COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP550 **Cir. Ct. No. 2012CV2286**

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

BRIAN D. SEAMONSON AND MELISSA L. SEAMONSON,

PLAINTIFFS-APPELLANTS,

V.

NAZARETH HEALTH & REHABILITATION CENTER AND SUNLAND RISK RETENTION GROUP, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Brian Seamonson and Melissa Seamonson appeal an order of the circuit court granting summary judgment against them and in favor of Nazareth Health & Rehabilitation Center and Sunland Risk Retention Group, Inc. For the reasons set forth below, we affirm the order of the circuit court.

¶2 This case arises out of the circumstances surrounding the death of the Seamonsons' two-year-old son, Blake. The Seamonsons visited Blake's great-grandmother at the Nazareth Health & Rehabilitation Center on November 1, 2011. On November 3, 2011, Melissa Seamonson put Blake to bed around 9:30 p.m. On the morning of November 4, 2011, Melissa woke up around 9:30 a.m. and went to wake her son, but was unable to rouse him. Both she and Brian called 911, and Brian administered CPR. Brian rode with Blake in the ambulance to the hospital, where Blake was pronounced dead at 11:02 a.m. An autopsy revealed that Blake died of poisoning from ingesting a Fentanyl medication patch, which the Seamonsons allege was improperly disposed of at Nazareth.

¶3 The Seamonsons sued Nazareth and its insurer, Sunland, alleging several causes of action. Nazareth and Sunland moved for summary judgment. The circuit court granted Nazareth and Sunland's summary judgment motion as to the Seamonsons' claims of negligent infliction of emotional distress and punitive damages. The court denied Nazareth and Sunland's summary judgment motion as to the Seamonsons' wrongful death claim and safe-place claim pursuant to WIS. STAT. § 101.11 (2013-14).[1] The Seamonsons filed a petition for leave to appeal, which we granted.

¶4 The Seamonsons argue on appeal that we should reverse the summary judgment order as to their claim for negligent infliction of emotional distress, also known as a "bystander" claim. We review a circuit court's ruling on

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

summary judgment de novo. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425.

¶5 In ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 632-33, 517 N.W.2d 432 (1994), our supreme court identified three public policy factors for courts to consider in determining whether a plaintiff may proceed with a claim for negligent infliction of emotional distress: (1) the injury suffered by the victim must be fatal or severe; (2) the victim and plaintiff must have a close familial relationship; and (3) the plaintiff must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim still at the scene. In this case, the parties agree that only the third ***Bowen*** factor is at issue.

¶6 In ***Bowen***, a fourteen-year-old boy died after he was hit by a car while riding his bicycle. 183 Wis. 2d at 634. The boy's mother did not witness the accident, but arrived at the scene a few minutes after the collision occurred and observed her son trapped beneath the car. ***Id.*** at 634-35. The court permitted the mother's bystander claim to go forward, stating, "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." ***Id.*** at 658. The Seamonsons argue that the ***Bowen*** court's usage of the word "minutes" was not meant to be taken literally but, rather, was a way of distinguishing between direct and indirect discovery of injury or death.

¶7 The Seamonsons point out that they discovered their son's death personally and directly, rather than through indirect means. They argue that this direct discovery makes them similar to the plaintiff in ***Bowen***. In support of their

position, the Seamonsons cite the Indiana Supreme Court case of ***Smith v. Toney***, 862 N.E.2d 656, 659-60 (Ind. 2007), which interpreted ***Bowen***. The Indiana court stated, "[W]e think the requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial." ***Smith***, 862 N.E.2d at 663. The ***Smith*** court emphasized that the scene viewed by the bystander must be essentially the same as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene. ***Id.*** Applying this line of reasoning, the Seamonsons argue that the circumstances under which they discovered their son—in the same condition and at the same scene as when he died—weigh in favor of allowing their bystander claim to proceed.

¶8 The respondents argue that ***Bowen*** has been more narrowly interpreted under Wisconsin law. They emphasize the ***Bowen*** court's usage of the word "minutes" in discussing negligent infliction of emotional distress. *See* ***Bowen***, 183 Wis. 2d at 659. The respondents also reference the Wisconsin Civil Jury Instructions for bystander claims, which explain emotional distress as arising "from the natural shock and grief of directly observing an (incident) (accident) which results in the (serious injury) (death) to a family member or from coming upon the scene minutes later and witnessing the aftermath." WIS JI—CIVIL 1510.

¶9 Wisconsin courts have not defined a specific temporal limit for bystander claims. No bright line rule defines exactly how soon a claimant must have come upon the scene of the victim's injury or death in order to state a claim for negligent infliction of emotional distress. Rather, the ***Bowen*** court emphasized that courts must rule on such claims on a case-by-case basis. *See* ***Bowen***, 183 Wis. 2d at 660.

¶10 Although none of the cases cited in the parties' briefs involve the exact factual circumstances present in this case, the pattern we observe is that the public policy factors articulated in ***Bowen*** have been interpreted narrowly under Wisconsin law. For example, in ***Rosin v. Fort Howard Corp.***, 222 Wis. 2d 365, 372, 588 N.W.2d 58 (Ct. App. 1998), this court upheld the circuit court's decision to dismiss the bystander claim of a nine-year-old child because the child's observance of the scene of his father's fatal accident "did not occur minutes after his father's death," but rather through viewing a newspaper photograph eighteen hours later. Similarly, Wisconsin courts have narrowly interpreted the "close family" relationship factor in ***Bowen***, 183 Wis. 2d at 657. *See* ***Rabideau v. City of Racine,*** 2001 WI 57, ¶¶26-27, 243 Wis. 2d 486, 627 N.W.2d 795 (holding that close family relationship does not extend to a best friend, whether that best friend is a person or a dog); *see also* ***Zimmerman v. Dane Cnty.***, Nos. 2009AP1710, 2009AP1711, unpublished slip op. at ¶2 (WI App July 22, 2010) (dismissing fiancé's bystander claim because fiancé relationship did not satisfy ***Bowen*** requirement of a close familial relationship).

¶11 In ***Kuehn v. Childrens Hospital***, 119 F.3d 1296, 1298-99 (7th Cir. 1997), the United States Court of Appeals for the Seventh Circuit also interpreted ***Bowen*** narrowly in concluding that Wisconsin law barred the plaintiffs' bystander claim. The plaintiffs in ***Kuehn*** were parents of a child who underwent a second bone marrow transplant necessitated by the hospital's failure to properly transport marrow from the first transplant. ***Kuehn***, 119 F.3d at 1297-98. The child died eight months later. ***Id.*** at 1298. The child's parents claimed negligent infliction of emotional distress, but the court dismissed the claim because they had not witnessed "'either an incident causing death or serious injury or the gruesome aftermath of such an event.'" ***Id.*** at 1300 (quoting ***Bowen***, 183 Wis. 2d at 658).

¶12 As we discussed above, the Seamonsons cite an Indiana Supreme Court case, ***Smith***, 862 N.E.2d at 659-60, that interprets ***Bowen*** broadly. However, case law from other jurisdictions is not binding on this court. *See* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930. Wisconsin courts have tailored recovery for negligent infliction of emotional distress to be available only in those cases where the narrow requirements of ***Bowen*** have been met.

¶13 We acknowledge the Seamonsons' position that the circumstances would have been no different had they discovered their son minutes rather than hours after he died. However, we are not persuaded, based on the facts before us, that the narrow ***Bowen*** requirements have been met here. Specifically, we are not aware of any binding precedent that would encompass the Seamonsons' situation—where they discovered their son in his bed after an undetermined amount of time, possibly hours, since his death—within ***Bowen***'s requirement that "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." ***Bowen***, 183 Wis. 2d at 633.

By the Court.—Order affirmed.

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