**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 11, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-2710** **Cir. Ct. No. 99-CV-971**

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

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**BONNIE PIERCE,**

**PLAINTIFF-APPELLANT,**

**V.**

**PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., FREDERICK J. BARTIZAL, JR., M.D., OHIC INSURANCE COMPANY, AND THEDA CLARK REGIONAL MEDICAL CENTER, WISCONSIN PATIENTS COMPENSATION FUND,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Bonnie Pierce appeals a summary judgment dismissing her claim for negligent infliction of emotional distress relating to the

stillbirth of her daughter. We conclude Pierce fails to fulfill the criteria established in ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 517 N.W.2d 432 (1994), and affirm the judgment.

## Background

¶2 The facts are undisputed. On November 18, 1996, Pierce, who was almost thirty-five weeks pregnant, appeared for an 11:15 a.m. appointment with her obstetrician, Frederick Bartizal. Bartizal discovered she was four centimeters dilated and admitted her to Theda Clark Regional Medical Center.

¶3 Later in the afternoon at Theda Clark, Pierce noted the fetal monitor flashing. The nurse advised her that the fetal heart rate was declining because the umbilical cord was wrapped around the baby's neck. The nurse repositioned Pierce, stating that would alleviate the problem.

¶4 At 6 p.m., Bartizal arrived and examined both Pierce and the fetal monitor readings. He noted that she was five centimeters dilated and advised that if Pierce did not go into labor that evening, he would perform an amniocentesis the next morning.

¶5 At 1:30 a.m., Pierce awoke to find a nurse searching for the fetal heartbeat. A second nurse came in and tried to find it as well. Neither was successful. The physician on call was brought in to perform an examination and ultrasound, but could not find a heartbeat or any fetal activity. Bartizal returned to the hospital and informed Pierce that her baby would be stillborn. The baby, named Brianna, was then delivered vaginally via vacuum extraction.

¶6 Pierce brought this suit, alleging that the defendants negligently caused Brianna's death and stillbirth, and that experiencing the stillbirth caused

Pierce physical injury, emotional injury, and prevented her from working for a year. She also brought a wrongful death claim.

¶7 The defendants stipulated to causal negligence. Pierce settled her wrongful death claim. The trial court then ruled that Pierce could recover for emotional distress related to her own physical injuries, but could not recover for emotional distress arising from Brianna's stillbirth. The parties stipulated to dismiss all issues except whether Pierce could recover on her "bystander" claim.[1] Pierce appeals the summary judgment concluding she could not.

## Discussion[2]

¶8 Because the facts are undisputed, all that remains is a question of law. ***GMAC Mortgage Corp. v. Gisvold***, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998). The question we address is whether Pierce may bring a bystander claim for negligent infliction of emotional distress after being informed that the umbilical cord had wrapped around Brianna's neck and having to observe the health care providers' subsequent conduct.

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[1] Pierce appears to dispute characterization of her claim as a "bystander" claim. Nevertheless, distilled to its essence, that is the appropriate legal characterization. "Bystander" is a shorthand reference to a person claiming emotional distress arising from a tortfeasor's negligent infliction of physical harm to a third person. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 632, 517 N.W.2d 432 (1994).

[2] We held this appeal in abeyance to await the decision in ***Finnegan v. Wisconsin Patients Comp. Fund***, 2003 WI 98, 263 Wis. 2d 574, 666 N.W.2d 797, which had been certified to the supreme court. That case also involved the issue of bystander claims and the medical malpractice statutes of WIS. STAT. ch. 655. ***Finnegan*** was decided on July 8, 2003, and the parties in this case requested the opportunity to file supplemental briefs. We granted that motion.

All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

¶9 Initially, we note that Pierce describes the issue as "whether a patient who was the victim of medical negligence is entitled to recover damages for emotional distress resulting from death and stillbirth of her child." This characterization actually confuses the issue.[3] Pierce claims she may bring WIS. STAT. ch. 655 claims under two theories: she was a patient and she was the parent of a patient. The court allowed her personal claim—a claim for "a patient who was the victim of medical negligence."

¶10 At issue now is her claim as Brianna's mother. Pierce seeks to recover as the parent of a patient who was the victim of malpractice. WISCONSIN STAT. § 655.007 authorizes "any spouse, parent, minor sibling or child of the patient having a *derivative* claim for injury or death on account of malpractice" to bring a ch. 655 claim.[4] (Emphasis added.) The question thus becomes whether negligent infliction of emotional distress is a derivative claim. This is a question we have struggled with in the past. Indeed, it is the question we hoped ***Finnegan v. Wisconsin Patients Comp. Fund***, 2003 WI 98, 263 Wis. 2d 574, 666 N.W.2d 797, would have resolved.

¶11 Two of our supreme court justices concluded that negligent infliction of emotional distress is a derivative claim and is therefore governed by WIS. STAT. ch. 655. ***Id.***, ¶2. Three justices concluded it is not derivative and is therefore barred in a malpractice action. ***Id.*** One justice declined to reach the question,

[3] Any claim relating to Pierce herself as the victim of medical negligence—for example, any physical or emotional injury she might have suffered as a result of the vaginal extraction—was apparently resolved by the stipulation.

[4] WISCONSIN STAT. § 655.007 states: "On and after July 24, 1975, any patient or the patient's representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter."

viewing part II of Chief Justice Abrahamson's concurrence as dispositive of the case. ***Id.*** In part II of the chief justice's concurrence, she assumed arguendo that a parent's claim for negligent infliction of emotional distress resulting from medical malpractice is not barred by ch. 655. ***Id.***, ¶51. The chief justice explained, however, why the Finnegans could not meet the ***Bowen*** test. ***Id.***, ¶¶51-55. Four justices joined that part of her concurrence, making it the majority opinion. ***Id.***, ¶56. We conclude that the chief justice's opinion in ***Finnegan*** disposes of this case as well because, like the Finnegans, Pierce does not fulfill the third prong of ***Bowen***.

¶12 ***Bowen*** established three key factors to consider when determining whether a bystander claim for negligent infliction of emotional distress survives: The victim's injury must be fatal or severe; the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings; and the plaintiff must have observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene. ***Bowen***, 183 Wis. 2d at 633.

¶13 In ***Finnegan***, five-month-old Jared was taken to a clinic the morning of August 6 for evaluation after his fever increased even with acetaminophen treatment. His pediatrician ordered a blood count and culture. The blood count showed a normal white blood cell count, and the pediatrician suggested the parents take Jared home and treat him with alternating doses of acetaminophen and ibuprofen. ***Finnegan***, 263 Wis. 2d 574, ¶5.

¶14 The fever spiked to 104º that afternoon but lowered slightly after treatment. Still, Jared continued to be irritable and he experienced episodes of vomiting that evening. The Finnegans called the pediatrician to report the change.

The pediatrician advised them to stop using the acetaminophen and go to the emergency room or call the on-call physician if Jared's condition worsened. ***Id.***, ¶6.

¶15 The morning of August 7 Jared awoke moaning and lethargic. The Finnegans returned to the clinic and saw the pediatrician again. Results of a blood culture showed bacteria in Jared's blood and the pediatrician told them to take Jared immediately to the hospital for a lumbar puncture to determine whether the bacteria had entered Jared's spinal fluid. ***Id.***, ¶7.

¶16 Significantly, the previous evening, August 6, the laboratory had completed the blood culture, informing the on-call physician about the bacteria. This physician, however, did not relay this information to the pediatrician or the Finnegans. It was not until the Finnegans returned the morning of August 7 that the pediatrician reviewed the blood culture results. ***Id.***, ¶8.

¶17 At the hospital, while Mrs. Finnegan and Jared took the elevator to the pediatric ward, Jared stopped breathing. Mrs. Finnegan immediately called the nurse when she entered the pediatric ward. ***Id.***, ¶9. Jared was apparently resuscitated and the pediatrician performed the lumbar puncture. Mrs. Finnegan remained with Jared until the pediatrician performed the lumbar puncture. The pediatrician informed the Finnegans that Jared's spinal fluid was cloudy. A flight team from Children's Hospital in Milwaukee transported Jared to Milwaukee, but by the time they arrived, his infection had progressed too far. Jared died at Children's Hospital on August 7. ***Id.***, ¶10.

¶18 Among other things, the Finnegans asserted a claim for negligent infliction of emotional distress under ***Bowen***, based on the on-call physician's negligent failure to act upon the lab results. ***Id.***, ¶11-12. That is, the claim was

based on the failure to properly diagnose and treat a dangerous health condition. The supreme court acknowledged that Mrs. Finnegan's experiences were "horrific. … [She] witnessed a prolonged and unsuccessful attempt to save" Jared. ***Id.***, ¶54.

¶19 Nevertheless, the supreme court ruled:

> [T]he compensable serious emotional distress of a bystander claim is not measured by the acute emotional distress of the loss of a family member. Rather, the damages arise from the bystander's observation of an extraordinary event. The hallmark of negligent infliction of emotional distress is a contemporaneous or nearly contemporaneous sensory perception of a sudden, traumatic, injury-producing event. …
>
> [T]he failure to make the proper medical diagnosis is not an event that itself is perceived by a family member. To extend ***Bowen*** to an injury caused by an improper diagnosis when the plaintiff observes the suffering of the victim and not the event that causes that suffering conflicts with the historical foundations for negligent infliction of emotional distress and would be a significant broadening of the ***Bowen*** rule.

***Id.***, ¶¶54-55.

¶20 In this case, the injury-producing event causing Brianna harm is the umbilical cord wrapping itself around her neck. There is no allegation that the doctor or nurses caused this problem. It is also an event that, absent sophisticated medical equipment, no person could contemporaneously perceive.

¶21 Bartizal and Theda Clark, as the nurses' employer, stipulated to negligence in managing Pierce's labor. However, there are no specifics as to what acts constituted the negligence.

¶22 Pierce first became aware of a potential problem when she noticed the flashing fetal monitor. The nurse apparently *correctly* noted that the umbilical

cord was causing the problem, and repositioned Pierce in an attempt to correct the problem. Stipulation notwithstanding, there is nothing in the record to indicate that this was an inappropriate method of treatment. At the very least, nothing indicates this was an inappropriate first step, that it exacerbated the problem, or that this was the treatment upon which the negligence stipulation was based.

¶23 With regard to Bartizal's stipulated negligence, it appears this relates to his decision to wait until the next morning to see if the labor would progress, despite the fact that Brianna had apparently been in distress for four hours when he examined Pierce. In any event, Bartizal cannot be held responsible for the cord initially wrapping around Brianna's neck. His wait-and-see course of treatment—his management of the labor—may have been negligent, but he is not responsible for causing the injury producing event.[5]

¶24 Under ***Finnegan***, extending ***Bowen*** to an injury caused by an improper diagnosis (here, improper treatment) when the plaintiff observes the suffering of the victim (here, by observing the flashing heart monitor) but not the event that causes suffering (here, the umbilical cord wrapping around Brianna's neck) conflicts with the historical foundations for negligent infliction of emotional

[5] Pierce also claims, in part, that her emotional distress arises from awakening to see the nurses trying to locate Brianna's heartbeat. However, this was nearly twelve hours after the first nurse diagnosed the umbilical cord problem and almost eight hours after Bartizal had seen her. While we are reluctant to draw any bright line, we are unpersuaded that either delay constitutes the "immediate aftermath" of the injury producing event. Indeed, Pierce was asleep for part of the timeline, making it essentially impossible for her to be aware of any suffering or difficulties during that time.

distress. *See* ***id.*** Thus, we must affirm the summary judgment dismissing Pierce's bystander claim.[6]

*By the Court.*—Judgment affirmed.

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

[6] We note that Pierce cites ***Westcott v. Mikkelson***, 148 Wis. 2d 239, 242, 434 N.W.2d 822 (Ct. App. 1988), for the argument that an obstetrics patient may always recover for emotional distress occasioning the death of a child during childbirth. Although Pierce contends otherwise, we conclude ***Westcott*** is no longer controlling precedent.

When ***Westcott*** was decided, there were two competing rules on negligent infliction of emotional distress claims. ***Waube v. Warrington***, 216 Wis. 603, 258 N.W. 497 (1935), established the "zone of danger" rule. In that case, a mother watching from a window in her house saw her child struck and killed while crossing the street. Her claim could not be maintained because she was inside her home and not within in the "zone of danger."

***Garrett v. City of New Berlin***, 122 Wis. 2d 223, 362 N.W.2d 137 (1985), established the "participant" rule as an exception to ***Waube***. There, a girl with a group of children in a grassy area outside an outdoor movie theater saw her brother get run over by a police car. The police had arrived to investigate the group. The girl, however, was fifteen to twenty feet away from her brother at the time. Although she was not in the "zone of danger," she was allowed to recover for her emotional distress because she had been a participant; that is, she had been part of the group the police were investigating. ***Id.*** at 232.

***Westcott*** had to choose between those two theories to decide whether the mother could recover for the death of her child during the birthing process and concluded that there was no better example of a ***Garrett*** participant than a mother giving birth. ***Westcott***, 148 Wis. 2d at 242. ***Bowen***, however, formally abandoned ***Garrett*** and the zone of danger rule. ***Bowen***, 183 Wis. 2d at 636. As a result, the legal foundation of ***Westcott*** no longer exists, and Pierce cannot rely on it.