

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2008

David R. Schanker
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. 2007AP2375

Cir. Ct. No. 2006CV211

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GALE SCHAFFER,

PLAINTIFF-APPELLANT,

V.

**PROGRESSIVE NORTHERN INSURANCE COMPANY AND ACCIDENT FUND
GENERAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marinette County:
DAVID G. MIRON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gale Schaffer appeals a partial summary judgment dismissing his emotional distress claim against Mindy Aubry's insurer, Progressive Northern Insurance Company. Schaffer contends the circuit court

applied the wrong standard in determining his claim's viability. We agree. We reverse the judgment and remand this case for further proceedings.

Background

¶2 On March 10, 2005, Aubry was travelling southbound on United States Highway 141 in Marinette County. Schaffer, a semi-truck driver, was driving his truck northbound. It was snowing. While entering a curve in the road, Aubry lost control of her vehicle, entering Schaffer's lane. Schaffer could not stop his truck and broadsided the car. Aubry was ejected from her car and died from her injuries.

¶3 Schaffer was injured as well and claims to suffer from post-traumatic stress disorder. He alleges he suffers from flashbacks and paranoia about driving, which made it difficult for him to return to work. He filed suit, seeking damages for his physical injuries, loss of income, and intentional or negligent infliction of emotional distress. Progressive sought to have the emotional distress claims dismissed, arguing Schaffer's own deposition testimony demonstrated he never feared for his own safety.

¶4 The court concluded "this claim has to be founded on Plaintiff's distress about what could happen to the plaintiff directly, not what had happened to somebody else...." It granted Progressive's motion for partial summary judgment and dismissed the emotional distress claim. Schaffer petitioned us for leave to take an interlocutory appeal, and we granted the request.¹

¹ We granted leave to appeal by order dated November 1, 2007. Additionally, Accident Fund General Insurance Company is not participating in this appeal.

Discussion

¶5 Summary judgments are reviewed de novo, using the same methodology as the circuit court. *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶8, 292 Wis. 2d 212, 713 N.W.2d 661. We start by examining the pleadings and affidavits to determine whether a claim for relief has been stated. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Whether a complaint states a claim is a question of law. See *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. If a claim for relief has been stated, we then determine whether any factual issues exist. *Green Spring Farms*, 136 Wis. 2d at 315. If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, we affirm the grant of summary judgment. WIS. STAT. § 802.08(2) (2005-06).

¶6 There are, generally speaking, two types of negligent infliction² of emotional distress claims—those to be brought by a “bystander” and those to be brought directly by a “participant” in an incident. “Bystander” is shorthand for “a plaintiff who alleges emotional distress arising from a tortfeasor’s negligent infliction of physical harm on a third person.” *Bowen v. Lumbermen’s Mut. Cas. Co.*, 183 Wis. 2d 627, 632, 517 N.W.2d 432 (1994). “Participant” refers to a person who is directly involved in the tort, “a victim of the actionable conduct” giving rise to the claim. See *Pierce v. Physicians Ins. Co.*, 2005 WI 14, ¶13, 278 Wis. 2d 82, 692 N.W.2d 558.

² On appeal, the parties focus on negligent, not intentional, infliction of emotional distress.

¶7 Regardless of the fact situation giving rise to the claim, a plaintiff alleging negligent infliction of emotional distress must prove: (1) the defendant’s conduct fell below the standard of care; (2) the plaintiff suffered injury; and (3) the defendant’s conduct was a cause in fact of the plaintiff’s injury.³ *Bowen*, 183 Wis. 2d at 632; *see also* WIS JI—CIVIL 1511 (2007).

¶8 Here, the circuit court concluded Schaffer’s claim was direct but untenable, not because it failed to meet the three elements articulated in *Bowen*, but because Schaffer did not fear for his own safety. On appeal, Progressive maintains that Schaeffer’s claim for emotional distress is not direct, but as a bystander, because he was not worried about harm to himself at the time.

¶9 We reject outright the argument that Schaffer was a bystander to this accident. His claim is not based on “negligent infliction of physical harm to a third person.” *Bowen*, 183 Wis. 2d at 632. Rather, Schaffer was a participant in the accident. He was injured by Aubry’s alleged negligence in controlling her vehicle, and there is no third party to the collision. Because we continue to recognize a claim for negligent infliction of emotional distress where the claimant is directly involved in the tortious activity, *Pierce*, 278 Wis. 2d 82, ¶17, the court properly characterized Schaffer’s claim as direct.

¶10 But we disagree with the notion, as held by the circuit court and perpetuated by Progressive, that Schaffer had to fear for his own safety for his

³ Case law has held for some time that “where the plaintiff can demonstrate physical injury at the time of the accident,” a claim for emotional injury arising from the accident may also be made. *See Rennick v. Fruehauf Corp.*, 82 Wis. 2d 793, 805, 264 N.W.2d 264 (1978). But severe emotional distress, without physical injury or physical manifestation, may be compensable standing alone. *See Bowen v. Lumbermen’s Mut. Cas. Co.*, 183 Wis. 2d 627, 652-53, 517 N.W.2d 432 (1994).

claim to proceed. In the first place, the “fear for one’s safety” and the similar “zone of danger” rules applied to bystander cases, *Bowen*, 183 Wis. 2d at 632, and this is not a bystander case. Second, these rules have been expressly rejected by our supreme court. *Id.*

¶11 Nevertheless, the circuit court relied on *Camp v. Anderson*, 2006 WI App 170, 295 Wis. 2d 714, 721 N.W.2d 146, to conclude that Schaffer had to fear harm to himself. This reliance is misplaced. There, the Camps brought suit because thirteen-year-old Anthony Machones had terrorized their four-year-old son, Steven, by chasing him with a feces-covered cattail. Machones had also chased and jumped on Steven’s dog, injuring the dog so severely that it had to be euthanized.

¶12 We prohibited any claim for Steven’s emotional distress arising from witnessing what happened to the dog. Although it might have been an otherwise proper bystander claim, we concluded public policy weighed against letting the claim proceed. We also concluded, however, that Wisconsin law gave Steven the right to bring a direct claim as a participant based on Machones’ direct threat to him. We then remanded the case to the circuit court to determine whether the Camps’ proposed amended complaint stated a proper claim for relief.

¶13 The circuit court here mistakenly focused on the *Camp* result to conclude Schaffer needed to fear for his own safety, but we understand why the court did so. The direct claim in *Camp* went back to emotional distress Steven suffered for being chased by—and therefore implicitly for being in fear of—Machones. But that specific conclusion was fact-driven. The general proposition from *Camp* is that Wisconsin recognizes a direct claim for negligent infliction of emotional distress and Steven, as a *direct participant* in Machones’ tort, had a

basis for bringing such a claim. Similarly, Schaffer, as a direct participant in Aubry's alleged negligence, has a properly pled direct claim against Progressive.⁴

¶14 Even when a claim for negligent infliction of emotional distress is properly pled and proven, such a claim may still be barred by public policy considerations. *See id.*, ¶¶13-14. These considerations include:

- (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, 183 Wis. 2d at 655. When the claim is a bystander claim, there are three additional considerations in the public policy analysis. The bystander must show: “(1) that the victim was seriously injured or killed; (2) that the bystander is related to the victim as spouse, parent, child, grandparent, grandchild or sibling; and (3) that the bystander witnessed the incident or its immediate aftermath.” *Camp*, 295 Wis. 2d 714, ¶14.

⁴ Progressive further insists this was a bystander case because, it argues, Schaffer's emotional distress is solely a result of witnessing Aubry's death. The record belies this assertion. Schaffer does not dispute Aubry's death caused him distress. However, he also testified at his deposition that he is bothered by the fact “the accident happened at all.” He claims to suffer paranoia about driving, which stems from the collision and not Aubry's death. Schaffer also stated he has flashes and nightmares about the impending crash with the vehicle. Again, these afflictions stem from being a participant in the event itself rather than being an outside observer. It is participation in the event, not a party's perception, that drives the determination of the type of claim.

¶15 Progressive makes a variety of public policy arguments as to why it believes Schaeffer's claim should be precluded. For example, Progressive argues the claim should be barred because Aubry and Schaffer are unrelated. However, Progressive's public policy arguments are unpersuasive, as they are premised on the mistaken belief that Schaffer's claim is a bystander claim.

¶16 The circuit court properly concluded Schaffer has a direct claim, but erred in applying the explicitly abrogated fear for one's own safety rule and dismissing Schaffer's claim on that basis.⁵ Accordingly, the partial summary judgment dismissing Schaffer's claim for negligent infliction of emotional distress is reversed, and the cause is remanded for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

⁵ We hold only that the complaint properly states a direct claim. We make no determination as to whether Schaffer has fulfilled the three-prong burden of proof articulated in *Bowen*, 183 Wis. 2d at 632. See ¶7, *infra*.

