**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

July 20, 1995

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.

**NOTICE**

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

**No. 94-0471**

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

**EDWARD G. PRENDERGAST,**

**Plaintiff-Appellant,**

**v.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Jefferson County: JACKIE R. ERWIN, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Edward G. Prendergast appeals from an order and an amended order dismissing his complaint for negligent infliction of emotional distress ("negligent infliction").[1] The issue is whether a negligent

[1] Originally, the trial court dismissed the action without prejudice. However, it

infliction action can be maintained absent physical injury. ***Bowen v. Lumbermens Mutual Casualty Co.***, 183 Wis.2d 627, 632, 517 N.W.2d 432, 434 (1994), held that physical manifestation of emotional distress ("physical injury") was no longer necessary. However, ***Bowen*** also held that recovery for negligent infliction was limited to a spouse, parent, child, grandparent, grandchild or sibling of the victim. ***Id***. at 657, 517 N.W.2d at 444. Therefore, we affirm.

Carol Jean Rowley, American Family Mutual Insurance Company's insured, collided with Prendergast when Rowley lost control of her pick-up truck. Prendergast exited his jack-knifed truck and ran to assist Rowley. However, he was unable to pry open her door and saw that she was dead. As a result, Prendergast suffered severe emotional trauma.

Prendergast sued American Family for negligent infliction of emotional distress. American Family moved to dismiss for failure to state a claim. The trial court dismissed the action because Prendergast had not alleged any physical injury. Prendergast appeals.

After Prendergast filed his appellate brief-in-chief, the Wisconsin Supreme Court decided ***Bowen***. ***Bowen*** supplanted the traditional method for recovery for negligent infliction with causal negligence requirements, absent physical injury, and added three public policy factors to establish legal cause. ***Id***. at 632-33, 517 N.W.2d at 434-35. Accordingly, the trial court's dismissal, based on the absence of physical injury, is no longer valid under ***Bowen***. However, ***Bowen***'s requirement that the plaintiff has a particular familial relationship is not satisfied here. *See* ***id***. at 657, 517 N.W.2d at 444. Consequently, we affirm the trial court's dismissal order, but for reasons that did not exist when the trial court decided this issue.

Prendergast contends that ***Bowen's*** abrogation of the physical injury requirement compels reversal. He further contends that the three policy factors on legal cause in bystander situations are factors for the trial court's

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amended its order dismissing the action with prejudice. Because Prendergast had appealed from the original dismissal order, he filed an amended notice of appeal to encompass the amended dismissal order. *See* ***Chicago & N. W. R.R. v. LIRC***, 91 Wis.2d 462, 473, 283 N.W.2d 603, 609 (Ct. App. 1979), *aff'd*, 98 Wis.2d 592, 297 N.W.2d 819 (1980).

consideration, rather than conditions precedent to recovery. We disagree. ***Bowen*** held that:

> *[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 ....

***Id.*** at 633, 517 N.W.2d at 434-35 (emphasis added). The supreme court expressly required the specified familial relationship by acknowledging that:

> [E]motional 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.*

***Id***. at 657, 517 N.W.2d at 444 (emphasis added). Prendergast does not allege that he and Rowley were related. We assume that the two were strangers, who coincidentally collided.[2]

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[2] Justice Abrahamson would allow recovery upon proof that the victim was the plaintiff's "loved one," defined as "a relationship analogous to one of the relationships specified." ***Bowen v. Lumbermens Mutual Casualty Co.***, 183 Wis.2d 627, 657 n.28, 517

American Family urges us to affirm on the absence of physical injury rather than on ***Bowen***, contending that ***Bowen*** does not retrospectively apply to this case. However, "we adhere to the concept that a decision that overrules or changes a rule of law is to be applied retrospectively unless it is established there are compelling judicial reasons [reliance and the administration of justice] for not doing so." ***Fitzgerald v. Meissner & Hicks, Inc.***, 38 Wis.2d 571, 579-80, 157 N.W.2d 595, 599 (1968). If these compelling judicial reasons warrant prospective application of the new rule, that is addressed in the opinion announcing the new rule. *See, e.g.*, ***Koback v. Crook***, 123 Wis.2d 259, 277, 366 N.W.2d 857, 865 (1985) (imposes liability on social hosts serving liquor to minors after August 31, 1985); ***Theama v. City of Kenosha***, 117 Wis.2d 508, 528, 344 N.W.2d 513, 522 (1984) (recognizes recovery by minor child for loss of parent's society and companionship after March 7, 1984). ***Bowen*** does not address prospective application. Thus, we assume its holding applies retrospectively, according to the general rule in ***Fitzgerald***, 38 Wis.2d at 579-80, 157 N.W.2d at 599, and we are bound to follow it, ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

*By the Court.*—Order affirmed.

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

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N.W.2d 432, 444 (1994). However, the majority does not extend its holding to a "loved one." Nevertheless, Prendergast could not recover even under Justice Abrahamson's analysis.