

STATE OF MICHIGAN
COURT OF APPEALS

MARRY BORLIK,

Plaintiff-Appellant,

v

SIME EDWARD LJUBICIC, REBECCA LYNN
HAMERLE and THOMAS FEITTEN,

Defendants,

and

ARENA ASSOCIATES, INC., d/b/a PALACE
SPORTS & ENTERTAINMENT,

Defendant-Appellee.

ANTHONY CACCIARELLI,

Plaintiff-Appellant,

v

SIME EDWARD LJUBICIC, REBECCA LYNN
HAMERLE and THOMAS FEITTEN,

Defendants,

and

ARENA ASSOCIATES, INC., d/b/a PALACE
SPORTS & ENTERTAINMENT,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 185723
Oakland Circuit Court
LC No. 93-463353

No. 185814
Oakland Circuit Court
LC No. 94-470241

Before: Holbrook, P.J., and White and S.J. Latreille,* JJ.

PER CURIAM.

In these consolidated dramshop cases, plaintiffs appeal by leave granted the circuit court's grant of summary disposition in favor of defendant on the ground that plaintiffs failed to comply with the 120-day notice requirement of MCL 436.22(5); MSA 18.993(5). We affirm as to plaintiff Cacciarelli and reverse as to plaintiff Borlik.

I

These cases arose out of a two-vehicle head-on collision on M-24 around 12:40 a.m. on July 3, 1993. Sime Ljubicic was driving Rebecca Hammerle's vehicle southbound in the northbound lane of M-24, a divided highway, at high speed, when the vehicle collided head-on with the northbound vehicle occupied by plaintiffs. Plaintiffs were immediately rushed to a hospital and both remained in the hospital for several weeks, having suffered serious injuries.

Hammerle was the lone passenger with Ljubicic. Fifteen opened beers, four unopened beers, and a cooler were recovered from the vehicle Ljubicic was driving. The police conducted a preliminary breath test of Ljubicic at 3:15 a.m. with a result of .123. Blood alcohol tests performed after the accident revealed that both Ljubicic and Hammerle were legally intoxicated.

The Oakland County Sheriff's Department (OCSD) refused Borlik's counsel's requests for the accident report and Ljubicic's file because the prosecutor's office was deciding whether to pursue criminal proceedings against Ljubicic. The OCSD provided some limited information, but did not disclose that Hammerle was a passenger in the car with Ljubicic.

On October 1, 1993, Borlik filed negligence claims against Ljubicic and "Rebecca Hammel," the name given to Borlik's counsel by the police of the person to whom the vehicle was registered. Borlik's suit thus named "Rebecca Hammel" only in her capacity as owner of the car driven by Ljubicic, under the owner liability statute, MCL 257.401; MSA 9.2101, Borlik being unaware that Hammerle was a passenger in the vehicle when the accident occurred. Thomas Feitten was a co-owner of the vehicle.

On November 29, 1993, Cacciarelli's counsel obtained from the OCSD the first two pages of a UD-10 traffic crash report concerning the accident. Borlik's counsel obtained the UD-10 report on December 9, 1993. The UD-10 report revealed that Rebecca Lynn "Hammle" was a passenger in the car driven by Ljubicic. Borlik's counsel, who at the time was attempting to serve Hammerle, noticed Hammerle's deposition on the same day he received the partial UD-10 report. The UD-10 report misspelled Hammerle's name and also stated an incorrect address for Hammerle. The UD-10 report was the first indication that Ljubicic had had a passenger in the car at the time of the accident. The UD-10 crash report gave no information as to Ljubicic's and Hammerle's whereabouts prior to the accident.

* Circuit judge, sitting on the Court of Appeals by assignment.

Borlik located and served Hammerle with the complaint, interrogatories and a deposition notice¹ on December 28, 1993. Hammerle² and Ljubicic filed answers to Borlik's complaint on February 11 and March 23, 1994, neither of which referred to their whereabouts before the accident. Ljubicic thereafter refused to be deposed, asserting his Fifth Amendment privilege against self-incrimination.

On February 8, 1994, Cacciarelli filed negligence claims against Ljubicic, and alleged owner liability on the part of Hammerle and Feitten. Ljubicic was served on March 1, 1994. Feitten and Hammerle were served on March 4, 1994. Ljubicic and Hammerle filed an answer on April 14, 1994. Feitten filed no appearance or answer, and his default was entered on June 27, 1994. Cacciarelli's counsel filed a motion for entry of default judgment against Feitten on July 12, 1994. After a default judgment was granted, Feitten moved to set it aside on July 27, 1994. At a hearing on August 3, 1994, Feitten's counsel was sanctioned, but the default judgment was set aside. Cacciarelli's counsel began discovery shortly thereafter.

In the interim, on March 10, 1994, Borlik's attorney deposed Hammerle, and Hammerle provided answers to Borlik's interrogatories. Hammerle testified that she and Ljubicic had driven from Lansing, where they lived, to attend a concert at the Pontiac Silverdome the night of the accident. Hammerle testified that they arrived at the parking lot at approximately 7:00 p.m., 1 1/2 hours before the concert, and while parked in the parking lot she drank approximately five beers and Ljubicic drank between five and seven beers. During the concert, Hammerle purchased two sixteen-ounce beers from a beer stand, returned to her seat and gave Ljubicic one of the beers. After the concert ended around 11:30 p.m., Ljubicic and Hammerle waited in the parking lot for the traffic to clear before heading back to Lansing. Hammerle's answers to Borlik's interrogatories also stated that she had been at the Pontiac Silverdome, rather than at defendant's arena, The Palace. Through investigation, Borlik's attorney determined that Ljubicic and Hammerle had been at The Palace, not the Silverdome.

On May 24, 1994, Borlik filed an amended complaint adding a dramshop claim against defendant. Defendant was served on June 10, 1994.

On July 12, 1994, Cacciarelli mailed his first request for production of documents and first set of interrogatories to Ljubicic and Hammerle. No responses were forthcoming, and on October 27, 1994, Cacciarelli obtained an order compelling Ljubicic and Hammerle to provide the discovery.

On August 4, 1994, Borlik's counsel informed Cacciarelli's counsel of Hammerle's deposition testimony. On August 26, 1994, Cacciarelli filed a motion for leave to amend complaint. The brief in support of his motion states that during discovery in Borlik's case, it was revealed that defendants purchased alcohol from the Palace of Auburn Hills while visibly intoxicated, and that previous representations to plaintiff's counsel had been that defendants had consumed alcohol in the Palace's parking lot, but had not purchased alcohol from the Palace. Cacciarelli argued that in early August 1994, the facts surrounding the Palace's sale of liquor to defendants were revealed to plaintiff's counsel by counsel for Borlik. Cacciarelli's counsel's affidavit, attached to the motion, stated that defendants, through their counsel, had theretofore represented that they had only consumed alcohol in the parking lot of the Palace, and never that the Palace had served them alcohol. The affidavit further stated that Ljubicic and Hammerle had not responded to discovery. An order granting leave to amend was

entered September 14, 1994. Cacciarelli's amended complaint was served on defendant on September 21, 1994.

On December 28, 1994, defendant filed its motion for summary disposition under MCR 2.116(C)(8) and (10). Defendant argued that there was no evidence to support a sale by defendant to Ljubicic, the alleged intoxicated tortfeasor, and that the sale of intoxicants to Hammerle was insufficient to impose liability on defendant. Defendant further argued that plaintiffs' amended complaints adding defendant were not filed within 120-days of entering into an attorney client relationship as required by the dramshop act, and that the 120 days began to run at least from the time plaintiffs filed their original complaints.

The circuit court granted defendant's motion for summary disposition on the basis that Hammerle's purchase of two beers was insufficient to raise a genuine issue of material fact regarding the question of agency, and on the basis that plaintiffs did not present evidence of Hammerle's visible intoxication. Plaintiffs each filed a motion for reconsideration. Their briefs addressed the grounds on which the circuit court granted defendant's motion, and not the 120-day notice requirement.

The circuit court then reversed its earlier ruling, holding that, based on the new evidence, it had erred in dismissing defendant on the grounds that plaintiffs failed to present evidence sufficient to raise a question of fact whether Hammerle acted as Ljubicic's agent in purchasing the beers and whether Hammerle was visibly intoxicated when she purchased the beers at the Palace. However, the court granted defendant summary disposition on the basis that plaintiffs had failed to meet the dramshop act's 120-day notice requirement:

Defendant's Motion for Summary Disposition also asserted that Plaintiffs' First Amended Complaints were filed in contravention of the 120 day notice provision of the dram shop act. MCL 436.22 (5). The court did not previously reach this issue finding that the agency issue was dispositive.

The dram shop act requires that notice to all defendants shall be given within 120 days after entering an attorney-client relationship for purposes of pursuing a claim under the dram shop act and that failure to do so shall be grounds for dismissal "unless sufficient information for determining that a retail licensee might be liable under [the dram shop act] was not known and could not reasonably have been known within 120 days." MCL 436.22(5). Plaintiffs provide no evidence of the date on which they entered into an attorney client relationship [,] however, the first notice Defendant had of the dramshop action was the filing of the First Amended Complaints well over 120 days from the filing of the original complaint.

Plaintiff Borlik's Complaint was filed on October 1, 1993. The First Amended Complaint adding the dram shop action against Defendant Palace was not filed until May 24, 1994, after Defendant Hammerle's deposition was taken. Plaintiff Cacciarelli's Complaint was filed on February 8, 1994 and a First Amended Complaint adding Defendant Palace was filed on September 20, 1994.

The Traffic Crash Report, which Plaintiffs acknowledge having received, indicates that Defendant Ljubicic had been drinking. Additionally the Traffic Crash Report contains the name, address and telephone number of Defendant Hammerle. Although the rest of Defendant Ljubicic's file with the Oakland County Sheriff's Department was unavailable because of the ongoing criminal investigation, there is no indication that Plaintiffs were not permitted to contact Defendant Hammerle initially to determine the possibility of a dramshop claim.

The court finds that, notwithstanding Hammerle's apparent confusion over whether she was at the Silverdome or the Palace, initial investigation given the information contained in the traffic crash report was sufficient to reasonably have expected Plaintiffs to know of their claim under the dramshop act within 120 days of entering into the attorney client relationship. See Lautzenheiser v. Jolly Bar, 206 Mich App 67 (1994). Defendant is entitled to dismissal based upon Plaintiffs' failure to give notice.³

On May 31, 1995, Borlik filed a motion for relief from order granting defendant's motion for summary disposition,⁴ arguing that the issue of plaintiff's compliance with the 120-day notice provision was decided

based on a mistaken belief regarding several facts crucial to the notice issue, to wit: this Court mistakenly believed that the relevant attorney-client relationship began earlier than it really did begin; this Court mistakenly believed that Plaintiff knew Defendant Hammerle was a passenger in Defendant Ljubicic's vehicle prior to when Plaintiff really did receive this information; and this Court mistakenly believed that Plaintiff could have reasonably known of the existence of a possible dramshop action prior to March 10, 1994.

Borlik attached an affidavit in which she stated that she first retained counsel Andris to pursue a dramshop action against defendant on March 10, 1994, and she had previously retained him on October 1, 1993 for the purpose of filing a suit against the driver of the vehicle that had negligently struck her vehicle. The affidavit stated that she also retained Andris to include in that lawsuit a claim against the owner of the negligently driven vehicle under the owner liability statute only; further, that the name of that owner was inaccurately conveyed to her as "Rebecca Hammel/Hammle by the Oakland County Sheriff's Department," and that her correct name, Rebecca Hammerle, "was not learned until she could be found and required to give a statement after service of process and deposition on March 10, 1994." Borlik's affidavit stated that prior to that date, she had no information to indicate that defendant provided intoxicants to Hammerle or Ljubicic or, in fact, that they had been to the Palace. Borlik's affidavit lastly stated that the only information she had prior to March 10, 1994 was that her attorney had told her that the OCSD had told him that the only evidence of intoxicants was that there appeared to have been numerous empty and full containers of beer in the vehicle that struck them.

Also attached to Borlik's motion for relief from order granting defendant summary disposition was an affidavit of her counsel, Andris, which stated that during August and September 1993, his office attempted to get information regarding the accident from both the Pontiac Police Department and the

OCSO but were limited to obtaining only the name of the driver and the city in which he lived, and an inaccurate name of the owner of the vehicle. Andris' affidavit further stated that on that limited information he commenced a lawsuit against the named persons, albeit the owner's last name was slightly inaccurate. The lawsuit was filed on October 1, 1993 and involved a claim against Rebecca "Hammel" as the owner only, under the owner liability statute, MCL 257.401. The affidavit further stated that he continued to attempt to discover more information about the persons in the other vehicle, but was denied this information by the OCSO. Andris' affidavit further stated that he was finally provided with just the first two sheets of the [UD-10] accident report on December 9, 1993, at which time he first learned that there was a passenger in the vehicle and that it appeared to be the owner of the vehicle. However, the address was incorrect and even though he had filed a lawsuit against her as an owner in October 1993, he still was not able to get service on her until the Ingham County Sheriff's Department found and served her at work on December 28, 1993. Andris' affidavit further stated that once Hammerle was found and served, he used all due aggressive diligence within the parameters of Rule 4.2 of the Michigan Rules of Professional Conduct and MCR 2.306(A), and that in accordance with those rules he was bound to have her attorney present for any statement or deposition, since she was a party to the case. Further, the affidavit stated that Hammerle's insurance company's adjuster, James Tello, requested an extension of time within which to file its answer, which Andris "always grant[s] at least once in the interest of civility." Further, Andris asked Tello whether Hammerle or Ljubic had been drinking anywhere, and Tello informed Andris that it was only in the vehicle. Hammerle's attorney filed an appearance on January 26, 1994, and an answer on February 9, 1994. The soonest that Hammerle's deposition could be scheduled by her counsel was March 10, 1994. Andris' affidavit further stated that on March 10, 1994, he first learned that Hammerle might have been to the Palace, although she mistakenly referred to it as the Pontiac Silverdome, and that she purchased beer there for herself and her boyfriend. Andris called his client at the conclusion of the deposition and told her about the new information, at which time Borlik retained Andris to represent her in a claim against defendant. Andris then obtained opposing counsel's stipulation to add defendant as a party on May 18, 1994, and the amended complaint was filed on May 24, 1994, with service occurring on June 10, 1994.

II

MCL 436.22(5); MSA 18.993(5) provides that a plaintiff seeking damages under the dramshop act must give written notice to all dramshop defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a dramshop claim, and that failure to give written notice within that time shall be grounds for dismissal as to any defendants that did not receive notice "unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days." *Id.* The relevant inquiry under the statute is plaintiff's knowledge within 120 days of retaining counsel. *Chambers v Midland CC*, 215 Mich App 573, 576; 546 NW2d 706 (1996). Whether such information was known or reasonably should have been known is a question of fact that we review for clear error. *Turnley v Rocky's Lounge*, 215 Mich App 371, 376; 547 NW2d 33 (1996).

III

We are satisfied that the circuit court clearly erred in concluding that Borlik failed to establish that she could not reasonably have known that a retail licensee might be liable within the 120 days.

When Borlik filed her initial complaint and interrogatories on October 1, 1993, Borlik neither knew, nor could have known, where Ljubicic had been before the accident, or that Hammerle was a passenger in the vehicle. Borlik was denied access to Ljubicic's file because criminal charges were pending, and was refused access to any accident report until December 9, 1993, when the OCSD turned over the first two pages of the UD-10 crash report. The first two pages of the UD-10 report made no reference to the whereabouts of Ljubicic and "Hammle" prior to the accident. The report provided the first notice that Hammerle had been in the vehicle. The UD-10 report misspelled Hammerle's name and provided an incorrect address for her. Plaintiff could not locate and serve Hammerle until December 28, 1993. Borlik's counsel prepared deposition notices for Hammerle and Ljubicic the day he received the UD-10 report, the depositions being noticed for February 1, 1994. Shortly after obtaining service, Borlik's counsel received a call from a claims adjuster, James Tello, with Allstate Insurance Company, Hammerle's auto insurance carrier, requesting a thirty-day extension to answer the complaint. Borlik's counsel agreed, and Tello told him that the only alcohol consumed on the evening of the accident was purchased at a party store and consumed in the automobile. Hammerle and Ljubicic's answers were not filed until February 11 and March 23, 1994, respectively, and made no reference to the Palace. Ljubicic refused to be deposed thereafter, asserting his Fifth Amendment privilege. Hammerle did not provide answers to Borlik's interrogatories until the day she was deposed, March 10, 1994, at which time she testified that she had been at a concert at the Pontiac Silverdome, not The Palace, and that beer had been purchased at the concert.

Under these circumstances, we conclude that Borlik did not know and could not reasonably have known of defendant's potential liability until March 10 at the earliest.⁵ Counsel then determined that defendant was involved, rather than the Silverdome, and moved to add defendant. The circuit court's determination that Borlik could reasonably have known of defendant's potential liability earlier is not supported by the record and is clearly erroneous. *Turnley, supra* at 376-377.

IV

While Cacciarelli presents a close case, we are unable to conclude that the circuit court's finding was clearly erroneous. Cacciarelli argued below at the hearing on defendant's motion for summary disposition, that Hammerle's counsel represented to him that no alcohol was served by the Palace, and that Cacciarelli's counsel had so stated in an affidavit filed in connection with his motion for leave to amend the complaint, which was filed on August 26, 1994. That affidavit states that "[d]efendants, through their counsel, have heretofore represented that they only consumed alcohol beverages in the parking lot of the Palace but never that the Palace served them any alcohol." Cacciarelli further argued that because he was delayed in proceeding with discovery by Feitten's failure to answer the complaint and the sanctionable actions of Feitten's attorney, he did not have sufficient information to determine that The Palace might be liable under the dramshop act and could not have reasonably known that within 120 days of obtaining counsel. Cacciarelli's response to defendant's motion attached an affidavit

of his counsel which stated that his first action as Cacciarelli's attorney was to obtain a copy of the police report from the OCSD. The affidavit stated that he followed up with the doctors who treated Cacciarelli as to the extent of his injuries, and pursued negotiations with various insurance companies in an attempt to settle the matter without having to commence litigation. The affidavit further stated that at the time the initial complaint was filed in February 1994, he did not know that Borlik had filed suit in 1993, and that when he later heard it through the grapevine, he obtained a copy of the Borlik complaint, which did not include a dramshop act claim. The affidavit stated that on August 4, 1994, Borlik's counsel called him and advised that he had deposed Hammerle and had amended his complaint. Cacciarelli's counsel requested a copy of the amended complaint and deposition transcript, and then filed a motion for leave to amend his complaint on August 25, 1994. Finally, the affidavit stated that defendant was served with Cacciarelli's amended complaint on September 21, 1994.

Cacciarelli argues that he took every reasonable step necessary to ascertain whether Hammerle and Ljubicic were drinking alcohol purchased from a dramshop. He asserts he was told by Hammerle's insurance carrier, her counsel, and the OCSD that there was no evidence of alcohol having been purchased at a dramshop and that Hammerle's attorney was "completely uncooperative and refused to divulge details of the case until all parties were officially in the case."⁶

Cacciarelli's counsel received the first two pages of the UD-10 crash report on November 29, 1993. Cacciarelli filed suit against Ljubicic, Hammerle and Feitten on February 8, 1994. Ljubicic and Hammerle filed an answer on April 14, 1994, which did not refer to their having been at The Palace. On July 12, 1994, Cacciarelli mailed Ljubicic and Hammerle his first request for production of documents and first set of interrogatories.⁷ Borlik's counsel called Cacciarelli's counsel on August 4, 1994, and informed him that he had deposed Hammerle and had added defendant as a party. Cacciarelli filed an amended complaint on September 20, 1994, adding defendant, which was served on defendant the following day.

The record supports that Cacciarelli and his counsel did not have actual knowledge that alcohol was purchased at The Palace until Borlik's counsel told Cacciarelli's counsel on August 4, 1994 of Hammerle's deposition testimony of March 10, 1994. However, we cannot say that the circuit court erred in concluding that Cacciarelli could reasonably have known of the claim earlier. While counsel's reluctance to conduct depositions before the issue of Feitten's default was resolved in order to avoid costly duplication is understandable, other less costly discovery avenues were open to him, such as interrogatories, which he did not pursue until July 12, 1994. Approximately ten months passed between the time Cacciarelli obtained the police report and the time defendant was served with the dramshop complaint on September 21, 1994. Nearly four months passed between the date Hammerle and Ljubicic answered Cacciarelli's initial complaint in April 1994 and the issue of Feitten's default was resolved in early August 1994.

Under these circumstances, we conclude that Cacciarelli has not established that he could not reasonably have known that defendant might be liable under the dramshop act within 120 days after retaining counsel in late January 1994.⁸

Further, we conclude that Cacciarelli's claim that counsel was not retained for purposes of pursuing a dramshop claim until August, 1995 is not supported.

In plaintiff Borlik's case, we reverse the circuit court's grant of summary disposition and remand. We affirm the circuit court's grant of summary disposition of Cacciarelli's claim for failure to comply with the 120-day notice requirement.

/s/ Donald E. Holbrook

/s/ Helene N. White

/s/ Stanley J. Latreille

¹ The deposition was noticed for February 1, 1994.

² Hammerle's answer spelled her name as "Hammel."

³ Opinion and Order dated April 14, 1995.

⁴ Borlik argued that since she had already filed a motion for reconsideration, she had to proceed under MCR 2.612 or otherwise have no opportunity to notify the court of crucial mistakes of fact it had assumed in its prior review.

⁵ We also note that an OCSO vehicle storage receipt identified no drinking establishment and, in fact, revealed affirmative evidence that beer had been consumed in the vehicle.

⁶ As to these arguments, defendant correctly observes that only Hammerle's attorney's representations were called to the attention of the circuit court.

⁷ Cacciarelli obtained an order compelling answers to these on October 27, 1994.

⁸ It was unclear below when counsel was actually retained. On appeal, Cacciarelli argues he signed a contingent fee retainer agreement on or about January 25, 1994. He appended to his appellate brief two letters from his counsel's law firm which support that he signed an agreement between December 7, 1993, and January 25, 1994.