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2020 VT 51

No. 2020-009

Awen R. Boland and Diana F. Boland — Supreme Court

v. — On Appeal from Superior Court, Orleans Unit, Civil Division

Estate of Paul Smith, V-Twin, LLC, Scott Abbott, and Magma Properties LLC — May Term, 2020

A. Gregory Rainville, J. (motion to dismiss); Robert R. Bent, J. (motion for default judgment)

Mary P. Kehoe of The Kehoe Law Firm, P.C., and Thomas J. Sherrer of Thomas J. Sherrer, PLLC, Burlington, for Plaintiffs-Appellees.

Harold B. Stevens of Stevens Law Office, Stowe, for Defendants-Appellants.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **EATON, J.** Defendants Scott Abbott and V-Twin, LLC, doing business as the Corner Pocket, appeal the trial court's order denying their motion to dismiss plaintiffs Awen and Diana Boland's claims under Vermont's Dram Shop Act (DSA). Awen, age three, brings her claim individually through Diana, her mother and financial guardian; Diana brings her claim in her capacity as administrator of Leonard Audet's estate. Defendants argue that Awen cannot recover under the DSA because she was a previability fetus at the time her father, Leonard Audet, died and therefore is not a "child" or "other person" "injured in . . . means of support." See 7

V.S.A. § 501(a) (providing recovery for certain types of persons, including "child"). We affirm the denial of the motion to dismiss.

¶ 2. We accept as true the facts stated in plaintiffs' complaint for the purpose of reviewing the trial court's order granting defendants' motion to dismiss. Amiot v. Ames, 166 Vt. 288, 291, 693 A.2d 675, 677 (1997). On November 25, 2016, Paul Smith was drinking at the Corner Pocket, a bar owned and operated by V-Twin, LLC. Defendant Scott Abbott is a former member of V-Twin who owned and operated the Corner Pocket on the date in question. Smith left the Corner Pocket in an intoxicated state and drove a car in which Leonard Audet was a passenger. Smith and Audet died when Smith drove off the road and crashed. Awen Boland is the child of Audet and Diana Boland. At the time of the incident, she was an unborn fetus with a gestational age of one-to-two months. She was born twenty-eight weeks after her father's death.

¶ 3. Plaintiffs filed claims for loss of support against defendants under Vermont's Dram Shop Act, see 7 V.S.A. §§ 501-503, and Wrongful Death Act, see 14 V.S.A. §§ 1491-1492. Defendants moved to dismiss the DSA claim for failure to state a claim upon which relief can be granted, arguing that Awen had no claim as a "child" or "other person" under the DSA because she was not a viable fetus at the time of her father's death.[1] See V.R.C.P. 12(b)(6) (permitting filing of motion to dismiss for "failure to state a claim for which relief can be granted"). The trial court denied defendants' motion because it concluded that Awen had a valid DSA claim, reasoning that she is currently a living child denied the financial support of a father who would have had a legal duty to support her.[2]

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[1] See Viable, Black's Law Dictionary (11th ed. 2019) ("Capable of living, esp[ecially] outside the womb.").

[2] Defendants did not move to dismiss the wrongful-death claim.

¶ 4. On appeal, defendants reiterate the argument raised below, claiming Awen is not entitled to recover for loss of support under the DSA because she was not a viable fetus at the time of her father's death. Plaintiffs' response to this contention is threefold: (1) Awen's DSA claim did not accrue until she was born; (2) the DSA is a remedial statute and should be construed broadly to include Awen's claim; and (3) prohibiting recovery for a nonviable fetus under the DSA violates the Common Benefits Clause of the Vermont Constitution. See Vt. Const. ch. I, art. 7. Because our decision turns on when a DSA claim accrues, and we find the accrual date to be dispositive, we do not address the question of whether a previability fetus is a "child" under the DSA or plaintiffs' constitutional argument.[3]

¶ 5. We review the trial court's decision on a motion to dismiss de novo. Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009. "A motion for failure to state a claim may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 7, 186 Vt. 605, 987 A.2d 258 (mem.) (quotations omitted). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1, 955 A.2d 1082.

¶ 6. Defendants' argument that Awen does not have a valid DSA claim is based on the assertion that Awen's claim accrued when Audet died and she was not a "child" or "other person" at that time. Determination of the date of accrual under the DSA is typically a fact question decided by the jury. Pike v. Chuck's Willoughby Pub, Inc., 2006 VT 54, ¶ 18, 180 Vt. 25, 904 A.2d 1133. However, when there is no dispute as to the material facts and "those facts [are] sufficient, as a

[3] Defendants speculate over who may fit the definition of "child" under the DSA if no restriction is placed on the definition, positing that the term could be construed to include a frozen embryo. We do not need to decide here how advancements in reproductive technology may impact the accrual date of a DSA claim because that is not the case before us.

matter of law, for plaintiff's dram shop action to accrue," it is proper for the court to decide the issue. Rodrigue v. VALCO Enters., Inc., 169 Vt. 539, 541, 726 A.2d 61, 64 (1999) (mem.). The material facts relevant to accrual are undisputed and sufficient to decide this issue as a matter of law. Id. (deciding DSA claim's accrual date as matter of law).

¶ 7. Under the DSA, a "child . . . who is injured in . . . means of support by an intoxicated person . . . shall have a right of action." 7 V.S.A. § 501(a). The date of accrual "seeks to identify the point at which a plaintiff should have discovered the basic elements of a cause of action: an injury caused by the negligence or breach of duty of a particular defendant." Earle v. State, 170 Vt. 183, 193, 743 A.2d 1101, 1108 (1999). We have abandoned the rule that accrual occurs at the date of the negligent act; rather, accrual occurs "when the plaintiff discovered both the injury and its cause." Pike, 2006 VT 54, ¶¶ 13-14. Therefore, Awen's dram shop claim accrued when she was injured. See Earle, 170 Vt. at 193, 743 A.2d at 1108 (explaining that accrual occurs under DSA when "the plaintiff knew of his injury, knew the driver who caused it and knew the driver had been drinking at the defendant's establishment").

¶ 8. However, Awen was not "injured" until she was born. Under the DSA, "injury" occurs when the individual is deprived of her "means of support." 7 V.S.A. § 501(a). The DSA allows claims for loss of support by persons for whom there is "a legislative judgment that an individual in decedent's circumstances had an obligation to support" the plaintiff. Thompson v. Dewey's S. Royalton, Inc., 169 Vt. 274, 281-82, 733 A.2d 65, 70 (1999). Such injury cannot predate the point at which the decedent was obligated to provide her with financial support. See Valicenti v. Valenze, 499 N.E.2d 870, 871 (N.Y. 1986) (stating "means of support" under New York's Dram Shop Act covers "the support the plaintiffs could reasonably have expected but for" death). No Vermont statute "embodies a legislative judgement" that a putative father has an obligation to support his child prior to its birth. Thompson, 169 Vt. at 281-82, 733 A.2d at 70

(concluding individuals with right to support under child-support statute could recover under DSA); see 15 V.S.A. § 650 (stating that "parents have the responsibility to provide child support"); Patnode v. Urette, 2015 VT 70, ¶ 11, 199 Vt. 306, 124 A.3d 430 (stating child-support obligation may be imposed from date of parentage action); In re Estate of Murcury, 2004 VT 118, ¶ 5, 177 Vt. 606, 868 A.2d 680 (mem.) ("[A] parentage action may be commenced any time after birth." (emphasis added)); see also Heustess v. Kelley-Heustess, 259 P.3d 462, 471 (Alaska 2011) ("[A] parent's duty of support commences at the date of the birth of the child." (quotation omitted)). Awen's injury did not occur until she was born alive; therefore, her DSA claim accrued when she was born alive.

¶ 9. The concept that a decedent's child is not injured in her means of support until she is born finds reinforcement in the Supreme Judicial Court of Massachusetts's holding on similar facts. See Angelini v. OMD Corp., 575 N.E.2d 41, 45 (Mass. 1991) (stating injury of loss of parental society could not occur until after child's birth). In Angelini, the court determined that the child was injured at birth because that was the point at which she could feel the effects of loss of consortium. See id. ("[T]he injury alleged here, namely the loss by Jeremy of his father's parental society, could occur only after Jeremy was born."). Likewise, here, Awen's injury occurred at her birth because that is when she was actually deprived of her father's support. When her claim accrued at her live birth, Awen was clearly a "child" within the meaning of the DSA.

¶ 10. Moreover, Diana Boland could not bring a DSA claim on her daughter's behalf until Awen was born alive. The DSA creates a claim for a "child . . . in his or her own name." 7 V.S.A. § 501(a); see also V.R.C.P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest."); V.R.C.P. 17(b) ("Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person."). When a "statute expresses

and presumes physical existence and juridical capacity to sue," the incapacity to sue informs the date of accrual. See LaBello v. Albany Med. Cent. Hosp., 651 N.E.2d 908, 909 (N.Y. 1995) ("[A]n infant plaintiff's medical malpractice cause of action, premised on alleged injurious acts or omissions occurring prior to birth, accrues on the earliest date the injured infant could juridically assert the claim and sue for relief, that is, the date of being born alive."). Awen was neither injured, nor able to bring her claim, until she was born alive. At the time her claim accrued and she was able to sue, Awen was a "child" within the meaning of 7 V.S.A. § 501(a).

¶ 11. Other jurisdictions agree with the conclusion that a child who is born alive has a right to recover for loss of support under a dram-shop statute arising from events that occurred before the child was born. See, e.g., Quinlen v. Welch, 23 N.Y.S. 963, 964 (N.Y. Gen. Term 1893) ("An unborn child, if subsequently born alive, if deprived of a parent, suffers in its means of support equally with the children that were living at the time of the decease of such parent."). The Michigan Supreme Court addressed a case in which the father of a fetus at a gestational period of approximately two months died in a drunk-driving accident. La Blue v. Specker, 100 N.W.2d 445, 445-47 (Mich. 1960). Analyzing an extensive list of cases, the court concluded the subsequently born plaintiff was a "child" or "other person" under the applicable statute and could recover for loss of means of support. Id. at 455. Similarly, the Indiana Court of Appeals recognized the right of a child born two months after her father's death to sue for loss of support under a sale of intoxicating liquor statute. See State ex rel. Niece v. Soale, 74 N.E. 1111, 1113 (Ind. App. 1905) ("[A posthumous] child is entitled to share equally with other children of the deceased to the benefit of such action."). We are aware of no authority, and we have been pointed to none, which has reached a different conclusion.

¶ 12. Our conclusion on the date of accrual alone is sufficient to decide this case. However, our conclusion is buttressed by the recognition that the DSA is a remedial statute that is

"to be liberally construed toward effectuating its purpose." Smith v. Wilcox, 47 Vt. 537, 544 (1875); see also Clymer v. Webster, 156 Vt. 614, 623 n.5, 596 A.2d 905, 910 n.5 (1991). It "was enacted to compel those who will hazard causing damage by furnishing intoxicating liquor to others to answer for such damage to those who may suffer it." Healey v. Cady, 104 Vt. 463, 466, 161 A. 151, 152 (1932). Various courts have broadly interpreted remedial statutes that provide a cause of action for a decedent's child to include a posthumous child. See La Blue, 100 N.W.2d at 454 (noting dram-shop statute's remedial nature in concluding decedent's posthumous child could recover); Nelson v. Galveston, H. & S.A. Ry. Co., 14 S.W. 1021, 1023 (Tex. 1890) (relying on purpose of statute in reading wrongful-death statute providing "surviving children" cause of action to include decedent's posthumous child); see also Phair v. Dumond, 156 N.W. 637, 639 (Neb. 1916) (interpreting dram-shop-equivalent statute to provide action for loss of support to child born after father was overserved).

¶ 13. Furthermore, one of the DSA's purposes is to equally provide a remedy for children injured in means of support. See Thompson, 169 Vt. at 283, 733 A.2d at 71 (1999) ("In other words, the goal of such legislation concerned economic compensation and the preservation of financial stability within the families of a deceased imbiber."); Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937) (describing need for broad reading of death statutes to avoid "misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied"). If the decedent had one child born prior to his death and another child, like Awen, born after his death, it would be unfair, and thus in conflict with the DSA's remedial purpose, for one sibling to have a cause of action and the other sibling to have no remedy when they are equally injured in loss of support.

¶ 14. In prior cases, we have read the DSA's scope of recovery broadly to include persons unrelated to the decedent because "an individual in the decedent's circumstances had an obligation

to support" them. Thompson, 169 at 281-82, 733 A.2d at 70. In Thompson, this Court determined a decedent's partner and partner's daughter, both of whom lived with him, fit into the class of persons entitled to recover under the DSA. Id. It would be inconsistent for this Court to determine the plaintiffs in Thompson are entitled to recover under the DSA while excluding Awen, the decedent's biological child.

¶ 15. Because she was born alive, Awen's fetal status at the time of her father's death does not preclude her, as a matter of law, from recovering under Vermont's DSA. Awen's DSA claim accrued when she was injured. She was injured under the DSA when she was born alive and deprived of her father as a means of support. At the time her claim accrued, she was a "child" for purposes of the DSA and entitled to bring a claim thereunder.

Affirmed.

FOR THE COURT:

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Associate Justice