

Pregnant Mother Is Actual Victim of Negligence Which Caused Unborn Child to Be Stillborn

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On July 27, 2010, the Indiana Court of Appeals held that an unborn child is legally part of the mother and, therefore, the mother is an actual victim of any negligence that causes the unborn child to be stillborn in *Spangler v. Bechtel*, Case No. 49A05-0908-CV-482.

In this case, a pregnant woman was admitted to a hospital in active labor and was being attended to by a midwife, who had provided prenatal care to the woman during her pregnancy. After the woman was admitted to the hospital, the midwife ruptured the "bag of waters." Less than an hour later, a prolapsed umbilical cord was identified and a doctor was called to the hospital in anticipation of having to perform a Cesarean section. Less than an hour after that, the doctor delivered a stillborn infant girl, who could not be resuscitated. It was discovered that the infant died while the mother was in labor and that the fetal heart rate monitor, which had indicated a heart rate, was actually registering Brown's heart rate. An examination of the umbilical cord and placenta revealed "a large thrombus midway in the cord."

The parents filed a complaint against both the hospital and the midwife, claiming wrongful death and negligent infliction of emotional distress. The trial court granted summary judgment to the defendants on all counts, from which the parents appealed.

On appeal, the Court held that parents could state a claim for negligent infliction of emotional distress against the hospital. It first concluded that the parents' claimed emotional damages, directly related to the child's stillbirth, are of the kind and extent normally expected to occur in a reasonable person and are not likely speculative, exaggerated, fictitious, or unforeseeable. The Court then turned to who qualified as a patient under the Medical Malpractice Act. It followed *Ind. Patient's Comp. Fund v. Winkle*, 863 N.E.2d 1 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*, which held that a fetus does not qualify as a "patient" under the Act, and then turned to the question of whether the pregnant mother qualified as an "actual victim" of negligence able to assert Parents' claim for negligent infliction of emotional distress under the Act. The Court held that she did.

[A] mother who suffers a stillbirth due to medical malpractice qualifies as an injured patient and satisfies the actual victim requirement under the Medical Malpractice Act regardless of whether the malpractice resulted in injuries to the mother, the fetus, or both, and Parents may assert a claim for negligent infliction of emotional distress under *Shuamber's* modified impact rule

The Court then held that the Parents may make the same claim against the midwife, even though she elected non-coverage under the Act, because the Act merely dictates procedures by which a claimant may bring a cause of action.

[The mother]'s direct involvement in the stillbirth allows Parents to proceed on their negligent infliction of emotional distress claim against Midwife, and we conclude that the trial court erred in granting Midwife's motion for summary judgment.

This case is interesting for many reasons. First it clarifies both the modified impact rule and the remedies Indiana law provides to parents whose children are stillborn due to the negligence of another. It is also likely that the Court's rationale in support of its judgment will be controversial, particularly the part of the case discussing the legal relationship between a pregnant woman and her unborn child. However, litigators should pay particular attention to a passage in the decision discussing *Ind. Patient's Comp. Fund v. Butcher*, 863 N.E.2d 11 (Ind. Ct. App. 2007), which highlights the reasons why the Court reached this particular result.

Lessons:

1. When representing parents of a stillborn child in a negligence action, focus on the parents' direct claims, rather than any derivative claims.
2. The existence of wrongful conduct that causes a death does not preclude actions for negligent infliction of emotional distress based on that same conduct.
3. The right set of facts can affect a court's interpretation of what the legislature would have intended when enacting a particular statute.