STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER DIRLA and APRIL DIRLA, Plaintiffs-Appellants,	UNPUBLISHED May 25, 2010
v	No. 292676 Schoolcraft Circuit Court
SENEY SPIRIT STORE & GAS STATION and STACEY STACHNIK, Defendants, and	LC No. 06-003811-NI
ANDY'S SENEY BAR, INC., Defendant-Appellee.	

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Plaintiffs Christopher and April Dirla appeal as of right the trial court's order granting defendant Andy's Seney Bar, Inc. summary disposition under MCR 2.116(C)(10). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In December 2005, Christopher Dirla and some friends of his were at Andy's Seney Bar in Seney, Michigan. Jason Sunkle was also at the bar that evening. However, Christopher Dirla and Sunkle did not know each other.

At the end of the evening, Christopher Dirla and his friends left Andy's Seney Bar to go play cards at his house, which was also located in Seney. Christopher Dirla made the short trek to his house by riding on the back of a friend's snowmobile. After getting off the snowmobile in the street in front of his house, Christopher Dirla slipped and fell. At that same moment, Sunkle came around the corner on a snowmobile and hit Christopher Dirla. Sunkle had rented the snowmobile from defendant Seney Spirit Store and Gas Station.[1] The snowmobile hit Christopher Dirla in the lower back, and he sustained serious injuries.

[1] Neither Seney Spirit Store, nor its owner, Stacey Stachnik, is a party to this appeal.

Sunkle did not stop after hitting Christopher Dirla. He was arrested shortly thereafter. And he later pleaded to operating the snowmobile under the influence of alcohol.

In January 2006, Christopher Dirla and his wife, April Dirla, contacted the Skinner Law Firm. During their consultation with attorney David Skinner, there was no discussion of Sunkle or the fact that drinking was a factor in the accident. The parties only discussed that Christopher Dirla had suffered injuries as the result of a hit and run accident. The parties then entered into a retainer agreement on January 12, 2006. The agreement stated that "[c]lient has a cause of action of damages sustained on or about December 11, 2005 as a result of a snowmobile accident, and Client desires to employ Attorney to prosecute that cause of action against any person or persons who may be responsible for it."

On March 8, 2006, the Dirlas' counsel sent a notice to Seney Spirit Store and Gas addressed with attention to Stacey Stachnik, owner of Seney Spirit Store and 50 percent owner of Andy's Seney Bar. The notice advised that Christopher Dirla had retained the Skinner Law Firm for purposes of filing a civil claim for injuries that he sustained from a snowmobile that Sunkle had rented from the Seney Spirit Store.

Shortly thereafter, Stachnik contacted attorney Skinner and informed him for the first time that Sunkle had been in Andy's Seney Bar on the night in question and that she and he had been drinking together.

On March 22, 2006, attorney Skinner met with the Dirlas to discuss the conversation he had with Stachnik, and they determined that a dramshop action should be filed.

On June 9, 2006, attorney Skinner sent a letter to Andy's Seney Bar, addressed with attention to Stachnik. The letter stated: "Our investigation reveals that Mr. Sunkle might have been served while visibly intoxicated in your place of business before the accident." The letter stated that it was intended to serve as notice pursuant to MCL 436.1801(4).

On June 19, 2006, the Dirlas filed a complaint, alleging, in pertinent part, violation of the dramshop act against Andy's Seney Bar. Andy's Seney Bar then moved for summary disposition under MCR 2.116(C)(10), arguing that the Dirlas failed to provide notice of their dramshop act claim within 120 days of retaining an attorney, as MCL 436.1801(4) requires. According to Andy's Seney Bar, 120 days from January 12, 2006, was May 12, 2006. However, the Dirlas did not send notice to Andy's Seney Bar until June 9, 2006, which was 148 days after they retained attorney Skinner. Citing *Chambers v Midland Country Club*,[2] Andy's Seney Bar argued that it could be presumed that the Dirlas entered the attorney-client relationship with attorney Skinner for the purpose of pursuing a dramshop act violation claim when the police report indicated that Sunkle had been drinking at Andy's Seney Bar before the accident. Andy's Seney Bar further argued that the March 2006 notice, which was sent to Seney Spirit Store and mentioned only that Christopher Dirla had been injured by a snowmobile driven by Sunkle and rented from Seney Spirit Store, was not sufficient to put Andy's Seney Bar on notice of a

[2] *Chambers v Midland Country Club*, 215 Mich App 573; 546 NW2d 706 (1996).

possible dramshop act claim. Andy's Seney Bar added that case law interpreting the statute made it clear that prejudice was not required to warrant dismissal for failure to comply with the notice requirement.[3]

The Dirlas responded, first stating that neither they nor attorney Skinner received a copy of the full police report until May 2007: the copy that the Dirlas had when they first met with attorney Skinner was only a portion of the full report and did not indicate that Sunkle had been drinking or at Andy's Seney Bar. The Dirlas then argued that, regardless whether they had a copy of the full police report, pursuant to the holding in *Langrill v Stingers Lounge*,[4] a plaintiff's knowledge of his potential dramshop act claim is irrelevant. According to the Dirlas, under *Langrill*, the salient factor is evidence of when the plaintiff and attorney executed a retainer agreement "for the purpose of pursuing a"[5] dramshop act claim.

Andy's Seney Bar replied, pointing out that the Michigan Supreme Court had vacated this Court's decision in *Langrill*, and that the proper inquiry was whether a plaintiff knew or reasonably could have known that the defendant might be liable under the dramshop act.[6] Andy's Seney Bar also added that even assuming the Dirlas did not have a full copy of the police report, the portion that they did admit to having stated that Sunkle has been drinking and had a .15 preliminary breath test result. Andy's Seney Bar added that the Dirlas or attorney Skinner could have easily requested a copy of the full police report.

After hearing oral arguments on the motion, the trial court concluded that the Dirlas "could have known . . . at the time of the signing of the retainer contract, that there would be other possibilities for recovery that were reserved and thus being reserved fall under the statute of retaining a—an attorney for the purpose of exploring a dram-shop action." Accordingly, the trial court granted summary disposition in favor of Andy's Seney Bar. The Dirlas now appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

The Dirlas argue that the trial court erred in dismissing their dramshop action because there were questions of fact regarding the intent of the retainer agreement, regarding when their counsel entered into an attorney-client relationship for the purpose of pursuing the dramshop action, and regarding when notice of the dramshop claim was given to Andy's Seney Bar.

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[3] See *Lautzenheiser v Jolly Bar & Grille, Inc*, 206 Mich App 67, 70; 520 NW2d 348 (1994) ("Whether [the] defendant was prejudiced by the delay in notice is irrelevant under the language of the notice provision."); *Brown v Jojo-Ab, Inc*, 191 Mich App 208, 212; 477 NW2d 121 (1991).

[4] *Langrill v Stingers Lounge*, 261 Mich App 698; 683 NW2d 225 (2004).

[5] MCL 436.1801(4).

[6] *Langrill v Stingers Lounge*, 471 Mich 926; 689 NW2d 228 (2004).

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[7] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[8] "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."[9] We review de novo the trial court's ruling on a motion for summary disposition.[10] We similarly review de novo questions regarding the proper interpretation of statutes.[11]

B. NOTICE

MCL 436.1801(4) states, in pertinent part:

> An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that 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.

In its order vacating this Court's decision in *Langrill*, the Michigan Supreme Court cited *Chambers*[12] and stated, "Because plaintiff did not present any evidence to the contrary, there is a presumption that the attorney-client relationship she entered into with her first attorney, who filed the original complaint in this matter, included the purpose of pursuing a claim under MCL 436.1801."[13] The Supreme Court then ordered the case remanded to the circuit court for a determination "whether sufficient information for determining that [the] defendant might be liable under MCL 436.1801 was not known and could not reasonably have been known within 120 days of the beginning of that first attorney-client relationship."[14] The Court clarified, "The circuit court shall grant [the] defendant's motion for summary disposition under the 120-day

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[7] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[8] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[9] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[10] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[11] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

[12] See *Chambers*, 215 Mich App at 577.

[13] *Langrill*, 471 Mich 926.

[14] *Id*.

notice rule if, and only if, the court finds that this information was known or could reasonably have been known during that 120-day period."[15]

As they did in the proceedings below, the Dirlas again argue that they could not have known that Sunkle had been drinking at Andy's Seney Bar when they first met with attorney Skinner in January 2006 because they did not receive a full copy of the police report until May 2007. However, we find this argument without merit.

In *Chambers*, the plaintiff argued that her notice was timely because evidence sufficient to require her to give notice to the defendant was not available until she took the intoxicated driver's deposition.[16] This Court disagreed, stating:

> The police report, which was available to [the] plaintiff shortly after the accident, was sufficient to indicate that [The] Midland [Country Club] "might be liable" under the clear language of the statute. The relevant inquiry under the statute is [the] plaintiff's knowledge within 120 days of retaining counsel.[17]

This Court added that "'the notice provision only requires notice where a dramshop owner *might* be liable under the act.'"[18]

Here, the Dirlas argue that they only had a portion of the police report at the time they executed the retainer agreement with attorney Skinner. But the portion they had clearly indicated Sunkle had been drinking and had a .15 preliminary breath test result. Moreover, the Dirlas do not contend that the full police report was not available to them. And as Andy's Seney Bar points out, the Dirlas could have obtained a copy of the January 4, 2006 preliminary examination hearing at which it was established that Sunkle had been drinking at Andy's Seney Bar. We therefore conclude that sufficient information for the Dirlas to determine that Andy's Seney Bar might be liable under the dramshop act could reasonably have been known within 120 days after they entered the attorney-client relationship with attorney Skinner.[19] The Dirlas have failed to rebut the presumption that the attorney-client relationship that they entered into with attorney Skinner included the purpose of pursuing a claim under the dramshop act.

Additionally, the retainer agreement stated that "[c]lient has a cause of action of damages sustained on or about December 11, 2005 as a result of a snowmobile accident, and Client desires to employ Attorney to prosecute that cause of action against any person or persons who may be responsible for it." Thus, whether attorney Skinner "was originally retained with the

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[15] *Id*.

[16] *Chambers*, 215 Mich App at 576.

[17] *Id*.

[18] *Id*., quoting *Lautzenheiser*, 206 Mich App at 70 (emphasis in *Lautzenheiser*).

[19] See *Lautzenheiser*, 206 Mich App at 69 ("The issue is whether [the] plaintiffs could reasonably have been expected to know of their claim under the dram shop act before" the 120-day notice period expired).

specific task of pursuing a dramshop act claim is also irrelevant because it was clear in the retainer agreement that he was hired to investigate all possible theories of recovery."[20]

We also find it significant that, by their own admission, the Dirlas and attorney Skinner determined on March 22, 2006 that they had a dramshop act claim. And March 22, 2006 was still well within the 120-day notice period, which did not expire until May 12, 2006. Yet, the Dirlas did not send notice to Andy's Seney Bar until June 9, 2006, which was 148 days after they retained attorney Skinner on January 12, 2006. Therefore, they failed to provide notice of their dramshop act claim within 120 days of retaining attorney Skinner, as MCL 436.1801(4) requires, and the trial court properly granted summary disposition in Andy's Seney Bar's favor.

In an apparent effort to absolve their failure to comply with the notice requirement, the Dirlas make much of the facts that Stachnik rented the snowmobile to Sunkle, that she was drinking with Sunkle at Andy's Seney Bar on the night of the accident, and that she testified in her deposition that she drove by the accident on her way home that night. Therefore, they contend that Stachnik, and concomitantly Andy's Seney Bar, had actual notice of the Dirlas' potential dramshop act claim. However, the burden was on the Dirlas to follow the statutory requirement, and we do not accept their attempt to circumvent that obligation by placing the burden of notice on the defendant instead.

We also conclude that the March 8, 2006 notice sent to *Seney Spirit Store*, which advised that the Dirlas would be pursuing a civil claim for injuries sustained from a snowmobile rented from the Seney Spirit Store, was not sufficient to put *Andy's Seney Bar* on notice of a potential dramshop act claim.

In light of our disposition on this issue, we need not address Andy's Seney Bar's alternative ground for affirmance regarding application of the name and retain provision of the dramshop act.[21]

We affirm. Andy's Seney Bar, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello

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[20] *Id*. at 70.

[21] MCL 436.1801(5).