COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 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 No. 2010AP522 **Cir. Ct. No. 2009CV229**

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

CRYSTAL ULRICH,

PLAINTIFF-APPELLANT,

V.

CERCUEILS ALLIANCE ST. LAURENT, INC., ZURICH AMERICAN INSURANCE COMPANY, THE E.C. MANGER & SON COMPANY, SCHUMACHER-KISH FUNERAL HOME, EMC PROPERTY & CASUALTY COMPANY AND STATE AUTOMOBILE MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

HEALTH INSURANCE RISK SHARING PLAN,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Crystal Ulrich appeals from a summary judgment decision that dismissed her multiclaim lawsuit against a funeral home, a casket manufacturer, a casket distributor and their insurers. The sole question on appeal is whether a person can recover damages for emotional distress suffered after witnessing a spouse's casket fall to the ground when a handle broke as pallbearers escorted the casket from hearse to gravesite. We conclude that public policy, as defined in ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 517 N.W.2d 432 (1994), precludes recovery for emotional distress under these circumstances, and therefore affirm the decision of the circuit court.

¶2 The parties agree that ***Bowen*** provides the framework for evaluating bystander claims for the negligent infliction of emotional distress. They disagree, however, as to what ***Bowen*** requires here.

¶3 In ***Bowen***, a mother sought recovery for the emotional distress she suffered after observing the "violent and gruesome aftermath" of a fatal accident. ***Bowen***, 183 Wis. 2d at 634. She did not witness the accident itself, but arrived in time to see her severely injured minor son still trapped beneath a car that had hit his bicycle, and she watched the prolonged, ultimately unsuccessful, rescue effort. ***Id.*** at 634-35.

¶4 After discussing why claims of emotional distress have been historically disfavored, the court concluded that past requirements that a bystander must have been in a "zone of danger" and must have exhibited a physical manifestation of emotional distress in order to recover prevented redress in some deserving cases and should be abandoned. ***Id.*** at 651. Yet, the court recognized that there is still a need to protect tortfeasors from spurious claims, claims concerning relatively more minor or common emotional shocks, and liability

disproportionate to culpability. ***Id.*** at 652. The court concluded that the best way to handle bystander claims of negligent infliction of emotional distress is to first subject them to the standard elements of all negligent tort cases, thus requiring a showing that: (1) a defendant's conduct fell below the standard of care (2) causing (3) an injury to the bystander plaintiff in the form of severe emotional distress. ***Id.*** at 632, 654. Then, also as in other negligent tort cases, a court may proceed to consider whether public policy precludes recovery under the circumstances of the case. ***Id.*** at 655.

¶5 The court noted that a traditional public policy analysis in negligence cases involves such considerations as:

> (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.

Id. at 655.

¶6 The court noted that the tort of negligent infliction of emotional distress on a bystander "compensates plaintiffs whose natural shock and grief upon the death or severe physical injury of a [close relative] are compounded by the circumstances under which they learn of the serious injury or death." ***Id.*** at 659. It pointed out that the tort would not provide compensation for learning indirectly of a loved one's death or injury, or for observing a serious injury or rescue efforts in a traditional setting such as an ambulance or hospital. ***Id.*** at 660. Therefore, the court held that:

> three factors are critical to the determination of [whether public policy precludes recovery] 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.

¶7 Applying those three factors to the case before it, the court explained that allowing recovery for a mother who witnessed the aftermath of an accident that killed her son "is neither too remote from nor out of proportion to [the] allegedly negligent driving, nor in retrospect does it appear too extraordinary that such negligence should have brought about the harm" and "does not place an unreasonable burden on the alleged tortfeasor." ***Id.*** at 659. The court further reasoned that the circumstances of the case "guarantee the genuineness" of the mother's emotional distress, and thus do not "raise the specter of unlimited liability for tortfeasors." ***Id.***

¶8 Ulrich argues that the three ***Bowen*** factors recited above were specific to the facts of ***Bowen***, and do not apply to all bystander claims. Instead, she contends that the circumstances of this case should be examined separately under the traditional six public policy factors. We disagree with Ulrich's reading of ***Bowen***. Properly read, Bowen teaches that the three factors the court identifies must be present in any bystander claim for negligent infliction of emotional distress to avoid being barred under the traditional negligence public policy test.

¶9 We conclude that the circumstances of this case do not satisfy the first of the three ***Bowen*** factors, namely that the injury suffered by the victim and observed by the bystander must have been fatal or severe. She provides no

support for this novel proposition and we discern no reason why damage to the casket should be considered injury to the deceased. The victim was of course deceased when the casket in which he was being carried fell to the ground. He could suffer no pain from the fall and, even assuming without deciding that damage to a corpse could ever qualify as a "severe injury" for the purposes of a bystander's claim of negligent infliction of emotional distress, there is no evidence that the body itself suffered any further damage or that the widow ever viewed any such damage. We also reject Ulrich's contention that the broken casket should be considered "part and parcel" of the deceased's body.

¶10 We in no way mean to suggest that emotional distress suffered by Ulrich in this case was not genuine and understandable. We acknowledge that it would be upsetting to most family members to observe such an incident. Indeed, Ulrich correctly points out that there have been situations in which Wisconsin law, at least predating ***Bowen***, permitted the recovery of damages for emotional distress based upon the mutilation of a corpse. *See* ***Koerber v. Patek***, 123 Wis. 453, 102 N.W. 40 (1905) (son permitted to seek damages for mental suffering after man removed and took away stomach from his mother's deceased body); ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 292 N.W.2d 816 (1980) (parents permitted to seek damages for emotional distress suffered as the result of an unauthorized autopsy on their child).

¶11 The cases involving claims of emotional distress resulting from the mutilation of a corpse do not control the outcome here, however. First, the cases cited by Ulrich preceded the adoption of the bystander test in ***Bowen***. Furthermore, in ***Koerber***, the court emphasized that the conduct before it represented a willful, rather than merely negligent, interference with a family's right to bury their dead intact; and in ***Scarpaci***, the court acknowledged the

Koerber distinction between willful and negligent acts and noted that the jury had not yet determined whether the coroner's actions in that case were intentional or negligent. ***Koerber***, 123 Wis. at 463; ***Scarpaci***, 96 Wis. 2d at 673 and n.8. This case involves a claim of negligence, not an intentional act, and, again, there is no indication that the body was actually affected by the fall of the casket to the ground.

¶12 In sum, we conclude that the trial court properly determined that Ulrich was precluded by the first ***Bowen*** factor from recovering damages on her bystander claim for negligent infliction of emotional distress.

By the Court.—Judgment affirmed.

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