COURT OF APPEALS DECISION DATED AND FILED

June 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1135

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

NANCY J. FLEEGE, AN INCOMPETENT, BY HER GUARDIAN AD LITEM CHARLES F. STIERMAN,

PLAINTIFF,

RALPH A. FLEEGE, JANET B. FLEEGE AND MICHAEL J. FLEEGE,

PLAINTIFFS-APPELLANTS,

V.

ST. MARY'S NURSING HOME, INC., A WISCONSIN CORPORATION, MICHAEL ZIMMERMAN, CONTINENTAL CASUALTY COMPANY, A FOREIGN CORPORATION, AND TERENCE M. MCCARTHY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Janet B. Fleege, Michael J. Fleege, and Ralph A. Fleege, the children of Nancy A. Fleege, appeal from the trial court's order granting partial summary judgment to St. Mary's Nursing Home, Inc., Michael Zimmerman, St. Mary's director, Terence M. McCarthy, a St. Mary's employee, and Continental Casualty Co., St. Mary's insurer. The Fleege children challenge the trial court's conclusion that, under ***Bowen v. Lumbermens Mutual Casualty Co.***, 183 Wis.2d 627, 517 N.W.2d 432 (1994), they had no cause of action for negligent infliction of emotional distress arising from McCarthy's sexual assault of their mother in the nursing home. We affirm.

For purposes of this appeal, the facts are undisputed. Nancy Fleege, an incompetent, was entrusted by her children to the care of St. Mary's Nursing Home. McCarthy, an employee of St. Mary's, repeatedly sexually assaulted her. Nancy, by her guardian ad litem, brought numerous claims against the defendants; those claims are pending. Her children brought additional claims alleging negligent infliction of emotional distress resulting from their learning of McCarthy's assaults of their mother.

The trial court granted partial summary judgment dismissing the children's claims, based on the supreme court's decision in ***Bowen***.[1] Because we conclude that ***Bowen*** controls, and because the Fleege's claims fail to satisfy one of the ***Bowen*** requirements for an action alleging negligent infliction of emotional harm, we affirm.

[1] Although the trial court ordered partial summary judgment, its decision was based solely on pleadings and, therefore, is reviewed as one dismissing a complaint.

The supreme court recently reiterated the standards, applicable to this appeal, for reviewing the dismissal of a claim for negligent infliction of emotional distress:

> The determination of whether public policy precludes liability in a negligence claim is a question of law solely for judicial decision. This court decides questions of law without deference to the trial court. Under Wisconsin's liberal construction of pleadings, however, a claim will be dismissed on the pleadings only if "'it is quite clear that under no conditions can the plaintiff recover.'" In making or reviewing a judgment on the pleadings, a court must view the complaint most favorably to the plaintiff and accept its allegations as true.

Kleinke v. Farmers Coop. Supply & Shipping, 202 Wis.2d 138, 142-43, 549 N.W.2d 714, 715-16 (1996) (citations omitted).[2] Accordingly, we accept as true that the Fleege children, as stated in their complaint, "sustained severe emotional distress, and resulting psychological injuries, and other compensable injuries … when [they] learned of the sexual assaults by defendant McCarthy upon [their] mother." Nevertheless, under ***Bowen***, the trial court correctly concluded that their claims must be dismissed.

In ***Bowen***, the supreme court re-examined the three elements of negligent infliction of emotional distress and further considered whether a victim's relative, who alleged all three elements, could clear the public policy hurdles potentially precluding a "bystander's" claim. *See* ***Bowen***, 183 Wis.2d at 632-33, 432 N.W.2d at 434-35. The court concluded:

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[2] Moreover, "the circuit court … may grant summary judgment on public policy grounds before a trial," and "[w]hen the pleadings present a question of public policy, the court may make its determination on public policy grounds before trial." ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 654-55, 517 N.W.2d 432, 443 (1994).

> [T]hree factors are critical to the determination of legal cause in the bystander fact situation. First, the injury suffered by the victim must have been fatal or severe. Second, the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild or siblings. Third, *the plaintiff must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene*.

Id. at 633, 517 N.W.2d at 434-35 (emphasis added).

The Fleege children point to other language in ***Bowen***, arguing that it provides the latitude allowing for their claim:

> In summary, to determine on the basis of public policy considerations whether to preclude liability for severe emotional distress to a bystander a court must consider three factors: the severity of the injury to the victim, the relationship of the plaintiff to the victim, and *the extraordinary circumstances surrounding the plaintiff's discovery of the injury*.

Id. at 660, 517 N.W.2d at 445 (emphasis added). They contend that "although [they] did not observe the incidents causing injury to their mother, there were 'extraordinary circumstances' surrounding their discovery of the injuries to their mother." Elaborating, however, the Fleege children say only that "[t]hey learned that the injuries were caused by the sexual abuse of their mother by an employee of the nursing home to whom they had entrusted the care of their mother."

As extraordinary and devastating as these circumstances may be, they do not carry the Fleege children's claim outside the ***Bowen*** rule. The supreme court referred not just to "extraordinary circumstances," but to "extraordinary circumstances *surrounding the plaintiff's discovery of the injury*." ***Id.*** (emphasis added). Moreover, several times in ***Bowen***, the supreme court clarified the line it was drawing and emphasized the limitations it was imposing. The court declared:

> Witnessing either an incident causing death or serious injury or the gruesome aftermath of such an event minutes after it occurs is an extraordinary experience, distinct from the experience of learning of a family member's death through indirect means. Thus it is an appropriate place to draw the line between recoverable and non-recoverable claims.
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> … The distinction between on the one hand witnessing the incident or the gruesome aftermath of a serious accident minutes after it occurs and on the other hand the experience of learning of the family member's death through indirect means is an appropriate place to draw the line between recoverable and non-recoverable claims.
>
> The tort of negligent infliction of emotional distress … reflects … the intensity of emotional distress that can result from seeing the incident causing the serious injury or death first hand or from coming upon the gruesome scene minutes later.
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> . . . .
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> … The compensable serious emotional distress of a bystander under the tort of negligent infliction of emotional distress is not measured by the acute emotional distress of the loss of the family member. Rather the damages arise from the bystander's observance of the circumstances of the death or serious injury, either when the incident occurs or soon after.

Id. at 658-60, 517 N.W.2d at 444-45.

The Fleege children do not claim that they observed or came upon the scene shortly after the assaults on their mother. Thus, the trial court correctly concluded that they "failed to state a claim on the third public policy factor enumerated by the ***Bowen*** Court since it has not been alleged that [they] observed or discovered the injury to the victim in an extraordinary manner."[3]

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[3] The appellants also argue that because the supreme court did not apply the ***Bowen*** limitations in ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis.2d 138, 549 N.W.2d 714 (1996), it implicitly allows for additional case-by-case analysis that would carry the instant action outside the ***Bowen*** limitations. We disagree. ***Kleinke*** dealt with a distinguishable claim — "for negligent infliction of emotional distress that is based upon property damage." ***Kleinke***, 202 Wis.2d at 141, 549 N.W.2d at 715. Nevertheless, it referred to and utilized the ***Bowen*** threshold

(continued)

By the Court.—Order affirmed.

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

standards at several points, and never implied the slightest deviation from ***Bowen***'s additional public policy/bystander rules.