FILED
JAN 25 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHN J. JOHNSON,)

Appellee,) Filed January 25, 1979

vs.)

JOY CORPORATION,)
an Iowa Corporation,)
d/b/a Happy Time Lounge,) 764
2-61440

Appellant.)

Appeal from Scott District Court - L. D. Carstensen, Judge.

Appeal by defendant dramshop licensee asserting trial court erred in finding that notice of intention to bring an action as provided by § 123.93 was timely given. Affirmed.

Ross H. Sidney & Stephen D. Hardy, of Grefe & Sidney, Des Moines, for Appellant.

Seymore M. Raben, Davenport, for Appellee.

Heard by Oxberger, C. J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Defendant, Joy Corporation, has been granted permission to pursue an interlocutory appeal. Plaintiff Johnson seeks damages against Joy Corp. under the provisions of the dramshop act, chapter 123, The Code. Joy Corp. asserts the action is barred by § 123.93 because notice was not given within six months of the occurrence of the injury. Johnson claims the six months limit is extended by the circumstances of the case as applied to the exception to the limitation provided by the statute. The trial court agreed.

The injuries to Johnson occurred on March 26, 1974. Johnson was walking on Highway 61 and had stopped to help a lady who was changing a tire. While at the rear of the parked car he was struck by a car driven by Arthur Day. Day was arrested by Trooper Robert Lindsey and charged with O.M.V.U.I. Johnson was hospitalized and as a result of his injuries his right leg was amputated. During the time he was hospitalized he was unconscious or not lucid much of the time. At the end of June or the first part of July, 1974, he first conferred with attorney Seymore Raben. Raben had been employed for legal services by Johnson's parents two or three weeks after the accident.

Raben pressed a claim against Day and effected a settlement for $50,000 from Day's insurer about February 25, 1975. This amount was the limit of Day's insurance policy coverage.

Raben learned the identity of Joy Corp., the owner of Happy Time Lounge in Scott County, where Day had allegedly been drinking on April 7, 1975. Notice was mailed to Joy Corp. by Raben on April 15, 1975 of plaintiff's intention to bring an action under § 123.93. The present action was commenced on June 5, 1975.

Joy Corp. asserts the appeal is from a ruling which is in effect on a motion to dismiss determining only a question of law. We note, however, that the parties waived a jury trial on the issue of notice and the trial court made extensive findings of fact and conclusions of law. In Batliner v. Sallee, 254 Iowa 561, 564, 118 N.W.2d 552, 554 (1962) the court stated:

> If the trial court had been ruling only on the motion to dismiss, there would have been no occasion for a detailed finding of fact and conclusion of law. All the evidence was in and the matter ready for the court's final decision. The trial court

> obviously did more than sustain the motion to dismiss. We interpret the court's ruling to be a finding of fact on the evidence produced and a judgment in favor of the defendant.

Similarly, in Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975) "We are persuaded trial court did not rule on a motion for a directed verdict, but rather determined the whole controversy on its merits. . . . Its findings of fact have the effect of a special verdict and are equivalent to a jury verdict." We view the instant appeal as so proceeding. Thus the trial court's findings of fact are binding if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure.

The trial court found that Raben first learned the identity of the licensee on April 7, 1975. He learned this information from J. Hobart Darbyshire who had been Day's attorney on the O.M.V.U.I. charge. Darbyshire, when contacted in November or December, 1974, by Raben, had refused to allow Raben to communicate with Day prior to resolving the criminal charge. Darbyshire was contacted by Raben two or three times. He told Raben he would let him know when the O.M.V.U.I. charge was resolved. The bond in the O.M.V.U.I. case was forfeited February 28, 1975 and Darbyshire told Raben the identity of the licensee on April 7, 1975.

The trial court also found Raben wrote to the Iowa Department of Public Safety for a copy of the accident report on June 25, 1974. On May 14, 1974, Raben wrote a letter to the insurance adjuster for Day's carrier. Raben also hired a detective agency to investigate and it first started checking the matter October 21, 1974. During this time Raben had no knowledge of where Day had been drinking.

Robert Lindsay was a trooper who investigated the accident. He was contacted by Raben on April 24, 1975. Raben received a copy of his accident report but it failed to state where Day had been drinking. Plaintiff Johnson was unconscious after the accident and was not lucid until the end of June, 1974. He saw Raben the end of June or the first part of July, 1974. In October, 1974, he went to a private home from the hospital. After being at the home for about three months he went to Younkers Rehabilitation Center for three or four months, then returned home and later went to Mercy Hospital.

Section 123.93, The Code, provides the following:

> Within six months of the occurrence of an injury the injured person shall give written notice to the licensee or permittee or

> such licensee's or permittee's insurance carrier of his intention to bring an action under this section, indicating the time, place and circumstances causing the injury. Such six months' period shall be extended if the injured party is incapacitated at the expiration thereof or unable, through reasonable diligence, to discover the name of a licensee, permittee, or person causing the injury or until such time as such incapacity is removed or such person has had a reasonable time to discover the name of the licensee permittee or person causing the injury.

In construing this section the supreme court has determined it should be given a liberal construction. Rigby v. Eastman, 217 N.W.2d 604, 608 (Iowa 1974); Shasteen v. Sojka, 216 N.W.2d 48, 52 (Iowa 1977). "We have often noted dramshop statutes should be liberally construed in order to further their purpose of discouraging serving excessive liquor to patrons." Shasteen, supra, at 50.

Under § 123.93 the six month period is extended due to incapacity of the plaintiff. Since the degree of incapacitation is not spelled out by the statute, the question must be resolved on the basis of reasonableness. Harrop v. Keller, 253 N.W.2d 588, 592 (Iowa 1977). The statute also provides an extension based on inability through reasonable diligence to find out who is the prospective dramshop defendant.

The trial court found that due to the seriousness of Johnson's injuries and the periods of his hospitalization, the notice period was extended by the incapacitation provision and notice was timely given. The court also found that notice was given within the reasonable diligence exception of the statute. We find the trial court's findings are supported by substantial evidence and therefore hold that notice was timely given as required by § 123.93.

AFFIRMED.