and its employees/customers. Amber's parents contend the drink tickets and the free drink an employee received after his shift were "perquisites" which contributed to worker morale and allowed Little Rock to pay below-market compensation to its staff. We disagree.

There is no evidence Little Oak paid their employees below market salaries[4] or that the free drinks resulted in higher worker morale. Further, there is no evidence any of these "perquisites" were provided to Jimenez on the night of December 13, 2011. As discussed above, the surveillance video from that night does not show Jimenez receiving any free drinks or food or pool from Little Rock. Instead, it shows Jimenez paid for a drink shortly after he arrived. Also, Little Rock presented declarations from both bartenders stating they did not provide Jimenez with free drinks that night. However, one of the bartenders stated he was aware other bar patrons bought drinks for Jimenez. That Jabra did not know who paid for Jimenez's drinks does not create a conflict in the evidence because it is undisputed Jabra was not at the bar the night of December 13, 2011. In any event, Amber's parents acknowledge in their reply brief that "the issue of free liquor is irrelevant."

Amber's parents contend Little Rock benefitted from Jimenez's conduct that night in the same way the employer in *Purton* benefitted from its holiday party. In *Purton*, the evidence showed the holiday party was a "thank you" for its employees and was for the purpose of "'[c]elebration, employee appreciation, holiday spirit, [and] team

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[4] In its opening brief, Amber's parents direct us to a government website to show the mean hourly wage for bartenders in the United States in May 2015 to be $11.89. This was not submitted into evidence below and we disregard it. (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 453, fn. 6.)

building.'" (*Purton, supra*, 218 Cal.App.4th at p. 509.) The court found "a trier of fact could conclude that the party and drinking of alcoholic beverages benefitted [the employer] by improving employee moral and furthering employer-employee relations." (*Id*. at pp. 509-510.) Likewise, in *McCarty,* the employer's recurrent drinking parties on its premises served to foster camaraderie and to provide an occasion to discuss company business.

Here, there is no evidence many other employees were present so as to engender camaraderie or provide an occasion to discuss company business. There were no facts to show Little Rock encouraged or required anyone to attend Jimenez's birthday. Although Svastics testified she stayed after her shift ended that night, it was to celebrate her friend's birthday, not Jimenez's. Further, there was no evidence Little Rock provided free drinks or anything else to Jimenez. Jimenez's birthday party, such as it was, was not at all like the parties hosted by the employers in *Purton* or *McCarty.*

Instead, the facts in this matter are more akin to the facts in *Harris.* The *Harris* court found the employee's drinking at work was not a customary incident of the employment relationship. The employee, "at the time of the drinking, was not performing any work-related service to [the employer]. The drinking was neither required, nor an incident to his job as a disc gluer; it was purely for his own personal benefit, prompted by his own personal motivations . . . ." (*Harris, supra,* 155 Cal.App.3d at p. 836.) Just as in *Harris,* the undisputed facts fail to show employer involvement sufficient to bring Jimenez's negligence within the scope of his employment. Jimenez voluntarily stayed to celebrate his birthday at the bar with his girlfriend. As in *Harris,* this decision was purely for his own personal benefit, prompted by his own personal motivations.

We also reject Amber's parents' contention that drinking had become a customary incident of Jimenez's employment at Little Rock. The practices highlighted —that Popovic hires regular customers, provides free drinks on occasion, and socializes with customers—do not rise to the level seen in *Childers.* In *Childers,* the evidence showed

the employer routinely furnished alcohol to customers and employees to encourage good customer relations. In fact, it had become a regular Friday night institution, occurring at least 10 times over the course of the past year. Moreover, the supervisor handed the employees the keys to the office and instructed them to "go get a beer" on the evening in question. (*Childers, supra,* 190 Cal.App.3d at p. 806.)

Here, there is no evidence drinking alcohol to the point of intoxication had become a customary part of Jimenez's role at Little Rock. Although there was evidence that a drink was provided at the end of each shift, there was no evidence Jimenez took advantage of that on the night of the accident. Neither was there any evidence he was given drink tickets that night. Even if we accept Amber's parents' contention that a free end-of-shift drink and drink tickets were customary incidents of employment at Little Rock, it is undisputed those perquisites were not granted on the night of December 13, 2011. In *Childers,* on the other hand, it was the customary Friday night drinking that resulted in the accident.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.