COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1486 **Cir. Ct. No. 00-CV-327**

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

TAYLOR VENN AND SHELLY EHLERS,

PLAINTIFFS-APPELLANTS,

COLLIN VENN,

PLAINTIFF,

V.

REBECCA VENN,

DEFENDANT-RESPONDENT,

STEPHEN VENN, COMPCARE HEALTH SERVICES INSURANCE CORPORATION AND BLUE CROSS & BLUE SHIELD OF WISCONSIN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Taylor Venn and Shelly Ehlers, her mother, appeal from a summary judgment dismissing their action alleging that Rebecca Venn, Taylor's stepmother, was negligent in not preventing sexual assaults committed against Taylor by Stephen Venn, Taylor's father. We affirm the judgment because the sexual assaults were not foreseeable or a known possibility to Rebecca.

¶2 It is undisputed that when she was four years old, Stephen sexually assaulted Taylor on more than one occasion. At least one assault occurred while Taylor was staying overnight at her father's apartment during Christmas visitation in 1996. At that time, Rebecca was in a relationship with Stephen. The relationship led to the couple's marriage in May 1997. The assaults were reported after the couple married.

¶3 The complaint alleges that Rebecca was present when the assaults occurred, that she knew or should have known that assaults would or had occurred, and that she had a duty to protect Taylor during periods of visitation with Stephen. Rebecca moved for summary judgment dismissing the complaint. Although Rebecca denied having stayed overnight in the house when the children were visiting, her affidavit indicated that any night she slept there, Stephen did not leave the room. She further stated that she never had any reason to believe that Stephen would sexually assault Taylor and that she did not become aware of the assaults until after her marriage to Stephen. Rebecca did not learn of sexual abuse Stephen suffered as a child until it came out as part of the criminal proceeding. The circuit court granted the motion for summary judgment concluding in part that there was no evidence that Rebecca had any knowledge that the assaults would or had occurred.

¶4 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2) (1999-2000).

¶5 Taylor argues that there are factual disputes which preclude summary judgment. She points to competing admissions and denials regarding the number and location of the sexual assaults, whether Rebecca stayed overnight when Taylor and her brother visited with Stephen on weekends, where Rebecca slept when she stayed overnight, and whether Rebecca witnessed Stephen dance naked in front of the children on one occasion. Alleged factual disputes precluding summary judgment must concern facts that affect the resolution of the controversy. ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992). For purposes of review, we accept as true all facts alleged in the complaint and all reasonable inferences from those facts. ***Gritzner v. Michael R.***, 2000 WI 68, ¶6, 235 Wis. 2d 781, 611 N.W.2d 906.

¶6 Taylor is trying to establish liability under ***Gritzner***. In ***Gritzner*** the plaintiffs' four-year-old daughter was sexually abused by the ten-year-old neighbor boy while playing at the neighbor's home. ***Id.*** at ¶1. The plaintiffs alleged that Roger Bubner, who resided with the boy and his mother, knew or should have known that the boy might engage in inappropriate sexual acts if left alone with the little girl and that Bubner was negligent in not warning of that possibility or controlling the boy to prevent the assault. ***Id.*** at ¶2. The lead opinion in ***Gritzner*** recognized that "a duty of care[] is established under

Wisconsin law whenever it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person," but determined that the claim for negligent failure to warn about the possibility of a sexual assault was barred as a matter of law and public policy. ***Id.*** at ¶¶20, 43, 44. The door was left open for the possibility that "under different circumstances a plaintiff could recover based on negligent failure to warn about a known risk of sexual abuse." ***Id.*** at ¶43. However, the plurality opinion of the court on the possible negligent failure to warn claim was set forth in the concurring opinion authored by Chief Justice Shirley S. Abrahamson. ***Id.*** at ¶86. The court recognized that a person entrusted with the care of a child has a duty of care when it is foreseeable that the failure to warn might cause harm to the child. ***Id.*** at ¶¶76, 77. Two key concepts are needed to state a claim—knowledge of the potential risk of sexual misconduct and foreseeability that the failure to warn or act might cause harm.

¶7 Here, assuming the facts in the light most favorable to Taylor, knowledge and foreseeability are not satisfied. If Rebecca stayed overnight when the children visited Stephen, she was asleep when the assaults occurred and was not aware that they had occurred. Rebecca's mere presence in the same household when the assaults occurred cannot be equated with the knowledge needed to make her negligent in not preventing the assaults. If Rebecca witnessed Stephen dance naked in front of the children, it was an observation of unusual and perhaps inappropriate behavior but would not give rise, in the absence of any other indicators, to knowledge or foreseeability that Stephen would sexually assault his daughter in the future. In short, Rebecca had no reason to suspect that Stephen would perpetrate the assaults. To send this case to trial would be inviting a jury to speculate on Rebecca's ability to foresee that Stephen would sexually assault

Taylor. We do not permit juries to speculate. ***Soderlund v. Alton***, 160 Wis. 2d 825, 837, 467 N.W.2d 144 (Ct. App. 1991).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).