COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

No. 94-0171

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

HOLLY LYNN WEISS,

Plaintiff-Appellant,

v.

CITY OF MILWAUKEE,
and YVETTE MARCHAN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

SULLIVAN, J. Holly Lynn Weiss appeals from a summary judgment dismissal of her complaint alleging a common law claim for negligent infliction of emotional distress against her employer, the City of Milwaukee. We conclude that the proper and sole avenue of relief for Weiss is under the Worker's Compensation Act, *see* § 102.01, STATS., *et seq*., and, thus, the trial court properly dismissed her common law claim at summary judgment.

Weiss made the following allegations in her complaint. In July 1990, Weiss separated from her husband, Osama Abughanim, because of his alleged "physical and psychological abuse of [her] and her two children." After the separation, she "resided with her parents where Abughanim would frequently call ... to threaten her life and those of her children." In February 1991, Weiss began working as an engineering technician with the City of Milwaukee. At the time she was employed, she asked about "the confidentiality of her address and telephone number and was assured by her employer that it was not the policy of the City of Milwaukee to disclose such information about its employees to private individuals." Relying upon this assurance, Weiss gave her employer her address and telephone number.

In June 1991, Weiss moved from her parents' house to an apartment on Milwaukee's north side. Then, on or about July 10, 1991:

> Osama Abughanim contacted the City of Milwaukee Department of Employee Relations and spoke to Shelia Bowle, an employee of that department. Osama Abughanim represented that he was calling on behalf of the Chase Manhattan Bank to inquire about [Weiss] for credit purposes and requested [her] address and phone number. Shelia Bowle relayed this request to ... Yvette Marchan [a supervisor with the Department of Employee Relations] who negligently authorized the disclosure of [Weiss's] then current address and phone number to Osama Abughanim without first verifying the truth of his claimed credentials. In accordance with the instructions of ... Yvette Marchan [,] Shelia Bowle disclosed [the] information to Osama Abughanim.

Abughanim did not have Weiss's address or phone number prior to the City's disclosure of the information. Subsequent to this disclosure, Abughanim "telephoned [Weiss] at work and stated that he now knew where she lived and that he would kill her and her children." Weiss could not move again for financial reasons. Accordingly, as "a direct and proximate result" of the City of Milwaukee's and Marchan's negligence:

> The awareness that her husband knew her address and her inability to change her residence caused [Weiss] severe emotional distress due to her fear for her safety and that of her children. Said emotional distress ... required medical care and treatment with resulting expense thereof; occasional great pain; [and] was physically manifested by sobbing, insomnia and nightmares.

Upon the City's motion for summary judgment, the trial court dismissed Weiss's complaint, concluding that: (1) "the Wisconsin Open Records Law would have required release of the information claimed by plaintiff as being the source of damages," and (2) "the zone of damages requested by the plaintiff is against the general public policy."[1] Weiss appeals from this judgment.

This court reviews a grant of summary judgment *de novo*. ***Burkes v. Klauser,*** 185 Wis.2d 308, 327, 517 N.W.2d 503, 511 (1994), *cert. denied*, 115 S. Ct. 1102 (1995). Summary judgment is governed by § 802.08, STATS., and the rules for our review have been frequently addressed. *See, e.g.,* ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). In reviewing a grant of summary judgment, this court first examines the complaint to determine whether a claim for relief has been stated. ***C.L. v. Olson***, 143 Wis.2d 701, 706, 422 N.W.2d 614, 615 (1988). If the pleadings meet this initial test, our inquiry shifts to the moving party's affidavits or other proof to determine whether a *prima facie* case for summary judgment has been presented. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). If the moving party has indeed made a *prima facie* case for summary judgment, we then examine the affidavits and other proof of the opposing party to discern whether there exists disputed material facts entitling the opposing party to a trial. ***Id***. at 338, 294 N.W.2d at 477.

[1] Weiss raises other questions of error based upon the trial court's ruling; however, we need not address them because we reach the result based upon other dispositive grounds. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

We first review Weiss's complaint to see if it states a valid claim for relief. We conclude that the complaint states a cause of action that falls solely within the aegis of the Worker's Compensation Act, and because Weiss's claim for relief is premised upon common law negligence theory instead of Worker's Compensation, her complaint fails. Hence, the trial court properly granted summary judgment in favor of the City, albeit for different reasons than this court.

For eighty-four years, Wisconsin courts have steadfastly applied the exclusivity provision of the Worker's Compensation Act. ***Messner v. Briggs & Stratton Corp.,*** 120 Wis.2d 127, 132, 353 N.W.2d 363, 365 (Ct. App. 1984); *see* § 102.03(2), STATS.[2] Given the conditions for liability under the Act, claims for bad faith, negligence, intentional and negligent infliction of emotional distress, economic distress, assault and battery,[3] and conspiracy are barred by exclusivity. ***Id.*** at 138, 353 N.W.2d at 368. Section 102.03(1), STATS., sets forth the conditions for liability:

> **Conditions of liability. (1)** Liability under this chapter shall exist against an employer only where the following conditions occur:
>
> (a) Where the employe sustains an injury.

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[2] Section 102.03(2), STATS., provides:

> **(2)** Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employe to bring action against any coemploye for an assault intended to cause bodily harm, or against a coemploye for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemploye of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employes under a collective bargaining agreement or a local ordinance.

[3] Section 102.03(2), STATS., permits suits against a coemployee for intentional assault and for negligent operation of a motor vehicle to a limited extent.

(b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.

(c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment.

Further, the Worker's Compensation laws should be liberally construed. *See* ***Cornejo v. Polycon Industries, Inc.,*** 109 Wis.2d 649, 654, 327 N.W.2d 183, 185 (Ct. App. 1982).

Weiss's complaint alleges the conditions for liability. She alleges an injury. She sets forth facts which establish that both she and the City were subject to the Act; that at the time of the wrong, Weiss was performing services growing out of and incidental to her employment; and that the incident causing the injury arose out of Weiss's employment.[4] Because Weiss's complaint arises out of events which occurred because of the employment relationship, her claim falls within the exclusivity provision of the Act. Her complaint raises no other causes of action; thus, it fails to state a valid claim for relief. *See* ***Olson***, 143 Wis.2d at 706, 422 N.W.2d at 615.

We must respond to the emotion-laden and rhetoric-driven premise of the dissent—i.e., that we are avoiding *the* critical issue in this case. The dissent intemperately castigates us, charging that: "The majority's failure to confront the critical issue in this case may allow these new open records dangers to continue to truly threaten the lives of countless battered women and children." Dissent slip op. at 5.

First, we note that the dissent seems preoccupied with the reasoning of the trial court's decision, rather than the issue at the heart of this case: What is the appropriate avenue of relief under Wisconsin law for Weiss to

[4] As pleaded in her complaint, Weiss's husband telephoned and threatened her while she was at work, thereby allegedly causing her injuries. This satisfies the requirement that Weiss's injuries arose out of her employment under the liberal reading we are required to give the Worker's Compensation statutes.

recover for her alleged injuries arising out of her employment with the City of Milwaukee?

We recognize that the dissent is obviously fueled by its fervent passion for the underlying subject matter of Weiss's suit against the City of Milwaukee, that is, the spousal harassment Weiss allegedly faced from her estranged husband. While this passion is understandable given the magnitude of the crisis posed by domestic violence in our society,[5] this passion should not overwhelm this court's duty to rationally evaluate the specific question at issue in this case. Further, contrary to the intimations of the dissent, *no one* on this court questions the need to protect victims of domestic violence from their abusers. Thus, to paraphrase the dissent's comments from another case: "To remove this case from its polemical mold, we would do well to begin by identifying the *central* issue in this appeal." *See* ***State v. Morgan,*** ___ Wis.2d ___, ___, 536 N.W.2d 425, 448 (Ct. App. 1995) (emphasis added) (Schudson, J., concurring in part, dissenting in part). The central question is, as stated above: What is Weiss's proper avenue for the relief she is seeking for her alleged injuries?

The dissent instead focuses its anger at the trial court, and then flagellates us for not doing the same. What the dissent ignores in its zeal to censure the trial court is the fundamental underpinning of this court's review of a motion for summary judgment. *We must review the summary judgment materials anew, and the trial court's reasoning is accorded no deference*. ***Burkes,*** 185 Wis.2d at 327, 517 N.W.2d at 511. We need not necessarily agree with the reasoning of the trial court. Indeed, we detect grave faults in the trial court's application of Wisconsin's Open Records law. Whether we agree or disagree with the trial court's reasoning, however, is irrelevant. On a motion for summary judgment we must reach our decision based *solely* on the law and the summary judgment materials, not our emotional response to the trial court's ruling. Our focus is

[5] Indeed, the author of this opinion recently noted the tragedy of domestic violence in Wisconsin: "Over 24,000 incidents of domestic abuse were reported in seventy Wisconsin counties in 1991. Additionally, 24% of all Wisconsin homicides in 1991 were domestic-abuse related." ***Barillari v. City of Milwaukee,*** 186 Wis.2d 415, 423 n.4, 521 N.W.2d 144, 147 n.4 (Ct. App. 1994), *rev'd*, 194 Wis.2d 247, 533 N.W.2d 759 (1995); *see also* Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 79-81 (1994) (highlighting national statistics of domestic crimes, including spousal stalkings, batterings, and homicides).

whether either party is entitled to relief *as a matter of law* and whether there are genuine issues of material fact remaining for trial. ***Grams,*** 97 Wis.2d at 338, 294 N.W.2d at 476-77. The law must guide us, not our individual concepts of justice.

Hence, we need not address the trial court's reasoning if we conclude that a more compelling and dispositive basis to resolve the issue exists within the law. In this case, the exclusivity provision of the Worker's Compensation Act provides a more compelling and dispositive basis on which this case must be decided. Additionally, based upon longstanding Wisconsin precedent, the Worker's Compensation Act provides Weiss with a potentially more just basis to recover for her alleged injuries than the common law.[6] The dissent fails to recognize this cogent point.

Instead, after attacking the trial court's decision, the dissent intimates that we have somehow passively "accepted" the City's argument that the Worker's Compensation Act is the sole avenue of relief available to Weiss. Dissent slip op. at 5. We have not "accepted" the City's argument; we have reviewed the pleadings as drafted by Weiss and her attorney and have concluded that, *as pleaded*, her complaint falls within the exclusivity provisions of the Worker's Compensation Act. We have not prevented Weiss from seeking relief for her alleged injuries through the Worker's Compensation procedure; indeed, that avenue of relief might remain open if she chooses to pursue it. What we have concluded, however, is that Weiss's common law negligence claim, as pleaded, is barred by the Worker's Compensation Act. Noticeably, the dissent does not disagree with our conclusion in a straight-forward manner. Instead, it posits a hollow call to certify this issue to our supreme court. There is

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[6] *See* ***Borgnis v. The Falk Co,*** 147 Wis. 327, 133 N.W. 209 (1911):

> The legislature has endeavored by this law to provide a way by which employer and employed may ... escape entirely from that very troublesome and economically absurd luxury known as personal injury litigation, and resort to a system by which every employee ... may receive at once a reasonable recompense for injuries accidentally received in his [or her] employment under certain fixed rules, without a lawsuit and without friction.

Id. at 337, 133 N.W. at 211.

no need to avoid reaching a conclusion on an issue that Wisconsin courts have clearly resolved over the last eighty years.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 94-0171 (D)

SCHUDSON, J. (*dissenting*). The trial court's interpretation of the Wisconsin Open Records Law is insupportable as a matter of law, unconscionable as a matter of public policy, and life-threatening for many battered women employed by government in Wisconsin. It delivers a deadly message to many battered women: you cannot run, you cannot hide, you and your children cannot be safe.

Holly Lynn Weiss, an engineering technician employed by the City of Milwaukee, alleged that she separated from her husband, Osama Abughanim, "due to his physical and psychological abuse of [her] and her two children." Following the separation, she lived with her parents for a short time and then moved to her own apartment. She gave her address and telephone number to her employer upon being assured "that it was not the policy of the City of Milwaukee to disclose such information about its employees to private individuals." Indeed, the City of Milwaukee Telephone Employment Verification forms provided in part:

Information is NOT to be given to private individuals.

....

If you are asked for an address, you may verify the one given. If the address is not correct state that our records do not show that address. DO NOT GIVE THE CORRECT ADDRESS TO ANY CALLERS OTHER THAN LAW ENFORCEMENT AGENCIES.

Contrary to that directive, Weiss's superiors disclosed her address and phone number to Abughanim when he telephonically posed as a bank representative seeking credit information. He then phoned Weiss "and stated that he now knew where she lived and that he would kill her and her children." Unable to move again for financial reasons for approximately one year, Weiss suffered "severe emotional distress due to her fear for her safety and that of her children," as well as physical symptoms requiring medical care and treatment.

Granting summary judgment to the City, the trial court concluded that the City had no duty to exercise reasonable care in disclosing Weiss's

address and phone number because the Wisconsin Open Records Law required the release of the information. Weiss cogently contends that the trial court incorrectly applied the Open Records Law in two respects.

First, Weiss argues that the trial court erroneously concluded that disclosure of information to Abughanim was authorized under the Open Records Law. Weiss is correct. The Wisconsin Open Records Law provides the right and procedures for a "requester" to "inspect, copy or receive copies of records." *See* § 19.35(1), STATS. It does not authorize a person to gain information from government records by telephone. Thus, Abughanim was not a "requester." He did not ask to inspect, copy, or receive a copy of any record. Further, the City's actions clearly were not pursuant to the Open Records Law—i.e., disclosing information to Abughanim by phone is not authorized anywhere in § 19.35, STATS. Thus, as Weiss maintains, "the defendants cannot anchor in the harbor of a statute whose dictates they disregarded."

Second, Weiss argues that the trial court erroneously presumed that disclosure would have been required had Abughanim been a "requester." Again, Weiss is correct. The trial court declared:

> The bottom line is—and I believe this is true—that under the open records statute if this husband would have filed a demand under the open records law, he would have been entitled to get the information from the City. This is not just any employer. This is a governmental employer to which the open records law applies.... If someone, whether it's the newspapers, the media or a disgruntled ex-husband, files a demand under the open records law, I think they're going to get the personnel records, not the

> records themselves, just the names, addresses, et cetera, identifying information for employees of the City of Milwaukee.

This interpretation is absolutely shocking. It would impose special vulnerability on every battered woman who happens to be a government employee in Wisconsin. It would require disclosure of a woman's phone number and address to anyone determined to abuse or abduct her or her children.

The Wisconsin Open Records Law does not allow "open season" on battered women and children. Section 19.35(1)(am)2.a., STATS., in part provides: "The right to inspect or copy a record ... does not apply to ... [a]ny record containing personally identifiable information that, if disclosed, would ... [e]ndanger an individual's life or safety." Moreover, the right to inspect records under the Open Records Law is presumptive, not absolute. ***Coalition for a Clean Government v. Larsen***, 166 Wis.2d 159, 163, 479 N.W.2d 576, 577 (Ct. App. 1991). Inspection may be denied where "there is an overriding public interest in keeping the public record confidential." ***Hathaway v. Green Bay School Dist.***, 116 Wis.2d 388, 397, 342 N.W.2d 682, 687 (1984); *see also* ***State ex rel. Morke v. Record Custodian***, 159 Wis.2d 722, 465 N.W.2d 235 (Ct. App. 1990) (inmate's open records request of names, home addresses and phone numbers of prison employees rejected where public interest in nondisclosure outweighs right to inspect). Thus, had Abughanim sought Weiss's residential information under the Open Records Law, and had the City properly applied the law, the City could have denied disclosure based on § 19.35(1)(am)2.a.,

STATS., and on the "overriding public interest" in protecting Weiss and her children.[7]

Regrettably, instead of confronting this critical issue, the majority has accepted the City's alternative argument that summary judgment was warranted because Weiss's exclusive remedy was under worker's compensation. In doing so, however, the majority may have misinterpreted the law.

For worker's compensation to apply, the injured employee "at the time of the injury" must have been "performing service growing out of and incidental to his or her employment." Section 102.03(1), STATS. Did Weiss's alleged injuries occur while she was "performing service growing out of and incidental to ... her employment?" In ***Goranson v. DILHR***, 94 Wis.2d 537, 289 N.W.2d 270 (1980), the supreme court explained:

> The statutory phrase "arises out of his employment" is not synonymous with the phrase "caused by the employment." In interpreting the meaning of this statutory language the "positional risk" doctrine is applied. The definition of the positional risk doctrine can be stated as follows: "[A]ccidents arise out of

[7] The trial court also concluded that Weiss's damages were so difficult to ascertain that her claim was precluded as a matter of public policy. Weiss points out, however, that the trial court seemed to focus on the fact that some of Abughanim's harassment preceded the City's disclosure of the information and thus confused the uncertainty about the amount of damage with uncertainty about the fact of damage. Here, again, Weiss's argument is strong. Admittedly, while Weiss's allegations leave some uncertainty about the extent of her damages resulting from the disclosure of her address and phone number, such uncertainty certainly does not preclude her claim.

> employment if the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose. Stated another way, an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the conditions of the location constituting a zone of special danger."

Id. at 555, 289 N.W.2d at 279 (brackets in ***Goranson***; citations omitted). ***Goranson*** held, in part, that worker's compensation did not apply where "injuries arose out of a cause solely personal to the employee and did not arise out of the employment relationship." ***Id.*** at 556, 289 N.W.2d at 279. These words would seem to carry Weiss's claim beyond the coverage of worker's compensation. The facts of ***Goranson***, however, are so different from those of the instant case that ***Goranson's*** guidance is uncertain. Moreover, ***Goranson's*** standards could lead to different conclusions. Consider the possibilities.

Did "the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose"? *See* ***id.*** at 555, 289 N.W.2d at 279. Yes, if we conclude that Weiss was under such a condition or obligation because the City required her to provide the residential information. No, if we conclude that Weiss was not under such a condition or obligation because only the City's violation of its directive and the Open Records Law produced the danger from which the injury arose.

Did the "accident arise[] out of employment when by reason of employment the employee is present at a place where [s]he is injured through the agency of a third person, an outside force, or the conditions of the location

constituting a zone of special danger"? *See* ***id.*** The answer may depend on where we focus: the City's disclosure of the information, Abughanim's call to Weiss, and/or Weiss's subsequent injuries. Certainly, when disclosing Weiss's address and phone number, the City's employees were "performing service growing out of and incidental to [their] employment." But what about Weiss? When Abughanim called her, Weiss was on the job, but it hardly seems that receiving a threatening phone call under these circumstances constitutes "performing service growing out of and incidental to ... her employment." *See* § 102.03(1), STATS.

On these and related questions, the statutes and case law provide mixed messages and uncertain direction. The extent to which worker's compensation covers injuries arguably arising *not* from the conditions of employment, but rather, from *violations* of policy and Open Records Law presents difficult policy questions. Whether the circumstances of this case present "a cause solely personal to the employee," *see* ***Goranson***, 94 Wis.2d at 555, 289 N.W.2d at 279, rather than one connected to the conditions of employment suggests additional questions. The trial court did not decide the worker's compensation issue and the parties barely briefed it. I believe the issue merits certification to the supreme court.

In this case the trial court added a tragic chapter to the never-ending novel of America's amazing ability to apply laws in ways that increase the dangers for battered women and their children. Once again, many battered women will believe that they have little choice but to stay with their abusers and, once again, uninformed observers will wonder why they stay.

> Historian Elizabeth Pleck notes that the inevitable question, or its variant "Why does she stay?," was first asked in the 1920s, coincidentally with the rise of

> modern psychology, and experts have been "answering" it ever since. "The answer given then," Pleck says, "was that battered women were of low intelligence or mentally retarded; two decades later,... it was assumed these women did not leave because they were masochistic. By the 1970s, an abused woman stayed married, the experts claimed, because she was isolated from friends and neighbors, had few economic or educational resources, and had been terrorized in a state of 'learned helplessness' by repeated beatings." As Pleck observes, even this "modern answer" is "far less revealing than the persistent need to pose the question." What that need reveals is our refusal to *do* anything to stop violence against women.

ANN JONES, NEXT TIME, SHE'LL BE DEAD/BATTERING & HOW TO STOP IT 152 (1994) (emphasis in original).

I understand that the trial court could not have intended that its decision would endanger battered women and children. That such consequences are *unintended*, however, again illustrates that judicial decisions, at times, can unconsciously perpetuate or increase the dangers that their authors would have hoped to prevent. The trial court's interpretation of the Wisconsin Open Records Law counters common sense and causes the justice system itself to become a source of unintended violence. The majority's failure to confront the critical issue in this case may allow these new open records

dangers to continue to truly threaten the lives of countless battered women and children.[8] Accordingly, I respectfully dissent.

[8] The majority's response to this dissenting opinion requires only two further, brief comments.

First, the majority writes, "contrary to the intimations of the dissent, *no one* on this court questions the need to protect victims of domestic violence from their abusers." Majority slip op. at 8. Clearly, this dissent offers no such intimation.

Second, I am now reassured in reading that the majority also "detect[s] grave faults in the trial court's application of Wisconsin's Open Records law." Majority slip op. at 9.