

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 00-2472-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RODNEY OLSON AND LAVONNE OLSON,

PLAINTIFFS-APPELLANTS,

V.

**JOSHUA A. BERG, LAVERN V. BERG AND MSI
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J.¹ Rodney and LaVonne Olson appeal a judgment upholding a jury verdict for loss of society and companionship damages, but denying interest on the verdict. Specifically, they claim the trial court erred when it prevented LaVonne from testifying about how the loss of her son's relationship has affected her since his death. They assert the jury verdict would have been higher had they been able to introduce the evidence. They also contend that they are entitled to interest on the award under WIS. STAT. § 814.04(4). We conclude that the trial court did not err and, therefore, we affirm the judgment.

BACKGROUND

¶2 Joshua Berg, thirteen years old, and his father, LaVern Berg, were hunting when Joshua fired at what he thought was a squirrel, but actually was a man. The man was the Olsons' twenty-seven year old son, Jason,² who died as a result of the gunshot wound. The Olsons sued the Bergs and their insurer for wrongful death.

¶3 The jury awarded the Olsons \$100,000 for their loss of society and companionship and \$12,815.80 for hospital, medical and funeral expenses. The court upheld the jury's verdict and denied the Olsons' request for interest on the verdict. Because the Bergs' offer of judgment was greater than the jury verdict,³ the court awarded them costs.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The family and counsel refer to him as "Jason." His given name was Rodney J. Olson, Jr.

³ The Bergs made an offer of judgment in the amount of \$162,815.80 plus the taxable costs incurred up to April 13, 2000. After trial, the court entered an award for \$112,439.06.

DISCUSSION

¶4 The Olsons assert that the parents' emotional and mental well-being associated with a parent/child relationship is part of what constitutes a claim for loss of society and companionship. Citing *Shockley v. Prior*, 66 Wis. 2d 394, 401, 225 N.W.2d 495 (1975), the Olsons contend that parents should be able to testify about the effect that the loss has had on them. In this case, the Olsons sought to introduce evidence of how Jason's death affected LaVonne's ability to work and caused her psychological and physical ailments that required medical assistance. The Olsons contend that this evidence is not merely proof of emotional distress, excludable under *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 660, 517 N.W.2d 432 (1994). They argue that the court erred when it excluded this evidence because it prevented the jury from accurately assessing damages. We disagree.

¶5 We will uphold a circuit court's decision to admit or exclude evidence unless the circuit court has erroneously exercised its discretion. *State v. Gilles*, 173 Wis. 2d 101, 113, 496 N.W.2d 133 (Ct. App. 1992). We will affirm a discretionary determination if it is reasonably based on the facts and the proper legal standard. See *State v. Hereford*, 195 Wis. 2d 1054, 1065, 537 N.W.2d 62 (Ct. App. 1995).

¶6 The court gave the standard jury instruction, WIS JI—CIVIL 1895:

Society and companionship includes the love, affection, care, protection, and guidance the parents would have received from their child had he continued to live. *It does not include the loss of monetary support from the child or the grief and mental suffering caused by the child's death.*

In determining [the Olsons'] loss of society and companionship, you should consider the age of the deceased child and the ages of the parents, the past

relationship between the child and the parents, the love, affection, and conduct of each toward the other; the society and companionship that had been given to the parents by the child, the personality, disposition, and character of the child, and *the extent to which you find the parents will suffer from the loss.*

The amount inserted by you should reasonably compensate the parents for the loss of society and companionship they have sustained since the death of their child and the amount you are reasonably certain they will sustain in the future. (Emphasis added.)⁴

The parties agreed that this instruction was proper.

¶7 Historically, courts have been reluctant to compensate plaintiffs for emotional harm. ***Bowen***, 183 Wis. 2d at 638. Wisconsin courts have reversed verdicts where the jury was not instructed to exclude damages for sorrow and grief associated with the death of a child. ***Prange v. Rognstad***, 205 Wis. 62, 65, 236 N.W. 650 (1931). Additionally, the courts have reduced jury awards that included compensation for grief. ***Crossman v. Gipp***, 17 Wis. 2d 54, 60, 115 N.W. 547 (1962).

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 [emotional distress].

Bowen, 183 Wis. 2d at 658.

¶8 Emotional distress is defined as "mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental

⁴ Subsequent to the jury trial in this case, the standard jury instruction was modified to omit the language that forms the substance of the Olsons' evidentiary argument.

reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." *Id.* at 652-53 n.23. These damages are compensable under claims of intentional infliction of emotional distress, *Alsteen v. Gehl*, 21 Wis. 2d 349, 356-57, 124 N.W.2d 312 (1963), or negligent infliction of emotional distress, *Bowen*, 183 Wis. 2d at 658. However, the Olsons have not claimed either intentional or negligent infliction of emotional distress. Still, they contend that under *Shockley* this evidence is otherwise admissible because WIS JI—CIVIL 1895 allows the jury to consider how the parent suffers as a result of the loss.

¶9 *Shockley* does not help the Olsons. In *Shockley*, the court allowed a parent to recover for loss of society and companionship during the child's minority for a severe, permanent injury. *Id.* at 404. The *Shockley* court confined its opinion to whether loss of society and companionship damages were available to a parent during the minority of an injured child. *Id.* at 396. It did not address what kind of evidence is admissible for a loss of society and companionship claim and does not support an award for the Olsons' suffering as a result of their adult son's death.

¶10 We conclude that the *Bowen* emotional distress definition encompasses the very evidence the Olsons sought to introduce.⁵ The Olsons have cited no authority that supports including emotional distress evidence in a loss for

⁵ In any event, LaVonne was allowed to testify about some of her reactions to Jason's death, such as persistent crying and not wanting to leave her house even to get groceries. She was only prevented from testifying to a clinical diagnosis of chronic depression after the accident, the necessity of lifelong medication and a causal connection between the accident and depression and a job change.

society and companionship claim and we find none. Therefore, the trial court did not erroneously exercise its discretion when it excluded this evidence.

¶11 Last, the Olsons claim that the trial court erroneously denied interest on the verdict under WIS. STAT. § 814.04(4).⁶ Section 814.04(4) defines interest on the verdict as a "cost" that a plaintiff may recover in certain circumstances. However, the Olsons ignore WIS. STAT. §§ 807.01(1) and 814.04(7).⁷ Under these sections, if the Olsons do not accept the offer of judgment and "fail[] to recover a

⁶ WISCONSIN STAT. § 814.04 provides in part:

[W]hen allowed costs shall be as follows:

....

(4) INTEREST ON VERDICT. [I]f the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

⁷ WISCONSIN STAT. § 807.01(1) provides:

After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. *If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.* (Emphasis added.)

WISCONSIN STAT. § 814.04(7) provides:

JUDGMENT OFFER NOT ACCEPTED. If the offer of judgment pursuant to s. 807.01 is not accepted and the plaintiff fails to recover a more favorable judgment the plaintiff shall not recover costs but the defendant shall have full costs to be computed on the demand of the complaint.

more favorable judgment, the plaintiff shall not recover costs" *Id.* Because the verdict did not meet or exceed the offer of judgment, the Olsons may not recover costs, which under § 814.04 includes interest on the verdict. The trial court properly denied the interest.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

