COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0649

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

GARY REGGE,

PLAINTIFF,

TERRY REGGE,

PLAINTIFF-APPELLANT,

V.

SUNSET MEMORY GARDENS, GENERAL CASUALTY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

OLSON-HOLZHUTER-CRESS FUNERAL HOME, FRANKENMUTH MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Gary and Terry Regge appeal from a judgment granting summary judgment against them in favor of Sunset Memory Gardens, and its insurer. Their complaint alleged that Terry Regge's grandmother was buried in the wrong cemetery plot due to the negligence of Sunset Memory Gardens. The trial court granted summary judgment in favor of Sunset Memory Gardens for public policy reasons.[1] The dispositive issue on appeal is whether public policy precludes the Regges from going forward on their claims. We conclude that the trial court correctly determined that public policy precludes the claims, and we therefore affirm.

BACKGROUND

The complaint alleged that Thelma Mae Grieshammer-Hearn, the grandmother of Terry Regge, was buried in the wrong grave plot at Sunset Memory Gardens Cemetery due to the negligence of Sunset Memory Gardens and Olson-Holzhuter-Cress Funeral Home (Cress Funeral Home).[2] The complaint further alleged that Cress Funeral Home acquired a disinterment permit and arranged with Sunset Memory Gardens to rebury Grieshammer-Hearn in the correct grave plot. As a result of the negligence of the defendants, the complaint alleged, Terry Regge suffered emotional and psychological injuries, loss of wages

[1] Although Sunset Memory Gardens filed a motion to dismiss, the court treated the motion as one for summary judgment since the parties presented matters outside of the pleadings.

[2] The trial court granted summary judgment in favor of Cress Funeral Home on the ground that the undisputed facts showed that it did not engage in any negligent conduct and for the same public policy reason that was the basis for the dismissal of the complaint against Sunset Memory Gardens. After the appeal was filed, we were advised that the Regges had reached a settlement with Cress Funeral Home and we dismissed that party and its insurer from this appeal.

and benefits associated with her employment; Terry and Gary Regge incurred medical expenses in the treatment of Terry's emotional and psychological injuries; and Gary was deprived of the services of society, companionship and consortium of Terry.

In support of the motion for summary judgment, Cress Funeral Home submitted a medical evaluation of Terry Regge and the affidavits of Philip Schadler and Andreen Kjentvet, funeral directors at Cress Funeral Home. The affidavits averred as follows. Schadler was present at the interment service for Grieshammer-Hearn, which took place at the Sunset Memory Gardens Chapel. Grieshammer-Hearn's daughters, Gail Deut and Lanora Ketter, made the arrangements for the service. A burial site at Sunset Memory Gardens Cemetery had been purchased prior to the making of the arrangements with Cress Funeral Home. Under its agreement, Cress Funeral Home was to perform certain pre-funeral and funeral services which did not include the arrangement for, performance or supervision of the actual interment at the burial site. Following the service at the chapel, the remains of Grieshammer-Hearn were placed in a Cress Funeral Home vehicle and an employee of Sunset Memory Gardens directed Schadler to a site, where the remains were buried. None of Grieshammer-Hearn's family, including Terry Regge, viewed the burial.

In opposition to the motion, the Regges submitted Terry's affidavit, which averred that she was a major caregiver of her grandmother for a period of three years prior to her grandmother's death, that she has been diagnosed with post-traumatic stress disorder and depression caused by the need for the second

burial of her grandmother and that the psychological conditions caused her to be institutionalized in the fall of 1995.[3]

DISCUSSION

When we review a summary judgment, we apply the same methodology as the trial court, and consider the issues de novo. ***Green Spring Farms v. Gersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We first examine the complaint to determine whether it states a claim and then the answer to determine whether it presents any material issue of fact. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994), *quoting* ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). If they do, we then examine the moving party's affidavits to determine whether that party has made a *prima facie* case for summary judgment. ***Brownelli***, 182 Wis.2d at 372, 514 N.W.2d at 49. If it has, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 372-73, 514 N.W.2d at 49-50.

In reviewing the complaint to determine whether it states a claim, we are presented with the same issue of law as presented to the circuit court and our review of this is de novo. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 635, 517 N.W.2d 432, 635 (1994). We construe the complaint liberally and

[3] In its decision, the trial court refers to this affidavit and relates its contents. A copy of the affidavit is contained in the appendix to the Regges' appellate brief, but is not part of the record prepared by the trial court. We do not ordinarily consider documents that are not part of the record. ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981). However, because the trial court considered it and because Sunset Memory Gardens does not object to our consideration of the affidavit, we will treat it as part of the record.

dismiss for failure to state a claim only if it is quite clear that under no conditions can the plaintiff recover. ***Id.*** The Regges characterize their complaint as alleging a claim for negligent burial and a claim for negligent infliction of emotional distress. The trial court accepted that characterization of the complaint but concluded that considerations of public policy required a dismissal of both claims. Although we review the issues presented on appeal de novo, we benefit from the thoughtful and thorough analysis of the trial court.

The supreme court in ***Bowen*** established the analysis that courts are to follow in deciding whether or not a complaint should be permitted to go forward on public policy grounds. In ***Bowen***, Sharon Bowen alleged a claim for negligent infliction of severe emotional distress based on viewing the immediate aftermath of her son's fatal injury. The court concluded that a plaintiff claiming negligent infliction of emotional distress, regardless of the fact situation in which the claim arises, must prove the following elements: (1) that the defendant's conduct fell below the applicable standard of care, (2) that the plaintiff suffered an injury, and (3) that the defendant's conduct was a cause in fact of the plaintiff's injury. ***Bowen***, 183 Wis.2d at 632, 517 N.W.2d at 434. The court stated that the fact-finder determines cause in fact, but the court determines whether considerations of public policy relieve the defendant of liability in a particular case, and these public policy considerations are an aspect of legal cause, not cause in fact. ***Id.*** Even if a complaint sets forth the elements of a cause of action for negligent infliction of emotional distress, a court may decide as a matter of law that considerations of public policy require dismissal of the claim. ***Id.*** at 654, 517 N.W.2d at 443.

Application of the public policy considerations is a function solely of the court and, while it is generally better procedure to submit negligence and

cause in fact issues to the jury before addressing legal cause—that is, public policy issues—the circuit court may grant summary judgment on public policy grounds before trial when the pleadings present a question of public policy. ***Bowen***, 183 Wis.2d at 654, 517 N.W.2d at 443. However, when the issues are complex or the factual connections attenuated, it may be desirable for a full trial to precede the court's determination on public policy. ***Id.*** at 655, 517 N.W.2d at 443.

The ***Bowen*** court enumerated the public policy considerations that arise in claims of negligent infliction of emotional distress:

> (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, 517 N.W.2d at 443-44.

Applying the six factors to the facts before it, the ***Bowen*** court concluded that Sharon Bowen's claim should be permitted to go forward because the injury to another was serious or fatal; the victim, her son, was a close family member;[4] and witnessing a serious or fatal injury of a family member, or its aftermath, is an extraordinary event, distinct from the more ordinary event of learning of the death of a family member through indirect means. ***Bowen***, 183

[4] We use "close family member" to refer to the family members the court held that a tortfeasor could be liable to on a claim for negligent infliction of emotional distress as a bystander: spouse, parent, child, grandparent, grandchild, or sibling of the victim. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 657, 517 N.W.2d 432, 444 (1994).

Wis.2d at 658, 517 N.W.2d at 444-45. The court stated that holding the tortfeasor responsible for Sharon's injury was "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[;]" a parent's severe suffering under such circumstances is not unusual. ***Id.*** at 659, 517 N.W.2d at 445.

We conclude that the facts necessary to the public policy analysis in this case are not complicated and that determination of this issue on the motion for summary judgment is appropriate. We also agree with the trial court that, although ***Bowen*** addresses the tort of negligent infliction of emotional distress, the public policy analysis as a part of the determination of legal cause is also applicable to the tort of negligent burial.

The Regges argue that the cases of ***Koerber v. Park,*** 123 Wis. 453, 102 N.W. 40 (1905), and ***Scarpaci v. Milwaukee County,*** 96 Wis.2d 663, 292 N.W.2d 816 (1980), support their position that their claim for negligent burial should be tried. In ***Koerber***, the son of a deceased person alleged in the complaint that the defendant, after obtaining permission to examine the stomach of the body, willfully, fraudulently and without authorization, removed the stomach and refused to return it. The court held that this stated a cause of action. ***Koerber*** 123 Wis. at 463, 102 N.W. at 43. In ***Scarpaci***, the court considered the claim of parents that the defendants performed an autopsy on their child without their permission despite the defendants' knowledge that they did not wish an autopsy done. ***Scarpaci,*** 96 Wis.2d at 666, 292 N.W.2d at 818. Citing ***Koerber***, the court stated:

> The law is clear in this state that the family of the deceased has a legally recognized right to entomb the

> remains of the deceased member in their integrity and without mutilation. Thus the next of kin have a claim against anyone who wrongfully mutilates or otherwise disturbs the corpse.

Id. at 672, 292 N.W.2d at 820. The court concluded that the complaint survived a motion to dismiss because it alleged that the negligent or intentional interference with the right of the parents to bury the body caused the plaintiffs both great emotional distress and physical injuries.[5] ***Id.*** at 675, 292 N.W.2d at 822.

We find ***Koerber*** and ***Scarpaci*** to be of little assistance. In ***Koerber***, the allegation was of intentional and unauthorized mutilation of a corpse, and in ***Scarpaci*** it was of either intentional or negligent performance of an unauthorized autopsy. The bar to proceeding based on public policy was neither raised nor addressed in either case. And the differences between mutilation or unauthorized autopsy of a corpse and negligent burial in the wrong site are so significant that we cannot infer from either ***Koerber*** or ***Scarpaci*** any determination that contributes to resolution of the public policy issue here.

Applying the six ***Bowen*** factors to the Regges' claims, we conclude that public policy requires dismissal of the claim for negligent burial and for negligent infliction of emotional distress. We begin our analysis, as did the court in ***Bowen***, with the nature of the circumstances giving rise to the injury.

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[5] The court in ***Scarpaci*** discussed the distinction between intentional and negligent interference and emphasized the allegation of physical injuries because, at that time, the law in Wisconsin permitted compensation for mental distress resulting from negligent acts only when there was an accompanying or resulting physical injury. ***Scarpaci v. Milwaukee County,*** 96 Wis.2d 663, 292 N.W.2d 816 (1980). However, in ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 632, 517 N.W.2d 432, 434 (1994), the court held that a claimant for negligent infliction of emotional distress need not prove a physical manifestation of severe emotional distress but only severe emotional distress. The trial court here decided that this rule was applicable to the Regges' claim for negligent burial, as well as their claim for negligent infliction of emotional distress. Sunset Memory Gardens does not challenge that decision.

In her affidavit, Terry Regge avers that her severe emotional distress was "caused because of the need for the second burial of [her] grandmother." She does not aver that she was present when the second burial took place, but the trial court states in its decision that, according to the Regges' brief in opposition to the motion for summary judgment, "Terri [sic] had to watch the vault of her grandmother be opened, view a truck lifting the vault out of the improper grave site, and then placed into the proper site." We will assume this is true.[6] Because there is no evidence creating a reasonable inference otherwise, we will take as true that Terry Regge was informed that her grandmother was buried in an incorrect site and chose to be present at the removal from the incorrect site and the reburial.

The negligent act—burial in the wrong site—was not observed by Terry Regge. There was no damage to the casket or the remains. There is no indication that the reburial, which she observed, was any different than a proper burial. We agree with the Regges that the disinterment, which Terry Regge observed, is not a sight usually witnessed by someone whose loved one has passed away. However, we cannot say that it is a shocking occurrence or a shocking sight to observe.

We acknowledge that the need to have a loved one reburied after thinking that there has been a proper and final burial, with or without presence at

[6] We find the Regges' brief confusing on this point. They state in one place that "nowhere in the affidavits that were submitted to the court does it state that the appellant had knowledge of both the disinterment and reinterment of the body of the grandmother sixteen days after the burial." However, the brief describes the "witnessing a disinterment and reinterment of a loved family member sixteen days after a would be final burial" as an extraordinary event, and that is the crux of its argument against the trial court's decision. If our assumption is incorrect and if Terry Regge did not witness the disinterment and reinterment of her grandmother, that would not change the result we reach in this decision, for her legal position would then be weaker.

the reburial, may intensify the grief and other emotions normally experienced upon the death of a loved one. However, we conclude that the severe emotional distress this event caused Terry is both too remote from the act of negligence—burial in an incorrect site—and too out of proportion to the negligent act. While the need to disinter and reinter in the correct site is a predictable result of the negligence, the desire of a close relative to witness that and then to be severely emotionally distressed by witnessing that is not at all predictable. In retrospect, it appears too extraordinary, too unusual, that the negligent act of burial in an incorrect site, when that is promptly and properly corrected by reburial in the proper site, would cause the severe emotional distress experienced by Terry Regge.

We do not question that Terry Regge experienced severe emotional distress, as she avers. However, we conclude that allowing her to seek recovery for that under these circumstances would place an unreasonable burden on Sunset Memory Gardens. In ***Bowen***, the court was persuaded that the very nature of the shocking circumstances that Sharon Bowen witnessed—seeing her son fatally injured and entangled in the wreck—created a "stopping point" to a tortfeasor's liability and distinguished her injury from the acute emotional distress from the loss of a family member, a "life experience that all may expect to endure." ***Bowen***, 183 Wis.2d at 658, 517 N.W.2d at 444-45. In this case, the circumstances that Terry Regge avers caused her severe emotional distress are not ones that we can say would usually cause such severe emotional distress, and the possibility of unlimited liability for the distress caused by the death itself is therefore likely.

We conclude that the trial court correctly decided that, as a matter of law, public policy requires dismissal of the Regges' claims of negligent burial and negligent infliction of emotional distress.[7]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] The Regges also challenge two other aspects of the trial court's reasoning—its references to Terry's history of depression and to § 157.112, STATS., 1995-96. That statute, enacted shortly after the filing of this complaint, provides that a cemetery is immune from civil liability for an error in burial that is corrected by reburial. *See* § 157.112(4). We need not address these points because our review is de novo, and we have concluded that the Regges' claims are precluded by public policy without consideration of either of these challenged points.