IN THE COURT OF APPEALS OF IOWA

No. 2-056 / 91-1171

FILED
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CLERK SUPREME COURT

DONALD E. TEEL,

Appellant,

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vs.

TONY A. RAY, d/b/a GUNCHIE'S TAP and ERIC J. VASTINE, d/b/a GUNCHIE'S TAP,

Appellees.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

In this dram shop action, plaintiff appeals the trial court's dismissal of the petition for failure to state a claim on which relief could be granted. **AFFIRMED.**

Lawrence J. Lammers of McCarthy & Lammers, Davenport, for appellant.

Andrew Johnson and Gerry M. Rinden of Wintroub, Rinden & Sens, Des Moines, for appellees.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ., but decided en banc.

HAYDEN, J.

Debra Teel was killed in a one-car auto accident after she had been sold and served alcoholic beverages by the operators of Gunchie's Tap. At the time of her death Debra was covered by an accidental death insurance policy naming her father, Donald Teel, as beneficiary. The policy excluded coverage for a death caused by operating a vehicle while intoxicated. Hence the policy provided no coverage for Debra's death.

Mr. Teel filed this action against the operators of Gunchie's Tap under the Iowa Dram Shop Act. Teel theorized he had been "injured in property" because he had been precluded from recovering death benefits under the policy due to Debra's intoxication.

The defendants moved to dismiss Teel's petition on the ground it failed to state a claim on which relief could be granted. After a hearing the district court granted defendants' motion and dismissed the petition. The court held Teel had no vested property right under the policy because the death benefits were excluded under the terms of the policy.

Teel appeals, contending his property interest under the policy would have entitled him to receive payment but for the operation of the policy exclusion which occurred because of defendants furnishing alcohol to Debra.

Our review is for errors at law. Iowa R. App. P. 4. Defendants secured a dismissal of plaintiff's claim on a motion to dismiss.

> Under such a motion, dismissal is proper only if no state of facts is conceivable under which the plaintiff might show a right of recovery. A motion to dismiss admits the allegations of the petition and waives any ambiguity or uncertainty in the petition. The allegations are construed in the light most favorable to the pleader, and doubts are resolved in his favor.

Leuchtenmacher v. Farm Bureau Mutual Insurance, 460 N.W.2d 858, 861 (Iowa 1990) (citation omitted).

Our dram shop act provides a statutory cause of action to "any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person" against the dram shop that sold and served the intoxicated person liquor. Iowa Code § 123.92 (1991). Certain interests have been recognized as property within the meaning of the Iowa Dram Shop Act. For example, a parent may seek recovery for the loss of a minor child's services, companionship and society as a property right under the dram shop statute. Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457, 462-63 (Iowa 1989). Medical expenses incurred by parent on behalf of an injured minor child constitute an injury in property under the dram shop statute. Atkins v. Baxter, 423 N.W.2d 6, 7-8 (Iowa 1988).

In the present case Teel makes no claim for such interests. Rather, as a named beneficiary, he seeks damages for the loss of the death benefits under an insurance policy. He seeks payment of those benefits not from the insurer, but rather from the dram shop, a stranger

to the insurance contract. We must determine whether Teel has sustained an injury "in property" within the meaning of section 123.92.

> An injury "in property" need not be a direct physical injury to property to be compensable. A claimant is usually required to show only a lessening of his total assets because of the intoxication of another in order to state a cause of action against the vendor of the liquor which caused the intoxication.

Atkins, 423 N.W.2d at 7 (quoting Federated Mutual Implement & Hardware Insurance Co. v. Dunkelberger, 172 N.W.2d 137, 141 (Iowa 1969)).

Here, the right to change the beneficiary was reserved by the insured. Under such circumstances, the named beneficiary has no vested interest in the policy during the lifetime of the insured. Penn Mutual Life Insurance Co. v. Mulvaney, 221 Iowa 925, 929-33, 265 N.W. 889, 891-93 (1936). All the beneficiary has during the lifetime of the insured is a mere expectancy. Id.; Sorensen v. Nelson, 342 N.W.2d 477, 480 (Iowa 1984). This expectancy is not property. Mulvaney, 221 Iowa at 933, 265 N.W. at 893. At her death no property interest in the policy accrued to Debra or Teel because of the operation of the policy's exclusion.

The flaw in Teel's argument is he never possessed a property interest in the insurance policy. He possessed a mere expectancy which was extinguished by the operation of the policy's exclusion. Teel has not sustained a "lessening of his total assets." A party has no cause of

action if there has been no loss to his property. Wolfswinkel v. Gesink, 180 N.W.2d 452, 456 (Iowa 1970).

We conclude Teel did not sustain an injury in property within the meaning of section 123.92. As such, no cause of action against the defendants accrued. We affirm the decision of the district court.

Costs of this appeal are taxed to Teel.

AFFIRMED.

Oxberger, C.J., and Donielson and Habhab, JJ., concur; Schlegel and Sackett, JJ., dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent. The majority finds Donald Teel never possessed a property interest in the insurance policy because he had no vested interest in the policy during Debra's lifetime. I believe the majority fails to realize that Teel had a vested interest at the time of Debra's death. I would reverse the trial court's dismissal of this action.

First, the supreme court discourages general motions to dismiss. Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991). I find a "valid recovery can be gleaned from the pleadings" here, id., such that Teel should have the opportunity to prove his claim.

Second, a dram shop act is to be liberally construed. Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger, 172 N.W.2d 137, 140 (Iowa 1969), overruled on other grounds by Lewis v. State, 256 N.W.2d 181, 191-92 (Iowa 1977). In order to show an injury in property, "a claimant is usually required to show only a lessening of his [or her] total assets because of the intoxication of another in order to state a cause of action against the vendor of the liquor which caused the intoxication." Dunkelberger, 172 N.W.2d at 141. I find Teel has shown a "lessening of his total assets."

Other courts have rejected actions by parents to recover under a dram shop act. Those courts noted parents'

interests in the life of their child is not a property interest. See Robertson v. White, 11 Ill. App. 2d 177, 136 N.E.2d 550 (1956). The situation here, however, is quite different. Teel is not arguing his child might be a source of financial protection, he proves he was the beneficiary under Debra's policy.

In this context, a contract right has been held to be property which might be injured. 45 Am. Jur. 2d Intoxicating Liquors § 569, at 863 (1969). Upon Debra's death, Donald Teel had a property interest in her accidental death policy. He lost his property interest upon application of the exclusion in the policy. I would allow Teel the opportunity to prove the defendants caused this loss.

Sackett, J., joins this dissent.