COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3503

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PATRICIA FLOWERS AND TODD FLOWERS, INDIVIDUALLY AND AS GUARDIAN FOR CASSANDRA L. FLOWERS, A MINOR,

PLAINTIFFS-APPELLANTS,

V.

HOWARD A. NEWTON,

DEFENDANT,

ELIZABETH NEWTON,

DEFENDANT-RESPONDENT,

ALLSTATE INSURANCE COMPANY, OZAUKEE COUNTY AND WAUPACA COUNTY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J. and Deininger, J.

PER CURIAM. Patricia Flowers and Todd Flowers, individually and as guardians for their daughter, Cassandra Flowers, appeal from a circuit court judgment granting summary judgment to Elizabeth (Betty) Newton and Allstate Insurance Company. Because we conclude that the circuit court correctly granted summary judgment dismissing the claims against Betty Newton and Allstate, we affirm.

BACKGROUND

In the fall of 1993, Betty Newton shared her home with her son, Todd, her daughter-in-law, Patricia, and her grandchildren, Jacob, then five, and Cassandra, then seven. Under an agreement, Betty was to baby-sit Jacob and Cassandra while Todd and Patricia looked for work. During the winter of 1993-94, Betty Newton's estranged second husband, Howard, who was also Todd's stepfather and the children's step-grandfather, returned to Wisconsin and eventually moved into the Newton house. During times when Betty was to baby-sit the children, Howard was left alone with the children on several occasions, both when Betty was in the house and when she went to run errands. Howard was eventually charged with sexually abusing Cassandra during the period October 1993 to May 1994, and was convicted of one count of sexual abuse.

The Flowers brought suit against Betty for leaving Howard alone with the children. The complaint alleged that Betty breached her duty of ordinary care to Cassandra, Todd and Patricia by leaving Cassandra in Howard's sole control because she knew or should have known that Howard presented a threat to Cassandra. The Flowers further alleged that Betty knew Howard was violent, had abused Betty several times, acted unusually nice to the children, which should

have provided a clue as to his real behavior, and was known to dislike Todd. The Flowers also alleged that, to Patricia's knowledge, Betty's sister-in-law had once told Betty that Howard was "quite the pervert."

Betty and her homeowner's insurer, Allstate, moved for summary judgment. On October 21, 1996, the circuit court granted summary judgment, dismissing the Flowers' claims against Betty and concluding that Allstate did not insure against Howard's behavior.[1] The court determined that, as a matter of law, there was no material issue of fact in dispute and that Betty and Allstate were entitled to summary judgment.

STANDARD OF REVIEW

We review summary judgments *de novo*, using the same methodology as the trial court. ***Reel Enters. v. City of La Crosse***, 146 Wis.2d 662, 667, 431 N.W.2d 743, 746 (Ct. App. 1988). Under § 802.08(2), STATS., we must determine whether a genuine issue exists as to any material fact and whether the moving party is entitled to judgment as a matter of law. We examine the pleading, affidavits or other proofs to determine whether summary judgment is appropriate. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477-78 (1980). Doubts as to the existence of a genuine issue of material fact are resolved against the moving party. ***Id.*** at 338-39, 294 N.W.2d at 477. On summary judgment, the court does not decide issues of fact; it determines whether there is a genuine issue of fact. ***Id.*** at 338, 294 N.W.2d at 477.

ANALYSIS

[1] The Flowers do not challenge, and we therefore do not consider, the issue of the homeowner's insurance.

Summary judgment is disfavored in negligence cases and should only be granted in rare cases. ***Ceplina v. South Milwaukee Sch. Bd***., 73 Wis.2d 338, 342-43, 243 N.W.2d 183, 185 (1976). In considering whether to grant summary judgment, a court applies an objective standard. Stated otherwise, to grant summary judgment a court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that the defendant failed to exercise ordinary care. ***Id***. at 342, 243 N.W.2d at 185. Despite this stringent standard, our *de novo* review convinces us that summary judgment was appropriately entered here.

The Flowers' complaint and affidavits do not raise a genuine issue as to any material fact.[2] Stated otherwise, taking all the allegations in the complaint and affidavits as true, there has been no issue raised as to whether a reasonable person in Betty's position would or should have known that leaving Howard in sole charge of Cassandra for short periods presented a threat to Cassandra. Consequently, there is no genuine issue of material fact raised relevant to whether Betty was negligent in breaching her duty of care to Cassandra, and Betty is entitled to judgment as a matter of law.

In Wisconsin, a person is negligent when "he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage." *See* WIS J I—CIVIL 1005.

[2] We agree with the Flowers that there are disputes of fact, such as whether Betty "delegated" her baby-sitting job to Howard and whether she was told by her sister-in-law that Howard was "quite the pervert." However, these are not issues of *material* fact, because even if the Flowers' contentions are correct (which we assume they are for the purposes of our analysis), they do not change our disposition.

The Flowers' filings do not establish that a reasonable person in possession of the knowledge Betty is alleged to have had would have foreseen that leaving Howard alone with Cassandra for short periods would subject Cassandra to an unreasonable risk of harm.

First, the filings establish that to Betty's knowledge, Howard had abused her and was violent to adult women. However, there is no nexus shown that Betty, or a reasonable person in Betty's position, should therefore have known that Howard posed a threat of harm to a seven-year-old child. Even accepting that expert opinion could show that abusers of women are likely to be child abusers, this is insufficient to allege that Betty or a reasonable person in her position would have or should have known that fact.

Second, the comment of Betty's sister-in-law that Howard was "quite the pervert" is also insufficient to establish that Betty, or a reasonable person in her position, would or should have known of the threat Howard posed. Even if a relative's comments were the type of opinion that must be considered convincing, the term "pervert" is not synonymous with "child molester," but may refer to many unrelated forms of perversion.

Third, other factors, such as Howard's animosity towards Todd and his unusually nice behavior to the children, also would not lead a reasonable person to conclude that Howard presented a threat to Cassandra.

We therefore conclude that summary judgment is appropriate.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.