

Appeal No. 01-2911

Cir. Ct. No. 99-CV-359

**WISCONSIN COURT OF APPEALS  
DISTRICT II**

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**JOSEPH FINNEGAN, TANICE FINNEGAN, CALVIN JOSEPH  
FINNEGAN, ZACHARY TREVOR FINNEGAN AND MIKAYLA  
FAE FINNEGAN, BY THEIR GUARDIAN AD LITEM, DAVID  
M. SKOGLIND,**

**PLAINTIFFS-RESPONDENTS,**

**MANITOWOC PUBLIC SCHOOLS SELF-INSURED, C/O PLAN  
ADMINISTRATORS HUMANA EMPLOYERS HEALTH,**

**INVOLUNTARY-PLAINTIFFS,**

**FILED**

**v.**

**WISCONSIN PATIENTS COMPENSATION FUND,**

**DEFENDANT-CO-APPELLANT,**

**May 22, 2002**

Cornelia G. Clark  
Clerk of Supreme Court

**MANITOWOC CLINIC INCORPORATED AND ABC  
INSURANCE COMPANY,**

**DEFENDANTS,**

**AURORA MEDICAL GROUP, INC. D/B/A MANITOWOC  
CLINIC AND AURORA HEALTH CARE, INC.,**

**DEFENDANTS-APPELLANTS.**

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Brown, Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

### ISSUES

Does WIS. STAT. ch. 655 (1999-2000) governing medical malpractice actions permit derivative claims for negligent infliction of emotional distress as set forth in *Bowen v. Lumbermen's Mutual Casualty Co.*, 183 Wis. 2d 627, 517 N.W.2d 432 (1994)?

If WIS. STAT. ch. 655 allows *Bowen* claims, do the undisputed facts in this case satisfy *Bowen*'s requirement that the claimant contemporaneously observe a traumatic event where the injury-producing event is a misdiagnosis resulting in the gradual progression of a bacterial infection leading to respiratory arrest and death?

### FACTS

Joseph and Tanice Finnegan brought a medical malpractice action for wrongful death and negligent infliction of emotional distress. The wrongful death portion of their claim has been settled, leaving only their *Bowen* claim for resolution. The Finnegans assert that they suffered severe emotional distress upon witnessing unsuccessful attempts to save the life of their infant son, Jared, who died of meningitis after a doctor's delay in initiating antibiotic treatment resulted in the fatal progression of the infection.

After settling the wrongful death claim, Aurora Medical Group, Inc. filed a motion for summary judgment seeking dismissal of the claim for negligent infliction of emotional distress. Aurora contended that *Ziulkowski v. Nierengarten*, 210 Wis. 2d 98, 565 N.W.2d 164 (Ct. App. 1997), bars *Bowen*

claims for emotional distress arising in medical malpractice actions. Aurora further argued that WIS. STAT. ch. 655 provides the exclusive remedy for such actions and the statute does recognize a cause of action for negligent infliction of emotional distress. The trial court denied the motion for summary judgment. This court granted Aurora's subsequent petition for leave to appeal the nonfinal order.

## DISCUSSION

This case presents the supreme court with an opportunity to resolve whether a claim for negligent infliction of emotional distress can be maintained in a medical malpractice action governed exclusively by WIS. STAT. ch. 655. As a threshold matter, the parties dispute the effect of the holding in *Ziulkowski* on this issue. Aurora claims that *Ziulkowski* stands for the proposition that *Bowen*, which recognized a claim for negligent infliction of emotional distress, has no application to medical malpractice claims. Aurora also claims that the *Ziulkowski* court "plainly indicated that its review of ch. 655 showed no claim for negligent infliction of emotional distress was authorized." Aurora relies on the following language in that case:

We are not persuaded by the argument that *Bowen* allows claims for negligent infliction of emotional distress premised on medical malpractice.... There is no language in *Bowen* which indicates that this cause of action should be extended to the medical malpractice arena. Further, medical malpractice cases have been treated differently than non-medical malpractice personal injury cases. Medical malpractice law is exclusively governed by Chapter 655, STATS. Therefore, *Bowen* is inapplicable to the instant case, and we must turn to an analysis of the statutory framework governing medical malpractice actions.

*Ziulkowski*, 210 Wis. 2d at 101-02 (citations omitted). The court then relied on case law to limit the word "child" in WIS. STAT. § 655.007 to minor children.

**Ziulkowski**, 210 Wis. 2d at 103. It concluded that the legislature did not intend to allow an adult child to assert a claim for emotional distress damages. *Id.* at 104.

Contrary to Aurora's above assertions, we do not read **Ziulkowski** to answer the issues raised in this certification. A fair reading of the above language is that the court in **Ziulkowski** distinguished **Bowen** because it was not a medical malpractice case and that any claim for relief must be found in the statute itself. Furthermore, its ultimate holding is that WIS. STAT. ch. 655 does not authorize *adult* children to make a derivative claim for emotional distress. In other words, the **Ziulkowski** court was concerned with the class of claimants entitled to assert a claim for emotional distress; it did not address the substantive issues raised in this case. *See also Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶13, 236 Wis. 2d 316, 613 N.W.2d 120 (adult children are not included in classification of claimants entitled to collect damages for loss of society and companionship in medical malpractice suits).

Turning to the applicable statutes, the parties present reasonable opposing interpretations of the statutory framework, focusing primarily on WIS. STAT. § 893.55, which establishes the damages a claimant can recover under medical malpractice suits brought under WIS. STAT. ch. 655. The Finnegans assert that damages for negligent infliction of emotional distress are recoverable under § 893.55(5)(a), which specifically allows recovery for "noneconomic effects of disability."<sup>1</sup> Furthermore, para. (4)(a) defines noneconomic damages to mean

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<sup>1</sup> WISCONSIN STAT. § 893.55(5) provides that every award for damages under WIS. STAT. ch. 655 shall specify the sum of money, if any, awarded for each of the following:

(a) Pain, suffering and noneconomic effects of disability.

(continued)

“mental distress” and “noneconomic effects of disability,” which explicitly includes “loss of mental or physical health.”<sup>2</sup> While para. (5)(a) does not contain the term “mental distress,” a discrepancy noted by the court in *Ziulkowski*, 210 Wis. 2d at 105-06, the Finnegans claim that the specific definition of noneconomic damages contained in para. (4)(a) controls the general verdict phrase used in para. (5)(a).

Aurora argues that even if “mental distress” is included within “noneconomic effects of disability,” the statute is referring to the patient’s disability since all of the items enumerated in WIS. STAT. § 893.55(5)(a) relate to the patient. On the other hand, para. (5)(b), according to Aurora, enumerates the types of derivative damages that a patient’s relatives may maintain, and para. (5)(b) excludes recovery for mental distress. Aurora further asserts that this distinction between derivative and direct claims is also made in WIS. STAT. §§ 655.005 and 655.007, proof that the legislature intended to distinguish between direct and derivative claims, allocating direct claims to the patient (under § 893.55(5)(a)) and leaving spouses, parents, minor siblings or children of the patient with derivative claims only (under para. (5)(b)). Aurora contends that a

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- (b) Loss of consortium, society and companionship or loss of love and affection.
- (c) Loss of earnings or earning capacity.
- (d) Each element of medical expenses.
- (e) Other economic injuries and damages.

<sup>2</sup> WISCONSIN STAT. § 893.55(4)(a) defines “noneconomic damages” to include compensation for “pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.”

claim for negligent infliction of emotional distress is a separate direct cause of action for emotional injury to the claimant. Accordingly, though a patient may have a direct claim for mental distress under ch. 655 and § 893.55, relatives of the patient are limited to derivative claims such as loss of consortium.

Finally, assuming that claims for negligent infliction of emotional distress can arise under WIS. STAT. ch. 655, we ask the supreme court to resolve whether the facts in this case satisfy the prerequisites for such a claim. In *Bowen*, the court allowed an emotional distress claim where the mother arrived on the scene of a serious accident involving her son moments after it occurred. *Bowen*, 183 Wis. 2d at 657. The court outlined three prerequisites for recovery: fatal or severe injury to the victim, a close relationship between the plaintiff and victim, and the plaintiff observed an extraordinary event. *Id.* at 633.

The parties disagree as to whether the contemporaneous observation of a traumatic event has occurred under these facts. This presents a legal issue of whether the event of misdiagnosis is the type of traumatic event that will permit bystander recovery for emotional distress. When a misdiagnosis occurs, for example, a bystander may not immediately observe or comprehend the results of the injury-producing event and therefore may not be sufficiently traumatized from the observation. Instead, a bystander is more likely only to observe the aftermath or result of malpractice.

In conclusion, whether WIS. STAT. ch. 655 recognizes a claim for negligent infliction of emotional distress is a question of statutory interpretation that raises important policy considerations. The supreme court is the appropriate judicial authority to resolve the legal and public policy concerns over permitting

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such a cause of action when health care providers undertake extraordinary measures to save a life in the presence of loved ones.