COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal Nos. 2009AP1710
2009AP1711

Cir. Ct. Nos. 2009CV165
2009CV655

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

NO. 2009AP1710

ESTATE OF BRITTANY ZIMMERMAN,
JEAN ZIMMERMAN, AND KEVIN ZIMMERMAN,

PLAINTIFFS,

JORDAN GONNERING,

PLAINTIFF-APPELLANT,

V.

DANE COUNTY, KATHLEEN FALK AND RITA GAHAGAN,

DEFENDANTS-RESPONDENTS.

NO. 2009AP1711

JORDAN GONNERING,

PLAINTIFF-APPELLANT,

V.

RUSS ENDRES; CARL VAN ROOY; RUSSELL ENDRES & CARL VAN ROOY D/B/A "ENDRES, RUSSELL, CARL VAN ROOY," A PARTNERSHIP; WISCONSIN MANAGEMENT CO., INC.; GENERAL CASUALTY INSURANCE COMPANY; ERIE INSURANCE EXCHANGE; AND AMERICAN FAMILY MUTUAL INS. CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: MARYANN SUMI and JAMES L. MARTIN, Judges. *Affirmed.*

Before Vergeront, Lundsten and Fitzpatrick,[1] JJ.

¶1 FITZPATRICK, J. Jordan Gonnering appeals the dismissal of his claims in two separate lawsuits relating to the death of his fiancée, Brittany Zimmerman. Gonnering contends that both circuit courts erred in granting motions to dismiss for failure to state a claim upon which relief can be granted. Gonnering found his fiancée murdered in the apartment they shared. He alleges he has viable claims as a bystander for negligent infliction of emotional distress against defendants Dane County and Rita Gahagan for the improper handling of the 911 call from Zimmerman, and against the owners and managers of the rental unit (and their insurers) for a lack of security which led to the murder of Zimmerman.

[1] Rock County Circuit Court Judge Michael R. Fitzpatrick is sitting by special assignment pursuant to the Judicial Exchange Program.

¶2 We conclude that Gonnering, as a fiancé, is not in a category of persons who may state a bystander claim for negligent infliction of emotional distress. Wisconsin law limits such claims to the relationships between the plaintiff and the victim as spouses, parent-child, grandparent-grandchild, or siblings. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 517 N.W. 2d 432 (1994). The circuit courts properly granted defendants' motions to dismiss. We therefore affirm.

BACKGROUND

¶3 The portions of the record relevant to these issues are the complaints and answers. Solely for the purpose of deciding the questions of law now before the court, the allegations of the complaints are accepted as true.

¶4 The complaints allege the following. Jordan Gonnering and Brittany Zimmerman were engaged to be married and shared a household together in Madison, Wisconsin. The relationship was "akin to the relationship of husband and wife." On April 2, 2008, Zimmerman was assaulted and murdered by an unknown intruder in the apartment she shared with Gonnering. Shortly after the murder, Gonnering returned to their apartment and found Zimmerman. Upon discovering his fiancée,[2] he suffered severe emotional injuries.

¶5 In one suit, Gonnering alleges that Dane County and the employee who took a 911 call from Zimmerman on the day of the murder were negligent and their actions and inactions led to Gonnering's severe emotional injuries. In

[2] "Fiancé" (*masculine*) and "fiancée" (*feminine*) are defined as "a betrothed person." 5 OXFORD ENGLISH DICTIONARY 865 (2d ed. 2000).

the other suit, Gonnering contends that Wisconsin Management Co., Inc., Russ Endres and Carl Van Rooy were owners and landlords of the rental unit Gonnering and Zimmerman lived in and at which Zimmerman was murdered. He claims that those defendants failed to provide adequate security for the premises. Gonnering further alleges that the actions of Endres, Van Rooy, and Wisconsin Management were a cause of the death of Zimmerman and, therefore, those defendants were a cause of his severe emotional distress.

¶6 In the circuit court, the defendants filed motions to dismiss Gonnering's complaints for failure to state a claim upon which relief can be granted. Relying on ***Bowen*** and other Wisconsin authorities, both circuit courts granted defendants' motions to dismiss. Each court concluded that Gonnering, as a fiancé, cannot state a viable claim as a bystander for negligent infliction of emotional distress under Wisconsin law. Gonnering appeals the orders of the circuit courts.[3]

DISCUSSION

¶7 On appeal, Gonnering renews his argument that he has stated a cause of action upon which relief can be granted on his bystander claim for negligent infliction of emotional distress. In the alternative, Gonnering argues that this court should certify to the Wisconsin Supreme Court the issue of whether a fiancé is in a category of persons who can state such a claim. The defendants argue that, according to ***Bowen***, the fiancé relationship is outside the relationships denominated by the supreme court which can form a basis for a bystander claim

[3] On July 17, 2009, the two cases were consolidated for purposes of appeal.

for negligent infliction of emotional distress.[4] The supreme court has denominated the types of relationships which can form the basis for a bystander claim for negligent infliction of emotional distress. Gonnering's relationship with his fiancée is not within the limited categories of relationships set forth under Wisconsin law. We decline to certify this issue to the supreme court since it is controlled by precedent from the supreme court.

I. Standard of Review

¶8 A motion to dismiss for failure to state a claim tests whether a complaint is legally sufficient to state a cause of action for which relief can be granted. ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶11, 270 Wis. 2d 146, 677 N.W.2d 233. "All facts pleaded and reasonable inferences that may be drawn from such facts are accepted as true, but only for purposes of testing the complaint's legal sufficiency. Nevertheless, legal inferences and unreasonable inferences need not be accepted as true." ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298 (citations omitted). *See also*, ***Bowen***, 183 Wis. 2d at 635-36.

¶9 The issue of whether a complaint states a claim is a question of law, and we review the matter de novo. ***Beloit Liquidating Trust***, 270 Wis. 2d 356, ¶17. The pleadings are to be liberally construed and the claim is to be dismissed

[4] The landlords also argue that Gonnering's claims against them should be dismissed. They claim it would be unprecedented to have an intentional act of a third person be a basis for a bystander negligent infliction of emotional distress claim when the intentional act (here, the act of the person who murdered Zimmerman) is an alleged cause of the emotional distress along with the negligent acts of the landlords. We need not reach the alternative argument of the landlords.

only if there are no conditions under which the plaintiff can recover. ***Bowen***, 183 Wis. 2d at 635-36.

¶10 The question in this appeal is whether Gonnering may bring a claim for negligent infliction of emotional distress arising from him finding Zimmerman murdered. It is appropriate that this issue be resolved in the context of a motion to dismiss. As is noted in the next sections, the question is resolved by an application of public policy considerations. There are circumstances where a jury is to address questions of negligence and cause-in-fact before a court addresses public policy concerns associated with legal causation. ***Kleinke v. Farmers Coop. Supply***, 202 Wis. 2d 138, 144, 549 N.W.2d 714 (1996) (a claim for emotional distress caused by property damage). However, courts are to determine public policy considerations before a trial if the facts presented are simple and the question of public policy is fully presented by the pleadings and the motions to dismiss. ***Id.*** (citing ***Bowen***, 183 Wis. 2d at 654-55). The facts alleged in Gonnering's complaints are straightforward and the arguments are well-presented by the motions to dismiss. Therefore, it is advantageous to make a determination regarding the public policy factors at the pleadings stage.

II. Applicable Authorities

¶11 Holdings of the Wisconsin Supreme Court set forth the framework to resolve the issue in this appeal. Those cases include ***Bowen***, 183 Wis. 2d 627, and ***Rabideau v. City of Racine***, 2001 WI 57, 243 Wis. 2d 486, 627 N.W.2d 795. A review of those cases is instructive.

¶12 In ***Bowen*** the circuit court dismissed Sharon Bowen's claim for negligent infliction of emotional distress, which arose from her seeing the immediate aftermath of her son's fatal injuries allegedly caused by a defendant's

negligent use of a motor vehicle. The court of appeals affirmed the dismissal and the supreme court reversed. ***Bowen***, 183 Wis. 2d at 631. Bowen's claim was that of a "bystander." That term is used as a "shorthand reference to a plaintiff who alleges emotional distress arising from a tortfeasor's negligent infliction of physical harm on a third person." ***Id.*** at 632. The issue in ***Bowen*** came to the court, as in this case, on a motion to dismiss. ***Id***. at 635.

¶13 In ***Bowen*** the supreme court found that:

> The tort of negligent infliction of emotional distress has troubled this court and other courts for many years….
>
> Historically this court and other courts have been reluctant to compensate plaintiffs for emotional suffering. While courts are willing to compensate for emotional harm incident to physical injury in a traditional tort action, they have been loath to recognize the right to recover for emotional harm alone.

Id. at 637-38. On the other hand, justice requires recognition of some such claims and courts have tried to devise criteria to balance a plaintiff's interests with the interests of society in authenticating claims and preventing unlimited liability for a defendant. ***Id.*** at 639-40.

¶14 ***Bowen*** included a lengthy discussion of the history of the cause of action of negligent infliction of emotional distress in Wisconsin. ***Bowen*** found that nearly sixty years of decisions demonstrated that "rigid doctrinal limitations on liability to bystanders produce arbitrary, incongruous and indefensible results." ***Id.*** at 651. The court went on to explain:

> Claimants and courts need a framework for evaluating a bystander's claims of negligent infliction of emotional distress. The framework should be free of artificial, vague and inconsistent rules, yet should allow plaintiffs to recover for negligently inflicted severe emotional distress while protecting tortfeasors from spurious claims, from claims

> concerning minor psychic and emotional shocks, and from liability disproportionate to culpability.

Id. at 652.

¶15 ***Bowen*** held that a plaintiff claiming negligent infliction of emotional distress, regardless of the fact situation in which a claim arises, must prove the following elements: (1) the defendant's conduct fell below the applicable standard of care; (2) the plaintiff suffered an injury; and (3) the defendant's conduct was a cause-in-fact of the plaintiff's injury. ***Id.*** at 632. Those elements are to be combined with public policy considerations so courts can evaluate a bystander claim. ***Id.*** at 653. The application of public policy considerations is a function solely of the court and is used to establish authenticity of the claim and ensure fairness of the financial burden on a defendant.[5] Applying those public policy considerations, ***Bowen*** held that three factors are critical to the determination of legal cause in a bystander situation. First, the injuries suffered 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, in other words, the incident or the scene soon after the incident with the injured victim. ***Id.*** at 633.

[5] The public policy considerations to be reviewed by Wisconsin courts are: (1) whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 655, 517 N.W. 2d 432 (1994).

¶16 The second of those factors is dispositive. Notably, even though ***Bowen*** involved a parent/child relationship only, the ***Bowen*** court listed other qualifying relationships and explained why it was drawing this line:

> The court concludes that a tortfeasor may be held liable for negligent infliction of emotional distress on a bystander who is the spouse, parent, child, grandparent, grandchild or sibling of the victim. We agree that emotional trauma may accompany the injury or death of less intimately connected persons such as friends, acquaintances, or passersby. Nevertheless, the suffering that flows from beholding the agony or death of a spouse, parent, child, grandparent, grandchild or sibling is unique in human experience and such harm to a plaintiff's emotional tranquility is so serious and compelling as to warrant compensation. Limiting recovery to those plaintiffs who have the specified family relationships with the victim acknowledges the special qualities of close family relationships, yet places a reasonable limit on the liability of the tortfeasor.

Bowen, 183 Wis. 2d at 657 (footnote omitted).

¶17 Seven years later, in ***Rabideau***, the Wisconsin Supreme Court rejected an attempt to expand ***Bowen*** beyond the relationships delineated. Although the facts in ***Rabideau*** are obviously different from the facts in this case, ***Rabideau*** reaffirmed the holding of ***Bowen*** regarding the relationships which may form the basis for a bystander negligent infliction of emotional distress claim in Wisconsin. Since the plaintiff and the victim, the plaintiff's dog, did not have such a relationship, the plaintiff could not maintain a claim for negligent infliction of emotional distress. ***Rabideau***, 243 Wis. 2d 486, ¶¶23, 24. ***Rabideau*** underscored the holding and the limitations of ***Bowen*** in regard to the relationship between the plaintiff and the victim:

> We agree, as we must, that humans form important emotional connections that fall outside the class of spouse, parent, child, grandparent, grandchild or sibling. We recognized this in ***Bowen***, and repeat here, that emotional distress may arise as a result of witnessing the death or

> injury of a victim who falls outside the categories established in tort law. However, the relationships between a victim and a spouse, parent, child, grandparent, grandchild or sibling are deeply embedded in the organization of our law and society. The emotional loss experienced by a bystander who witnessed the negligent death or injury of one of these categories of individuals is more readily addressed because it is less likely to be fraudulent and is a loss that can be fairly charged to the tortfeasor. The emotional harm occurring from witnessing the death or injury of an individual who falls into one of these relationships is serious, compelling and warrants special recognition.

Id., ¶26 (footnote and citation omitted).

¶18 Plaintiff relies on numerous out-of-state cases. While other states may balance various factors in the same manner or a different manner than Wisconsin, that is not the issue. We may not rely on those out-of-state authorities since the supreme court has, in the clearest of terms, set forth the framework to resolve the question before this court.

¶19 In summary, Wisconsin law has not retreated from the requirement that, in a bystander negligent infliction of emotional distress claim, the relationship between the victim and the plaintiff be within one of the clearly-delineated categories: spouses, parent-child, grandparent-grandchild, or siblings. If not, the claim must be dismissed.

III. Application of Authorities

¶20 With that background and framework in mind, we address Gonnering's arguments. Gonnering argues that ***Bowen*** (and later cases) did not decide whether a fiancé has a viable bystander negligent infliction of emotional distress claim and, as a result, we should find that he has a viable cause of action. It is true that, in ***Bowen***, the supreme court did not list every possible type of

relationship and then expressly state whether each of those relationships could be a basis for a viable bystander claim for negligent infliction of emotional distress. What ***Bowen*** did was to specify that the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild or siblings. ***Bowen***, 183 Wis. 2d at 657.

¶21 ***Bowen***, and later ***Rabideau***, explained that other relationships exist but the denominated relationships are "unique in human experience." Limiting recovery to those plaintiffs who have those specified family relationships with the victim acknowledges those special qualities and places a reasonable limit on the liability of a tortfeasor. ***Bowen***, 183 Wis. 2d at 657; ***Rabideau***, 243 Wis. 2d 486, ¶26.

¶22 "Fiancé" is not a new type of relationship which has come into being since ***Bowen***. The facts presented by Gonnering are not a novel fact situation unanticipated by ***Bowen*** and later cases. While not explicitly stated in ***Bowen*** and later cases, there is no question that the relationship of fiancé cannot be the basis for a bystander negligent infliction of emotional distress claim in Wisconsin.

Therefore, the complaints of Gonnering do not state claims upon which relief can be granted.[6]

¶23 Gonnering next argues that the holding of ***Bowen*** is not binding in this appeal since ***Bowen*** twice noted that it was reviewing the public policy factors "in this case" and "in this fact situation." ***Bowen***, 183 Wis. 2d at 656. The language quoted by Gonnering does not support the argument that ***Bowen*** is limited to its unique facts or that the public policy restrictions of ***Bowen*** do not apply to Gonnering's claims. First, and most importantly, ***Bowen*** itself states (in language quoted in paragraph 14 above) that its holding is intended to give courts and practitioners guidance. ***Id.*** at 652. Gonnering's argument cannot be reconciled with that admonition. Second, ***Rabideau*** relies on the ***Bowen*** analysis. ***Rabideau***, 243 Wis. 2d 486, ¶¶26-27. This underscores that the analysis in ***Bowen***, including the public policy factors cited, are not to be used only in that one case. The language of ***Bowen*** relied on by Gonnering merely states the general proposition that, when a court analyzes a case, it must do so based on the facts and then apply the law to those facts. Simply because a court cites this unremarkable proposition does not mean that a holding is then limited to its unique facts or that the guidance of the court may be disregarded in future cases.

[6] Gonnering argues that a footnote in ***Bowen*** should be a basis for distinguishing that case. Specifically, then Justice (now Chief Justice) Abrahamson stated in a footnote: "The author of the opinion would allow recovery when the plaintiff can prove that the victim is a loved one, that is, when the plaintiff and the victim have a relationship analogous to one of the relationships specified." ***Bowen***, 183 Wis. 2d at 657 n.28. No other justice joined in that footnote and it was not a holding of ***Bowen***. Of interest on this point is Chief Justice Abrahamson's concurrence in ***Rabideau*** in which she stated that, for purposes of recovery for negligent infliction of emotional distress, "this court" does not allow recovery for "injury to or death of a best friend, a roommate, or a nonmarital partner." ***Rabideau v. City of Racine***, 243 Wis. 2d 486, ¶52, 627 N.W. 2d 795. There is no basis to distinguish ***Bowen*** factually or legally based on the footnote cited by Gonnering.

¶24 Finally, in the alternative, Gonnering requests that we certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61.[7] The question in this appeal is controlled by the holdings of the supreme court. We discern no reason to believe that the court was not cognizant of other relationships, such as fiancé/fiancée, when it formulated the exclusive list of qualifying relationships. For that reason, we decline to certify this case to the supreme court.

CONCLUSION

¶25 We conclude that Gonnering's complaints do not state causes of action upon which relief can be granted. We affirm the orders of the circuit courts dismissing Gonnering's complaints.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[7] On January 12, 2010, the Wisconsin Supreme Court denied Gonnering's petition to bypass the court of appeals pursuant to WIS. STAT. RULE 809.60.