

December 1996

To Recover Or Not to Recover: A State by State Survey of Fetal Wrongful Death Law

Jill D. Washburn Helbling
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

Recommended Citation

Jill D. Washburn Helbling, *To Recover Or Not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. Va. L. Rev. (1996).
Available at: <https://researchrepository.wvu.edu/wvlr/vol99/iss2/10>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

TO RECOVER OR NOT TO RECOVER: A STATE BY STATE SURVEY OF FETAL WRONGFUL DEATH LAW

I.	INTRODUCTION	364
II.	STATES THAT REQUIRE A LIVE BIRTH FOR RECOVERY	367
	A. <i>Arkansas</i>	367
	B. <i>California</i>	367
	C. <i>Florida</i>	368
	D. <i>Iowa</i>	370
	E. <i>Maine</i>	372
	F. <i>Nebraska</i>	372
	G. <i>New Jersey</i>	373
	H. <i>New York</i>	374
	I. <i>Tennessee</i>	376
	J. <i>Texas</i>	377
	K. <i>Utah</i>	379
	L. <i>Virginia</i>	380
III.	STATES THAT ALLOW RECOVERY FOR THE DEATH OF A VIABLE FETUS NOT BORN ALIVE	381
	A. <i>Alabama</i>	381
	B. <i>Alaska</i>	383
	C. <i>Arizona</i>	384
	D. <i>Colorado</i>	385
	E. <i>Connecticut</i>	385
	F. <i>Delaware</i>	387
	G. <i>District of Columbia</i>	387
	H. <i>Hawaii</i>	388
	I. <i>Idaho</i>	389
	J. <i>Illinois</i>	391
	K. <i>Indiana</i>	393
	L. <i>Kansas</i>	393
	M. <i>Kentucky</i>	394
	N. <i>Louisiana</i>	395
	O. <i>Maryland</i>	396
	P. <i>Massachusetts</i>	398
	Q. <i>Michigan</i>	399

R.	<i>Minnesota</i>	402
S.	<i>Mississippi</i>	402
T.	<i>Montana</i>	403
U.	<i>Nevada</i>	404
V.	<i>New Hampshire</i>	405
W.	<i>New Mexico</i>	406
X.	<i>North Carolina</i>	407
Y.	<i>North Dakota</i>	409
Z.	<i>Ohio</i>	409
AA.	<i>Oklahoma</i>	411
BB.	<i>Oregon</i>	412
CC.	<i>Pennsylvania</i>	413
DD.	<i>Rhode Island</i>	415
EE.	<i>South Carolina</i>	417
FF.	<i>Vermont</i>	419
GG.	<i>Washington</i>	419
HH.	<i>Wisconsin</i>	420
IV.	STATES THAT ALLOW RECOVERY FOR THE DEATH OF A NONVIABLE FETUS NOT BORN ALIVE	422
A.	<i>Georgia</i>	422
B.	<i>Missouri</i>	423
C.	<i>South Dakota</i>	426
D.	<i>West Virginia</i>	427
V.	STATES WITH NO CASE LAW	429
A.	<i>Wyoming</i>	429
VI.	CONCLUSION	429

I. INTRODUCTION

Since 1884 there has been great controversy surrounding the issue of civil recovery for prenatal injuries and fetal wrongful death. In that year *Dietrich v. Inhabitants of Northampton*¹ was decided, in which the Supreme Judicial Court of Massachusetts held that an unborn infant was a part of its mother, not an independent entity that could maintain an action for injuries sustained in the

¹ 138 Mass. 14 (1884).

womb.² This was the first time an American court addressed this issue.

Over the following years courts of other states adopted the *Dietrich* view and rejected recovery for prenatal injuries.³ Various reasons were given for denying recovery, most of which have since been discounted.⁴ The first was that the unborn child was seen as a part of the mother, having no independent existence, so that an injury to the unborn child was actually an injury to the mother.⁵ This view has been abandoned in a majority of jurisdictions due to advances in medical science.⁶ The second reason was the lack of precedent allowing recovery.⁷ However, this reason is no longer valid because the “weight of authority currently allows a cause of action for the tortious death of a viable child en ventre sa mere.”⁸ The third reason traditionally given for denying recovery for prenatal injuries was that the difficulties proving causation would lead to many fraudulent claims.⁹ The final reason was that the issue was one which should appropriately be decided by the legislature, not the courts.¹⁰ Courts often stated that if the legislature intended to include an unborn child within the meaning of the applicable wrongful death statute, it could do so explicitly in the language of the statute.¹¹

In 1946, in *Bonbrest v. Kotz*,¹² an American court departed from *Dietrich*

² *Id.* at 17.

³ *See, e.g.*, *Allaire v. St. Luke’s Hosp.*, 56 N.E. 638 (Ill. 1900); *Newman v. City of Detroit*, 274 N.W. 710 (Mich. 1937); *Buel v. United Ry.*, 154 S.W. 71 (Mo. 1913); *Gorman v. Budlong*, 49 A. 704 (R.I. 1901).

⁴ *Farley v. Sartin*, 466 S.E.2d 522, 529 (W. Va. 1995).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Farley*, 466 S.E.2d at 530. The term “en ventre sa mere” means “[i]n its mother’s womb.” BLACK’S LAW DICTIONARY 534 (6th ed. 1990). “A term descriptive of an unborn child.” *Id.*

⁹ *Farley*, 466 S.E.2d at 529.

¹⁰ *Id.* at 520.

¹¹ *Id.*

¹² 65 F. Supp. 138 (D.D.C. 1946).

for the first time, rejecting the theory that a viable fetus¹³ is a part of its mother and holding that a child could maintain an action for injuries it sustained while viable in the womb.¹⁴ Following that decision, courts began rejecting *Dietrich* and adopting *Bonbrest*.¹⁵ Today, every jurisdiction in the country permits recovery for prenatal injuries if the child is born alive.¹⁶ Furthermore, a majority of jurisdictions now permit a cause of action to be maintained on behalf of a viable¹⁷ fetus that is killed in the womb by a tortfeasor's negligence.¹⁸ Four jurisdictions have gone even further in construing their wrongful death statutes, holding that a nonviable fetus is a "person," and therefore recovery can be had for the wrongful death of a nonviable fetus en ventre sa mere.¹⁹

This Note will examine prenatal injury and fetal wrongful death law in all fifty states and the District of Columbia. In all cases mentioned, a challenge was brought by the defendant questioning the existence of a cause of action for prenatal injuries or fetal wrongful death. Each court then decided whether the word "person" or "minor child," as used in the applicable wrongful death statute, includes an unborn child.

¹³ Although the "fetus" is defined as "the unborn offspring in the post embryonic period after major structures have been outlined (in man from seven to eight weeks after fertilization)," the term is used throughout this Note to refer to an unborn child at any stage between conception and birth. BLACK'S LAW DICTIONARY, *supra* note 7, at 621.

¹⁴ *Bonbrest*, 65 F. Supp. at 140.

¹⁵ *Farley*, 466 S.E.2d at 528.

¹⁶ *Id.* at 528 (quoting RESTATEMENT (SECOND) OF TORTS § 869 subsection 1 app. at 79 (1977)).

¹⁷ The term "viable" is used throughout this Note to refer to a fetus that "is sufficiently developed so as to be capable of life outside the uterus." RANDOM HOUSE COLLEGE DICTIONARY, 1464 (rev. ed. 1980). It is not used to refer to a specific point of prenatal development because courts and doctors alike disagree as to at what point in prenatal development a fetus becomes viable.

¹⁸ *Farley*, 466 S.E.2d at 529.

¹⁹ See *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. 1955), *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996); *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995).

II. STATES THAT REQUIRE A LIVE BIRTH FOR RECOVERY

A. *Arkansas*

In the only on-point case decided in Arkansas, *Chatelain v. Kelley*,²⁰ the parents of a stillborn fetus brought a medical malpractice action against the physicians and hospital for the wrongful death of their full-term, unborn child caused by a delay in the performance of a Cæsarian section.²¹ The Supreme Court of Arkansas held that an unborn fetus, viable or not, is not a person within the context of the Arkansas Wrongful Death Statute, stating that it was the legislature's job to determine the meaning of the word "person."²²

B. *California*

California courts have been reluctant to expand the definitions of "person" and "minor person" within the context of its wrongful death statute.²³ In *Norman*

²⁰ 910 S.W.2d 215 (Ark. 1995). The Supreme Court of Arkansas was previously presented with the issue of whether a viable fetus born dead was a "person" within the wrongful death statute, but it did not reach a decision on the issue because the case was barred by the doctrine of parental immunity. See *Carpenter v. Bishop*, 720 S.W.2d 299 (Ark. 1986). However, the court did decide a similar issue in *Carpenter v. Logan*, in which it held that there was no basis for the conclusion that a fetus was a "decendent" in the context of probate. *Carpenter v. Logan*, 662 S.W.2d 808 (Ark. 1984).

²¹ *Chatelain*, 910 S.W.2d at 215.

²² *Id.* at 219. The Arkansas Wrongful Death Statute is a survival statute and provides, in part:

(a)(1) Whenever the death of a person shall be caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, then, . . . the person who . . . would have been liable if death had not ensued shall be liable to an action for damages.

ARK. CODE ANN. § 16-62-102(a)(1) (Michie Supp. 1995).

²³ California statute currently provides, in part that "[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by . . . the decedent's personal representative on their behalf . . ." CAL. CIV. PROC. CODE § 377.60 (Deering Supp. 1996). The code also provides that "[e]xcept as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." CAL. CIV. PROC. CODE § 377.20(a) (Deering Supp. 1996).

*v. Murphy*²⁴ the parents of a stillborn child brought a wrongful death action for the death of their nonviable fetus following an automobile accident.²⁵ The District Court of Appeals for the Third District of California held that an unborn child is not a “minor person” within the California wrongful death statutes because “the right of action for wrongful death is unqualifiedly a matter of statutory provision and is completely within the jurisdiction of the legislature to grant, to withhold, or to restrict as it sees fit.”²⁶ The court did not discuss the issue of viability.

In 1972, the Court of Appeals for the First District of California was faced with a wrongful death claim for the stillbirth of a viable fetus that died as a result of an automobile accident in *Bayer v. Suttle*.²⁷ The court held that “the rationale of [*Norman*] applies with equal facility to the viable,”²⁸ and “the legislature did not intend to include an unborn child within the meaning of ‘person’ in Code of Civil Procedure section 377.”²⁹

Thus, California still requires that a fetus be born alive before allowing recovery for its wrongful death.

C. Florida

In 1968, the Supreme Court of Florida was first called upon to decide whether a stillborn fetus was a “minor child” under the existing law in *Stokes v. Liberty Mutual Insurance Co.*³⁰ In *Stokes*, the fetus was stillborn as a result of

²⁴ 268 P.2d 178 (Cal. Dist. Ct. App. 1954) (interpreting CAL. CIV. PROC. CODE § 377 (West 1949) (current version at CAL. CIV. PROC. CODE § 377.60 (Deering Supp. 1996))).

²⁵ *Id.* at 179.

²⁶ *Id.* at 180.

²⁷ 100 Cal. Rptr. 212 (Cal. Ct. App. 1972) (interpreting CAL. CIV. PROC. CODE § 377 (West 1968) (current version at CAL. CIV. PROC. CODE § 377.60 (Deering Supp. 1996))).

²⁸ *Id.* at 213.

²⁹ *Id.* at 215. Similarly, in *Justus v. Atchison*, the court held that there could be no recovery for the death of a fetus during delivery because the child was not born alive. *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977).

³⁰ 213 So.2d 695 (Fla. 1968). This case interpreted a Florida statute, which provided, in part that, “[w]henver the death of a minor child shall be caused by the wrongful act, negligence, carelessness or default of any individual . . . the father of such minor child, or if the father be not living, the mother may maintain an action against such individual.” FLA. STAT. ANN. § 768.03 (West 1965).

the negligence of an uninsured motorist.³¹ The court, emphasized the “peculiar language of section 768.03, [that allowed] recovery for the wrongful death of a ‘minor child,’” and held that a stillborn fetus was not a “minor child” and that a right of action for wrongful death can only arise after the live birth and subsequent death of a child.³²

Following *Stokes*, Florida’s wrongful death statutes were repealed and replaced.³³ The first case to interpret the new statute was *Davis v. Simpson*.³⁴ There, the parents of a stillborn, but otherwise viable fetus, brought a wrongful death action against physicians, alleging that the physicians’ negligence caused the fetus to be stillborn.³⁵ The District Court of Appeals of Florida concluded that:

[w]e must assume that the legislature knew the construction that had been placed upon the previous death by wrongful act statute by the Supreme Court in *Stokes* when it enacted the new statute. There is no departure in wording of the new statute from that of the old with relation to ‘persons’ and ‘minor children’ which would indicate an intent to create a new right of action on behalf of an unborn fetus. Had the legislature intended to make such a radical change in the law, there is every reason to believe it

The statute has since been amended and renumbered. See *infra* note 33.

³¹ *Stokes*, 213 So. 2d at 696.

³² *Id.* at 700.

³³ Florida’s wrongful death statute currently provides:

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act.

FLA. STAT. ANN. § 768.19 (West 1986).

³⁴ 313 So. 2d 796 (Fla. Dist. Ct. App. 1975).

³⁵ *Id.*

would have done so in clear language.³⁶

Day v. Nationwide Mutual Insurance Co. is the final significant case in Florida dealing with prenatal injuries.³⁷ *Day* involved an action for prenatal injuries suffered in an automobile accident by a child who was in the sixth week of gestation (thus presumably nonviable) and was later born alive.³⁸ The court held that a child that suffers prenatal injuries at any time after conception may recover for those injuries if it is born alive.³⁹

D. Iowa

The issue of recovery for fetal wrongful death was addressed for the first time by a federal court in *Wendt v. Lillo*.⁴⁰ The parents of a viable fetus that was killed *in utero* as a result of an automobile accident brought a wrongful death action against the negligent driver.⁴¹ The district court decided that the applicable statute⁴² allowed an infant to bring a cause of action for prenatal injuries received while viable in the womb; therefore, the action survived to the parents of the infant.⁴³

In 1971, the Supreme Court of Iowa faced the issue of recovery for fetal

³⁶ *Id.* at 798. *Stokes* and *Davis* have been stubbornly adhered to by the Supreme Court of Florida. *See, e.g.,* *Abdelaziz v. A.M.I.S.U.B. of Florida, Inc.*, 515 So. 2d 269 (Fla. 1987) (denying wrongful death claim for death of fetus, regardless of viability, because fetus is not a “person” under wrongful death statute); *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978) (holding that an unborn fetus is not a “person” within the meaning of the wrongful death statute and holding that a child is not born alive until it achieves an existence separate and independent from that of mother).

³⁷ 328 So. 2d 560 (Fla. Dist. Ct. App. 1976).

³⁸ *Id.*

³⁹ *Id.* at 562.

⁴⁰ 182 F. Supp. 56 (N.D. Iowa, 1960).

⁴¹ *Id.*

⁴² The Iowa Code provides that “[a]ll causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.” IOWA CODE ANN. § 611.20 (West 1950).

⁴³ *Wendt*, 182 F. Supp. at 62.

wrongful death for the first time in *McKillip v. Zimmerman*.⁴⁴ The mother of a stillborn, nonviable fetus that died as a result of an automobile accident brought a wrongful death action against the negligent driver.⁴⁵ The court held that the legislature did not intend to include an unborn child when it adopted the survival statute but intended to include “only those born alive.”⁴⁶

In 1981, the Supreme Court of Iowa was presented with the same issue involved in *Wendt*. The suit was brought by a mother who was improperly treated for bronchitis and hypertension which caused her nearly full-term fetus to be stillborn.⁴⁷ The court upheld *McKillip*, and decided that a fetus must be born alive before any action under the survival statute can be maintained because a fetus, viable or not, is not a “person” within the context of that statute.⁴⁸

Two years later, in 1983, *Dunn v. Rose Way, Inc.* was decided.⁴⁹ That case also involved the death of a viable fetus that occurred as a result of an automobile accident.⁵⁰ The court quickly dismissed the wrongful death claim under the survival statute, but then went on to hold that the father could maintain his action under Rule 8 of the Iowa Rules of Civil Procedure.⁵¹ The court distinguished the two rules by saying “[t]he survival statute and rule 8 serve different functions and compensate different people for different wrongs. Under section 611.20 the wrong is done to the injured person and to that person’s estate. Under rule 8 the wrong is done to a child’s parents.”⁵²

To summarize, Iowa does not allow a wrongful death claim under the survival statute unless the child is born alive and then dies from its injuries.

⁴⁴ 191 N.W.2d 706 (Iowa 1971).

⁴⁵ *Id.* at 707.

⁴⁶ *Id.* at 709. See IOWA CODE ANN. § 611.20 (setting forth the survival statute).

⁴⁷ *Weitl v. Moes*, 311 N.W.2d 259, 261 (Iowa 1981).

⁴⁸ *Id.* at 270.

⁴⁹ 333 N.W.2d 830 (Iowa 1983).

⁵⁰ *Id.* at 831.

⁵¹ The Iowa Rules of Civil Procedure provide that “[a] parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child.” Iowa R. Civ. P. 8

⁵² *Dunn*, 333 N.W.2d at 832.

However, a claim may be brought under Rule 8 of the Iowa Rules of Civil Procedure to recover expenses and damages resulting from the death of an unborn child.

E. Maine

*Milton v. Cary Medical Center*⁵³ is the Maine case that deals with fetal wrongful death. *Milton* was a wrongful death action brought by a mother against a hospital and its physicians for causing the death of her viable unborn daughter.⁵⁴ The Supreme Judicial Court of Maine held that a viable fetus is not a person as that term is used in the wrongful death acts, unless born alive.⁵⁵

F. Nebraska

Nebraska courts first addressed the issue of fetal wrongful death in 1951 in *Drabbels v. Skelly Oil Co.*⁵⁶ That case involved a wrongful death action on behalf of a stillborn fetus that was killed in its eighth month of development as the result of an explosion caused by a defective oil container.⁵⁷ The Supreme Court of Nebraska held that there can be no recovery for a fetus killed *in utero*,

⁵³ 538 A.2d 252 (Me. 1988).

⁵⁴ *Id.*

⁵⁵ *Id.* at 253. The Maine Code provides in part that:

Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person . . . that would have been liable if death had not ensued shall be liable for damages.

ME. REV. STAT. ANN. tit. 18-A, § 2-804(a) (West 1981).

⁵⁶ 50 N.W.2d 229 (Neb. 1951).

⁵⁷ *Id.* at 230. The Nebraska Code provides that:

Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages.

NEB. REV. STAT. § 30-809 (1996).

even after the point of viability.⁵⁸ *Drabbels* has been re-examined several times, but the Supreme Court of Nebraska stubbornly adheres to its original ruling that a stillborn fetus is not a “person” for purposes of the wrongful death statute.⁵⁹

G. *New Jersey*

There are several cases in New Jersey dealing with the issue of prenatal injuries. The first, *Ryan v. Public Service Coordinated Transport*, was an action brought by an infant for injuries he sustained while in the womb.⁶⁰ The court held that no cause of action existed for prenatal injuries because an act of the legislature was necessary to provide for such a cause of action.⁶¹

In *Smith v. Brennan*, a case similar to *Ryan*, an infant brought an action for prenatal injuries.⁶² The court overruled *Ryan* and its progeny, stating:

We conclude that the reasons advanced for the decisions denying recovery to a child who survives a prenatal injury are inadequate. They deny basic medical knowledge; they ignore the protection afforded unborn children by other branches of the law, and are founded upon fears which should not weigh with the courts. We believe that a surviving child should have a right of action in tort for prenatal injuries for the plain reason that it would be unjust to deny it. Therefore, the rule of *Stemmer v. Kline* is no longer the law of this State.⁶³

The court also added that this decision was applicable regardless of whether the infant was viable at the time of the injury in the womb.⁶⁴

⁵⁸ *Drabbels*, 50 N.W.2d at 231.

⁵⁹ See *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490 (Neb. 1986); see also *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977).

⁶⁰ 14 A.2d 52, 53 (N.J. 1940).

⁶¹ *Id.* at 55. In 1942, *Ryan* was affirmed in *Stemmer v. Kline*, 26 A.2d 489 (N.J. 1942).

⁶² 157 A.2d 497, 498 (N.J. 1960).

⁶³ *Id.* at 503. The rule in *Stemmer* was that no cause of action existed for prenatal injuries. 26 A.2d 489 (N.J. 1942).

⁶⁴ *Id.*

In 1964, the Supreme Court of New Jersey was confronted with the stillbirth of a viable fetus following an automobile accident in *Graf v. Taggart*.⁶⁵ The parents of the fetus brought a wrongful death action against the negligent driver.⁶⁶ The court held that there was no right of recovery for the death of a viable fetus en ventre sa mere.⁶⁷ This decision was later ratified by *Giardina v. Bennett*.⁶⁸

H. New York

New York courts have addressed the issue of prenatal torts numerous times, beginning with *Drobner v. Peters*.⁶⁹ In *Drobner*, a cause of action was brought on behalf of an infant who experienced injuries while viable *in utero*.⁷⁰ The Court of Appeals of New York denied recovery, ruling that imputing a legal personality to an unborn child is a “legal fiction or indulgence” and that a prenatal injury is an injury to the mother, not to the unborn child.⁷¹

⁶⁵ 204 A.2d 140 (N.J. 1964).

⁶⁶ *Id.* at 141. The New Jersey wrongful death statute provides that:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages.

N.J. STAT. ANN. § 2A:31-1 (West 1987).

⁶⁷ *Graf*, 204 A.2d at 146. The court stated:

There are compelling policy reasons, set forth in *Smith v. Brennan*, for allowing recovery where a child born alive and suffering from prenatal injuries sues for damages. In that situation the child bears the mark of defendant’s wrong as a physical or mental deformity which could handicap him for the rest of his life; and could require him, his parents, or the state to expend considerable sums of money on his behalf. These reasons do not exist when the child is stillborn.

Id.

⁶⁸ 545 A.2d 139 (N.J. 1988).

⁶⁹ 133 N.E. 567 (N.Y. 1921).

⁷⁰ *Id.*

⁷¹ *Id.* at 567-68. The court wrote:

The modern tendency of decided cases is to ignore fiction and deal with things as they are May this court attach an unnatural meaning to simple words

Drobner remained the law in New York for thirty years, until *Woods v. Lancel*⁷² was decided in 1951. In *Woods*, an infant brought an action for injuries he sustained while viable in his mother's womb.⁷³ The court overruled *Drobner*, concluding that "[t]o deny the infant relief in this case is not only a harsh result, but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified."⁷⁴

In 1953, the *Woods* rule was broadened by *Kelly v. Gregory*.⁷⁵ In *Kelly*, the Supreme Court, Appellate Division ruled that if an infant is injured prenatally and survives birth, the infant may maintain an action for those injuries, regardless of viability at the time of the injury.⁷⁶

In 1957, the Court of Appeals decided *In re Estate of Logan*.⁷⁷ *Logan* involved an application for letters of administration on the estate of a stillborn fetus on the grounds that a cause of action existed for the wrongful death of a fetus.⁷⁸ The court denied the application because it concluded that a right of action for the wrongful death of a fetus en ventre sa mere did not exist.⁷⁹

and hold independently of statute that a cause of action for prenatal injuries is reserved to the child until the moment of its birth and then accrues? The formulation of such a principle of legal liability against precedent and practice may be a tempting task, to which sympathy and natural justice point the way; but I cannot bring myself to the conclusion that the plaintiff has a cause of action at common law. The injuries were, when inflicted, injuries to the mother.

Id.

⁷² 102 N.E.2d 691 (N.Y. 1951).

⁷³ *Id.*

⁷⁴ *Id.* at 695. The court limited its ruling to allow recovery only for infants who were injured after the point of viability in the womb. *Id.*

⁷⁵ See *Kelly v. Gregory*, 125 N.Y.S.2d 696 (App. Div. 1953).

⁷⁶ *Id.* at 698.

⁷⁷ 156 N.Y.S.2d 49 (N.Y. 1956). The decision was affirmed by the Court of Appeals in a very brief opinion. *In re Logan's Estate*, 144 N.E.2d 644 (N.Y. 1957).

⁷⁸ *Id.* at 50. Letters of administration are "[f]ormal document[s] issued by probate court appointing one an administrator of an estate." BLACK'S LAW DICTIONARY, *supra* note 8, at 905.

⁷⁹ *In re Estate of Logan*, 156 N.Y.S.2d at 52. If the cause of action does not exist, then "there is no property warranting administration." *Id.*

The issue was next addressed in *Endresz v. Friedberg*,⁸⁰ which involved a wrongful death action brought for the stillbirth of viable twin fetuses.⁸¹ The court, relying on the *Logan* decision, maintained that a right of recovery for the wrongful death of a fetus not born alive did not exist.⁸²

In short, New York allows recovery for prenatal injuries suffered while in the womb if the fetus is born alive, regardless of whether the fetus is viable at the time of the injury. Recovery for the death of a fetus before a live birth has been denied.

I. Tennessee

Tennessee is one of the few states that adhere to the minority view that a stillborn viable fetus is not a person and therefore cannot be the object of recovery for wrongful death.⁸³ This view requires a live birth before wrongful death recovery can be had for tortious prenatal injuries. The first time Tennessee

⁸⁰ *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969).

⁸¹ *Id.* at 902. The New York Code provides, in part, that:

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.

N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney's 1981 Supp. 1996).

⁸² *Endresz*, 248 N.E.2d at 901. The court stated:

It is argued that it is arbitrary and illogical to draw the line at birth, with the result that the distributees of an injured foetus which survives birth by a few minutes may have recovery while those of a stillborn foetus may not. However, such difficulties are always present where a line must be drawn. To make viability rather than birth the test would not remove the difficulty, but merely relocate it and increase a hundredfold the problems of causation and damages.

Id. This decision was reaffirmed in *Ryan v. Beth Israel Hosp.*, 409 N.Y.S.2d 681 (1978).

⁸³ The Tennessee Code provides, in part, that:

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to [the personal representative of the decedent].

TENN. CODE ANN. § 20-5-106(a) (1994).

articulated this opinion was in 1958 in *Hogan v. McDaniel*.⁸⁴ That case was an action by the parents of an unborn child to recover for its death in the womb after nine-and-one-half months of prenatal development.⁸⁵ The court found decisions in other jurisdictions holding that there can be no recovery for the death of a viable fetus en ventre sa mere to be most persuasive.⁸⁶ That decision has been challenged, but the Supreme Court of Tennessee has steadfastly declined to overrule it, even though the overwhelming majority of states have renounced the rule as unjust and illogical.⁸⁷

In 1962, the Supreme Court of Tennessee was asked to decide if a wrongful death action could be maintained for the death of an infant injured while viable in the womb.⁸⁸ The court held that the triplet infants would have been able to maintain actions for their prenatal injuries had they lived; therefore, when the children died from those injuries, their right of action survived in the parents.⁸⁹

J. Texas

In Texas, the adjudication of the controversial issue of recovery for prenatal injuries began in 1935 in the case of *Magnolia Coca Cola Bottling Co. v. Jordan*.⁹⁰ In *Jordan* the court held that, for reasons of "lack of authority; practical inconvenience and possible injustice; no separate entity apart from the

⁸⁴ 419 S.W.2d 221 (Tenn. 1958) (interpreting TENN. CODE ANN. § 20-607 (1953) (current version at TENN. CODE ANN § 20-5-106 (1994))).

⁸⁵ *Id.* at 221-22.

⁸⁶ *Id.* at 224. The court stated:

The cases relied on by plaintiffs' counsel and which follow the [at that time] minority rule, are based upon the notable advance in medical science and the biological fact that life begins at the moment of conception, and that it is such a vital organism as to be at once a person is esse. This is a pure fiction of the law.

Id.

⁸⁷ See *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977); see also *Durrett v. Owens*, 371 S.W.2d 433 (Tenn. 1963).

⁸⁸ *Shousha v. Matthews Drivurself Serv., Inc.*, 358 S.W.2d 471 (Tenn. 1962) (interpreting TENN. CODE ANN. § 20-607 (1959) (current version at TENN. CODE ANN. § 20-5-106 (1994))).

⁸⁹ *Id.* at 476.

⁹⁰ 78 S.W.2d 944 (Tex. 1935).

mother, and therefore no duty of care; no person or human being in esse at the time of the accident," recovery for the death of an infant due to prenatal injuries would be denied, despite a live birth.⁹¹

This remained the law in Texas for forty-two years, until the Supreme Court of Texas decided *Leal v. C.C. Pitts Sand & Gravel, Inc.*⁹² In that case, the parents of an infant girl who had sustained injuries in her sixth month of prenatal development, and who died two days after birth, challenged the *Jordan* decision that no cause of action existed in such cases.⁹³ The court expressly overruled *Jordan*,⁹⁴ holding that a right of action for prenatal injuries sustained by an infant while viable in the womb was recognized in Texas, as was an action for the death of such a child after birth.⁹⁵

In 1971, the Texas Court of Civil Appeals addressed the issue of whether an infant who sustains injuries while not viable in the womb can maintain an action for those injuries after birth.⁹⁶ The court held that a cause of action exists for prenatal injuries sustained any time during prenatal development only when the child is born alive and survives.⁹⁷

The final significant case in Texas was *Witty v. American General Capital Distributors, Inc.*,⁹⁸ decided by the Supreme Court of Texas in 1987. There, the mother of a viable fetus that died in the womb brought wrongful death and survival actions.⁹⁹ As to the wrongful death action, the court held that no cause

⁹¹ *Id.* at 947 (quoting *Drobner v. Peters*, 133 N.E.2d 567 (N.Y. 1921)). The Texas Code provided, "The preceding article [4671] must be of such character as would, if death had not ensued, have entitled the party to maintain an action for such injury." TEX. REV. CIV. STAT. ANN. tit. 77 art. 4672 (West 1921) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (West 1986)).

⁹² 419 S.W.2d 820 (Tex. 1967).

⁹³ *Id.* at 821.

⁹⁴ *Id.* at 822.

⁹⁵ *Id.*

⁹⁶ *See* *Yandell v. Delgado*, 471 S.W.2d 569 (Tex. Civ. App. 1971).

⁹⁷ *Id.* at 570.

⁹⁸ 727 S.W.2d 503 (Tex. 1987).

⁹⁹ *Id.* at 504. The Texas Code provides, in part, that "[a] person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's . . . wrongful act, neglect, carelessness, unskillfulness, or default." TEX. CIV. PRAC. & REM. CODE ANN. § 71.001

of action exists for the death of a child due to prenatal injuries unless it is born alive.¹⁰⁰ The court came to the same conclusion with regard to the survival statute.¹⁰¹

K. Utah

In Utah there is only one important on-point case. In that case, *Webb v. Snow*,¹⁰² the mother of a viable but stillborn fetus brought a wrongful death action alleging negligent obstetric care.¹⁰³ The court held that “[w]hile injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings experienced by a woman who has a miscarriage by reason of injuries caused by the wrongful acts of others, damages are not awarded for ‘loss of the unborn child’ itself.”¹⁰⁴ Accordingly, a wrongful death action may not be maintained for the death of a viable fetus *in utero*.

(West 1986).

¹⁰⁰ *Witty*, 727 S.W.2d at 504. The court stated:

[w]e have found no evidence that the legislature intended to include a fetus within the scope of our wrongful death statute. Therefore, no cause of action may be maintained for the death of a fetus under the wrongful death statute until the right to bring such action is afforded by the legislature.

Id. at 506.

¹⁰¹ *Id.* at 506. This decision has been challenged and reaffirmed several times. See *Krishnan V. Sepulveda*, 916 S.W.2d 478 (Tex. 1995); see also *Edinburg Hosp. Auth. v. Trevino*, 904 S.W.2d 831 (Tex. 1995); *Blackman v. Langford*, 795 S.W.2d 742 (Tex. 1990); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23 (Tex. 1987).

¹⁰² 132 P.2d 114 (Utah 1942).

¹⁰³ *Id.* at 115. The Idaho Code currently provides, in part, that “[e]xcept as provided in Title 35, Chapter 1, Workers’ Compensation, a parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another.” UTAH CODE ANN. § 78-11-6 (1992).

¹⁰⁴ *Webb*, 132 P.2d at 119. That decision was affirmed in 1975 in the case of *Nelson v. Peterson*, which also involved the death of an unborn viable child. 542 P.2d 1075 (Utah 1975). The Supreme Court of Utah took only two brief paragraphs to address the issue, holding that the action was without merit and that the mother could recover for injuries to herself due to the miscarriage, but not for the death of the fetus itself. *Id.* at 1077.

L. Virginia

The courts of Virginia addressed the issue of prenatal injuries for the first time in 1969 in *Lawrence v. Craven Tire Co.*¹⁰⁵ In that case, the father of a stillborn viable fetus sought damages for its death under the wrongful death statute.¹⁰⁶ The court concluded that “the proposition that a viable fetus is a person is a highly theoretical and fictional concept, and to say that such a ‘person’ could have maintained an action if death had not ensued is to carry the fiction even further. This [the court is] unwilling to do.”¹⁰⁷

The only other case addressing the issue of prenatal injuries in Virginia is *Kalafut v. Gruver*,¹⁰⁸ decided by the Supreme Court of Virginia in 1990. That case was a wrongful death action brought on behalf of a child that was prenatally injured and died only a few hours after a premature birth.¹⁰⁹ The court held:

[W]e adopt the following principle in this case, paraphrasing the Restatement rule: A tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child’s estate, for the harm to the child, if the child is born alive. [citations omitted] We do not limit the application of this rule to unborn children who are viable at the time of the tortious act. Thus, an action may be maintained for recovery of damages for any injury

¹⁰⁵ 169 S.E.2d 440 (Va. 1969).

¹⁰⁶ *Id.* at 440. Virginia’s statutory scheme provided in pertinent part that:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, . . . and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, . . . and to recover damages in respect thereof, then, and in every such case, the person who, or corporation . . . which, would have been liable, if death had not ensued, shall be liable to an action for damages.

VA. CODE ANN. § 8-633 (1958) (current version at VA. CODE ANN. § 8.01-50 (Michie 1992)).

¹⁰⁷ *Lawrence*, 169 S.E.2d at 442. In 1986, the Supreme Court of Virginia allowed an action to recover damages for the death of an unborn child, stating that in *Lawrence* the court adopted the view that the fetus is a part of the mother until birth and therefore an injury to the fetus is an injury to the mother. See *Modaber v. Kelley*, 348 S.E.2d 233 (Va. 1986). The court limited damages to physical and mental damages suffered by the mother as the result of the stillbirth, not permitting recovery for loss of the child’s society, companionship, comfort, or guidance. *Id.* at 237.

¹⁰⁸ 389 S.E.2d 681 (Va. 1990) (interpreting VA. CODE ANN. § 8.01-50 (Michie 1992)).

¹⁰⁹ *Id.*

occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established.¹¹⁰

III. STATES THAT ALLOW RECOVERY FOR THE DEATH OF A VIABLE FETUS NOT BORN ALIVE

A. *Alabama*

The courts of Alabama have played an active role in defining the words “minor child” in the Alabama wrongful death statute.¹¹¹ In 1926, in *Stanford v. St. Louis-San Francisco Railway. Co.*,¹¹² the Supreme Court of Alabama held that a cause of action did not exist for prenatal injuries because the child was a part of the mother.¹¹³ Accordingly, the personal representative of a fetal child injured *in utero*, but subsequently born alive, had no right to proceed with a wrongful death action if the child later died from its prenatal injuries.

This remained the law in Alabama until 1972, when the Supreme Court of Alabama decided *Huskey v. Smith*.¹¹⁴ *Huskey* involved a wrongful death action on behalf of an infant who was injured while viable in the womb and who died two days after birth from injuries sustained in an automobile accident occurring just before parturition.¹¹⁵ The court expressly overruled *Stanford* and held that a parent or legal representative had “the right to proceed in a wrongful death action where (a) the fetal child was viable at the time of the injury; and (b) the

¹¹⁰ *Id.* at 683-84.

¹¹¹ The Wrongful Death Act provides, in part:

When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so within six months from the death of the minor, the personal representative of the minor may commence an action.

ALA. CODE § 6-5-391(a) (Supp. 1996).

¹¹² *Stanford v. St. Louis-S.F. Ry.*, 108 So. 566 (Ala. 1926).

¹¹³ *Id.* at 567.

¹¹⁴ 265 So. 2d 596 (Ala. 1972).

¹¹⁵ *Id.* at 596.

child is born alive.”¹¹⁶

In *Wolfe v. Isbell*,¹¹⁷ the plaintiff brought an action, alleging that his daughter’s death minutes after birth was the result of an automobile accident that occurred prior to viability *in utero*.¹¹⁸ The court held that an action can be maintained for the wrongful death of an unborn child as the result of prenatal injuries, whether or not the child was viable at the time of the injury, if the child is subsequently born alive and dies from the injury.¹¹⁹

In *Eich v. Town of Gulf Shores*,¹²⁰ the Supreme Court of Alabama decided that live birth was not a prerequisite to liability for wrongful death.¹²¹ The *Eich* court did not expressly discuss viability, and the scope of the opinion was unclear. The court seemed as if it would allow recovery for the death of an unborn child at any stage, whether viable or not.¹²²

However, any speculation on this issue was dispelled when two decisions were handed down that denied recovery for the wrongful death of a nonviable fetus *en ventre sa mere*.¹²³ In both cases, the court stated that a nonviable fetus is not a “minor child” within the meaning of the wrongful death statute.¹²⁴ The court based its decisions on two factors: the lack of authority from other

¹¹⁶ *Id.* at 597.

¹¹⁷ 280 So. 2d 758 (Ala. 1973) (interpreting ALA. CODE tit. 7, § 119 (1940) (current version at ALA. CODE § 6-5-391 (Supp. 1996))).

¹¹⁸ *Wolfe*, 280 So. 2d at 759.

¹¹⁹ *Id.* at 763.

¹²⁰ 300 So. 2d 354 (Ala. 1974) (interpreting ALA. CODE tit. 7, § 119 (1940) (current version at ALA. CODE § 6-5-391 (Supp. 1996))).

¹²¹ *Eich*, 300 So. 2d at 358.

¹²² *Id.* at 358. The court made broad, vague statements such as: “[O]nce we accept the basic premise that a fetus is a potential human life at the time of the injury, we feel that the substantive rights resulting from wrongful death must be protected” *Id.*

¹²³ See *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993); *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993). Both cases were actions against physicians for negligently performing a dilatation and curettage (“D & C”). A dilatation and curettage is a medical procedure which is performed for the purpose of removing placenta and fetal tissue from the uterus.

¹²⁴ *Gentry*, 613 So. 2d at 1241; see also *Lollar*, 613 So. 2d at 1249. Both cases were interpreting section 6-5-391 of the Alabama Code. *Id.*; *Gentry*, 613 So. 2d at 1241; see ALA. CODE § 6-5-391 (1993) (previously codified at ALA. CODE tit. 7, § 119 (1940)).

jurisdictions which would allow recovery for the wrongful death of a nonviable fetus en ventre sa mere and the lack of legislative intent to include nonviable fetuses within the statute.¹²⁵

In sum, Alabama allows recovery for both the death after a live birth, regardless of when the injury was inflicted, and for the death of a viable fetus en ventre sa mere. The Supreme Court of Alabama has denied recovery for the stillbirth of a nonviable fetus.

B. *Alaska*

Alaska's state courts have never considered whether recovery for fetal wrongful death is available, but the United States District Court of Alaska addressed the issue in *Mace v. Jung*.¹²⁶ In *Mace*, the Administratrix of the Estate of Baby Mace brought a wrongful death action on behalf of the stillborn fetus who died as the result of an automobile accident which occurred before the fetus was viable.¹²⁷

The court noted the lack of precedent in Alaska and then determined that the trend in other jurisdictions was to allow actions where the child was viable at the time of the injury and born dead¹²⁸ and where the child was viable, born alive, and then died as a result of the injuries.¹²⁹ Based on these decisions, the court held that "recovery could not be had under Alaska's wrongful death statute for the death of a nonviable unborn child."¹³⁰

¹²⁵ *Gentry*, 613 So. 2d at 1244. *See also Lollar*, 613 So. 2d at 1252.

¹²⁶ 210 F. Supp. 706 (D. Alaska 1962) (interpreting ALASKA STAT. § 61-7-3 (1949) (current version at ALASKA STAT. § 09.55.580 (1994))).

¹²⁷ *Id.* at 706.

¹²⁸ *Id.* (citing *Wendt v. Lillo*, 182 F. Supp. 56 (Iowa 1960); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *Verkennes v. Cornica*, 38 N.W.2d 838 (Minn. 1949)).

¹²⁹ *Id.* (citing *Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953); *Keyes v. Construction Serv.*, 165 N.E.2d 912 (Mass. 1960)).

¹³⁰ *Id.* The Alaska Wrongful Death Act is a survival statute and states, in part:
 Except as provided under (f) of this section, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission.
 ALASKA STAT. § 09.55.580(a) (1994).

C. *Arizona*

Whether a fetus was a “person” within the Arizona’s wrongful death statute was first decided in 1974 in *Kilmer v. Hicks*.¹³¹ In that case, Evelyn Kilmer was killed in an automobile accident while two days overdue in her pregnancy. Her viable fetus died *in utero* as a result of the accident.¹³² The Arizona Court of Appeals held that “the meaning of the word ‘person’ in the statute is clear and unambiguous in its non-inclusion of a viable fetus. It is a matter of the legislature to expand the statutory definition if it deems appropriate and not a matter for this court.”¹³³

In 1985, the Supreme Court of Arizona reversed *Hicks* when it decided *Summerfield v. Superior Court*.¹³⁴ In *Summerfield*, the parents of a viable fetus that was stillborn as a result of alleged medical malpractice brought a wrongful death action against the physicians.¹³⁵ The court took the opportunity to disapprove of *Hicks*, and holding that “absent a clear and definitive demonstration of legislative intent to the contrary, the word ‘person’ in the wrongful death statutes¹³⁶ encompasses a stillborn, viable fetus.”¹³⁷

¹³¹ 529 P.2d 706 (Ariz. 1974). The issue was first raised in 1966 but was not decided at that time because the case was dismissed for unrelated reasons. See *Larriva v. Widmer*, 415 P.2d 424 (Ariz. 1966). The Arizona Wrongful Death Act provides:

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable had death not ensued shall be liable to an action for damages.

ARIZ. REV. STAT. ANN. § 12-611 (1992).

¹³² *Kilmer*, 529 P.2d at 706.

¹³³ *Id.* at 708.

¹³⁴ 698 P.2d 712 (Ariz. 1985).

¹³⁵ *Id.*

¹³⁶ ARIZ. REV. STAT. ANN. § 12-611 *et. seq.* (1992).

¹³⁷ *Summerfield*, 698 P.2d at 724. The court based its decision on the fact that the fetus would have been able to maintain an action had it lived and on the legislative objective of providing protection for the fetus. *Id.* at 720-21.

D. Colorado

Colorado state courts have never addressed a case involving prenatal injuries resulting in death. However, the United States District Court of Colorado interpreted the word “person” in Colorado’s wrongful death statute in *Espadero v. Feld*.¹³⁸ There, Alejandra Pieroni, who was nine months pregnant, was killed in an automobile accident along with her full-term unborn son.¹³⁹ The court held that “a wrongful death action may be maintained under Colorado law for the death of a viable fetus, particularly a full-term fetus.”¹⁴⁰

E. Connecticut

The first time Connecticut courts interpreted the meaning of the Connecticut wrongful death statute¹⁴¹ regarding fetal injuries was in *Tursi v. New England Windsor Co.*¹⁴² In that case a child who was injured prenatally brought

¹³⁸ 649 F. Supp. 1480 (D. Colo. 1986). The Colorado statute is a survival statute and provides:
When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, and default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages.

COLO. REV. STAT. ANN. § 13-21-202 (West 1987).

¹³⁹ *Espadero*, 649 F. Supp. at 1481. In *Espadero*, the plaintiffs alleged that Jerry Feld negligently served intoxicating beverages to a customer, which caused the customer to strike the automobile which Luis Espadero was driving. *Id.* Alejandra Pieroni was a passenger in Espadero’s vehicle. *Id.*

¹⁴⁰ *Id.* at 1484.

¹⁴¹ The Connecticut Code provides:

In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses.

CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953)).

¹⁴² 111 A.2d 14 (Conn. Super. Ct. 1955).

a negligence action for the injuries sustained.¹⁴³ The Superior Court held that “[w]here a viable fetus is injured en ventre sa mere through negligence of the defendants, he has, when born, a cause of action against them.”¹⁴⁴

Another significant case was *Prates v. Sears, Roebuck & Co.*¹⁴⁵ In *Prates*, an action was brought for the death of a child, five days after her live birth, caused by personal injuries received while viable in the womb.¹⁴⁶ The Superior Court held that, because, under *Tursi*, the decedent would have had a right of action had she lived, the action survived her and could be brought by her administrator.¹⁴⁷

In 1962, the Superior Court addressed a similar issue involving the stillbirth of a viable fetus as the result of an automobile accident in *Gorke v. LeClerke*.¹⁴⁸ The court held that a wrongful death action could be maintained for the death of a viable fetus in the womb.¹⁴⁹

One final significant case in Connecticut is *Simon v. Mullin*.¹⁵⁰ In that case, a nonviable fetus was injured en ventre sa mere, was born alive, and died from its injuries.¹⁵¹ The court held that a child born alive who subsequently dies can recover for prenatal injuries inflicted at any time after conception, without regard to viability.¹⁵²

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 16.

¹⁴⁵ 118 A.2d 633 (Conn. Super. Ct. 1955) (interpreting CONN. GEN. STAT. ANN. § 2428 (West 1953) (current version at CONN. GEN. STAT. ANN. § 52-555 (West 1991))).

¹⁴⁶ *Id.* at 633.

¹⁴⁷ *Id.* at 635.

¹⁴⁸ 181 A.2d 448, 449 (Conn. Super. Ct. 1962) (interpreting CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953))).

¹⁴⁹ *Id.* at 451.

¹⁵⁰ 380 A.2d 1353 (Conn. Super. Ct. 1977) (interpreting CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953))).

¹⁵¹ *Id.* at 1354.

¹⁵² *Id.* at 1357.

F. *Delaware*

In the only notable Delaware case on the issue, *Worgan v. Greggo & Ferrara*,¹⁵³ the administrator of the estate of a stillborn viable fetus killed by negligence brought a wrongful death action against the defendants.¹⁵⁴ The Superior Court of Delaware, held that a right of action did exist for the wrongful death of a viable fetus.¹⁵⁵ The scope of this decision is not clear, but most courts have interpreted the opinion to hold that a cause of action exists for the death of a viable fetus, whether or not it is born alive.¹⁵⁶

G. *District of Columbia*

One of the most important cases in the area of fetal wrongful death law was decided by the Federal District Court for the District of Columbia in 1946. That case, *Bonbrest v. Kotz*,¹⁵⁷ was the first to recognize a cause of action for prenatal injury.¹⁵⁸ In *Bonbrest*, a father sued on behalf of his child for injuries sustained during delivery.¹⁵⁹ The court held that an infant who is viable at the time of the injury may maintain an action for prenatal injuries if it is subsequently born alive.¹⁶⁰ Following this decision, every jurisdiction now allows a cause of action for prenatal injuries if the child is born alive.¹⁶¹

In 1971, *Simmons v. Howard University*¹⁶² was decided by the United States District Court for the District of Columbia. In *Simmons*, a father brought

¹⁵³ 128 A.2d 557 (Del. Super. Ct. 1956).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See, e.g.,* *Summerfield v. Superior Court*, 698 P.2d 712, 721 n.5 (Ariz. 1985).

¹⁵⁷ 65 F. Supp. 138 (D.D.C. 1946).

¹⁵⁸ *See id.* at 139.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 142.

¹⁶¹ Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 935 (1995).

¹⁶² 323 F. Supp. 529 (D.D.C. 1971).

a wrongful death action after his wife died during delivery and the defendant negligently failed to deliver his child alive.¹⁶³ The court concluded that “a viable unborn child, which would have been born alive but for the negligence of the defendant, is a ‘person’” as that term is used in the District of Columbia Wrongful Death Statute.¹⁶⁴

In 1983, the Court of Appeals for the District of Columbia decided *Greater Southeast Community Hospital v. Williams*.¹⁶⁵ In *Williams*, the plaintiff brought a wrongful death action against a hospital and a physician for negligent treatment that resulted in the stillbirth of her fetus in the thirty-third week of gestation.¹⁶⁶ The court first adopted the *Bonbrest* rule and held that a child born alive can recover for prenatal injuries.¹⁶⁷ The court, holding that fatal prenatal injury to a viable fetus is actionable, stated that:

[i]f a viable fetus is a “person injured” at the time of the injury, then perforce the fetus is a “person” when he dies of those injuries, and it can make no difference in liability under the wrongful death and survival statutes whether the fetus dies of the injuries just prior to or just after birth.¹⁶⁸

H. *Hawaii*

Hawaii’s state courts have never addressed the issue of fetal wrongful death. However, the United States District Court for the District of Hawaii did have the opportunity to interpret the state’s wrongful death statute as it relates to

¹⁶³ *Id.*

¹⁶⁴ *Id.* The District of Columbia Code provides, in pertinent part:
When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, . . . to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death.
D.C. CODE ANN. § 16-2701 (Michie 1981).

¹⁶⁵ 482 A.2d 394 (D.C. 1984).

¹⁶⁶ *Id.* at 395.

¹⁶⁷ *Id.* at 396.

¹⁶⁸ *Id.* at 397.

prenatal injuries in *Wade v. United States*.¹⁶⁹ In *Wade*, the parents of stillborn twin fetuses injured in their twenty-second week brought an action against the government for the malpractice of Army hospital physicians.¹⁷⁰ The court concluded that the Supreme Court of Hawaii would be most likely to adopt the majority view that allows a cause of action for the wrongful death of a viable, but not a nonviable, fetus because it is the “more logical and thoughtful holding.”¹⁷¹

I. Idaho

In Idaho, there are two cases in the area of recovery for prenatal injuries. The first, *Volk v. Baldazo*,¹⁷² was decided by the Supreme Court of Idaho in 1982. *Volk* involved an action brought by a mother whose viable, unborn child was stillborn as a result of a car accident.¹⁷³ The mother claimed that a viable, unborn fetus is a “person” under section 5-311 of the Idaho Code¹⁷⁴ and a “child” as used in section 5-310 of the Idaho Code.¹⁷⁵ The court, noting that this was a matter of first impression, took the “unique opportunity to clarify the law of Idaho as it pertains to the narrow area presented by these unusual circumstances.”¹⁷⁶

¹⁶⁹ 745 F. Supp. 1573 (D. Haw. 1990). The Hawaii Code provides, in part, “[w]hen the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased’s legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person causing the death or against the person responsible for the death.” HAW. REV. STAT. § 663-3 (1993).

¹⁷⁰ *Wade*, 745 F. Supp. at 1575.

¹⁷¹ *Id.* at 1579.

¹⁷² 651 P.2d 11 (Idaho 1982).

¹⁷³ *Id.* at 12.

¹⁷⁴ The Idaho Code provided, in part, that “[w]hen the death of a person, not being a person provided for in section 5-310, Idaho Code, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing death.” IDAHO CODE § 5-311 (1972).

¹⁷⁵ The Idaho Code provided, in part, “[t]he parents may maintain an action for the injury or death of an unmarried minor child . . . when such injury or death is caused by the wrongful act or neglect of another.” IDAHO CODE § 5-310 (1972).

¹⁷⁶ *Volk*, 651 P.2d at 13.

The court first concluded that a cause of action exists on behalf of a child who sustains prenatal injuries while viable in the womb and is subsequently born alive.¹⁷⁷ Accordingly, had the Volk child lived, it would have been able to maintain a cause of action for its injuries.¹⁷⁸ The court limited this holding to circumstances in which the fetus was viable at the time of the injury, but did not necessarily preclude liability for injuries to a nonviable fetus that was later born alive.¹⁷⁹ The court then held that the term “minor child” in section 5-310 of the Idaho Code marked the upper age limit beyond which a parent may not bring a cause of action, not a lower age limit.¹⁸⁰ Therefore, the term “minor child” encompassed a viable, unborn fetus and a wrongful death action could be maintained for its death.¹⁸¹

Although the *Volk* court did not make any decisions regarding the injury or death of a nonviable fetus, the United States District Court for the District of Idaho was forced to decide the issue in *Santana v. Zilog, Inc.*¹⁸² *Santana* involved a woman who alleged that exposure to harmful chemicals caused her to suffer six miscarriages, all prior to viability.¹⁸³ The court refused to extend the law to encompass the death of a nonviable fetus, saying:

[B]ased on the better-reasoned view of the majority of jurisdictions, I hold that under Idaho Code § 5-311, viability marks the beginning of legal personhood, and the right to assert a cause of action for the wrongful death of fetus is correspondingly limited to cases involving the death of a viable

¹⁷⁷ *Id.* at 13.

¹⁷⁸ *Id.* at 14.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Volk*, 651 P.2d at 15.

¹⁸² 878 F. Supp. 1373 (D. Idaho 1995). Two years after *Volk*, in 1984, the Idaho legislature amended sections 5-310 and 5-311 of the Idaho Code by removing all references to death in section 5-310 and removing references to section 5-310 contained in section 5-311. Hence, the Idaho Code now provides, in pertinent part, “When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death” IDAHO CODE § 5-311 (1990).

¹⁸³ *Santana*, 878 F. Supp. at 1375.

fetus.¹⁸⁴

J. *Illinois*

The Supreme Court of Illinois first faced the issue of prenatal torts in *Allaire v. St. Luke's Hospital*.¹⁸⁵ In that case, a minor child brought a cause of action for prenatal injuries he received as the result of the negligent operation of an elevator.¹⁸⁶ The court held that no cause of action existed for injuries received before birth because the unborn child did not have an existence independent from that of the mother.¹⁸⁷

Allaire remained the law in Illinois until 1953, when *Amann v. Faidy*¹⁸⁸ was decided. In *Amann*, the personal representative of a child brought an action for the death of a child injured while viable en ventre sa mere and subsequently born alive.¹⁸⁹ The Supreme Court of Illinois, noting that since *Allaire*, numerous states had found prenatal injuries actionable, overturned *Allaire* and held that:

we conclude that the reasons which have been advanced in support of the doctrine of nonliability fail to carry conviction. We hold, therefore, in conformity with the recent decisions of the courts of last resort of [various other states] that plaintiff, as administratrix of the estate of a viable child, who suffered prenatal injuries and was thereafter born alive, has a right of

¹⁸⁴ *Id.* at 1382.

¹⁸⁵ 56 N.E. 638 (Ill. 1900).

¹⁸⁶ *Id.* at 638.

¹⁸⁷ *Id.* at 640.

¹⁸⁸ 114 N.E.2d 412 (Ill. 1953).

¹⁸⁹ *Id.* at 413. The Illinois Code provides, in part:

§ 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages.

ILL. ANN. STAT. ch. 740, para. 180/1 (Smith-Hurd 1993) (previously codified at ILL. ANN. STAT. ch. 70 para. 1 (Smith-Hurd 1951)).

action against the defendant.¹⁹⁰

The next important case was *Daley v. Meier*,¹⁹¹ decided in 1961. In that case, the guardian of a minor brought an action for prenatal injuries received when he was not viable.¹⁹² The court held that an infant, born alive, can recover for injuries received in the womb regardless of viability at the time of the injuries.¹⁹³

In 1969, *Rapp v. Hiemenz* was decided.¹⁹⁴ There, the mother of an unborn child brought a cause of action for the stillbirth of her child which occurred prior to viability.¹⁹⁵ The court held that no wrongful death action exists where the injury took place before viability and where the child was not born alive.¹⁹⁶

The last notable case in the area of fetal wrongful death in Illinois is

¹⁹⁰ *Amann*, 114 N.E.2d at 417.

¹⁹¹ 178 N.E.2d 691 (Ill. 1961).

¹⁹² *Id.* at 692.

¹⁹³ *Id.* at 694. Interestingly, in 1976, a case was decided based on *Daley* in which a mother brought an action for injuries to her child that resulted from alleged medical malpractice that occurred eight years prior to her daughter's conception. *Renslow v. Mennonite Hosp.*, 351 N.E.2d 870 (Ill. App. Ct. 1976). When the mother was thirteen years old, she was negligently given A-RH negative blood during a blood transfusion. *Id.* at 871. Her blood type was A-RH positive. *Id.* This caused her child born eight years later to have permanent damage to her nervous system and brain. *Id.* The court held in part that

the case law in Illinois has established that a minor may recover for prenatal personal injuries sustained by him if he is born alive. That is alleged to have happened here. We find no logical reason to deny recovery to a person simply because he had not yet been conceived when the wrongful conduct took place.

Id. at 874.

¹⁹⁴ 246 N.E.2d 77 (Ill. App. Ct. 1969), *aff'd*, 367 N.E.2d 1250 (Ill. 1977) (interpreting ILL. ANN. STAT. ch. 70, para. 1 (Smith-Hurd 1971) (current version at ILL. ANN. STAT. ch. 740, para. 180/1 (Smith-Hurd 1993))).

¹⁹⁵ *Id.* at 78.

¹⁹⁶ *Id.* at 80. *Rapp* was supported by the Supreme Court of Illinois in *Green v. Smith* where the court held that viability should remain the line of demarcation in cases of a fetus' death en ventre sa mere and that if the fetus was not viable, no cause of action existed. *Green v. Smith*, 377 N.E.2d 37 (Ill. 1978).

Chrisafogeorgis v. Brandenburg.¹⁹⁷ In that case, a mother brought a cause of action for the stillbirth of her viable child caused by an automobile accident.¹⁹⁸ The court held that “[w]eighing the holdings for and against giving a right of action and their supporting grounds we are persuaded that the preferred rule is that a right of action [for the death of a viable fetus en ventre sa mere] should be recognized.”¹⁹⁹

In summary, Illinois allows a cause of action for prenatal injuries if the child is subsequently born alive regardless of viability at the time of the injury and for the stillbirth of a viable fetus. A cause of action for the death of a nonviable fetus en ventre sa mere has been rejected.

K. *Indiana*

The only notable case in Indiana on the subject of prenatal torts was *Britt v. Sears*,²⁰⁰ where a father brought a wrongful death action for the stillbirth of his son.²⁰¹ The court concluded that “a full-term healthy male capable of independent life with which its mother, at the time of the death in her womb was then nine months and one week pregnant, is a ‘child’ within the meaning of [the wrongful death statute].”²⁰² Accordingly, a wrongful death action can be maintained for the death of a viable fetus en ventre sa mere.

L. *Kansas*

Kansas courts have decided only two cases involving fetal wrongful

¹⁹⁷ 304 N.E.2d 88 (Ill. 1973) (interpreting ILL. ANN. STAT. ch. 70, para. 1 (Smith-Hurd 1971) (current version at ILL. ANN. STAT. ch. 740, para. 180/1 (Smith-Hurd 1993))).

¹⁹⁸ *Id.* at 88-89.

¹⁹⁹ *Id.* at 91.

²⁰⁰ 277 N.E.2d 20 (Ind. Ct. App. 1971).

²⁰¹ *Id.* at 21.

²⁰² *Id.* at 27. The Indiana Code provided that “[a] father . . . may maintain an action for the . . . death of a child.” IND. CODE § 34-1-1-8 (1971).

The Indiana Code now provides, in pertinent part, that “[a]n action may be maintained under this section against the person whose wrongful act or omission caused the injury or death of the child.” IND. CODE § 34-1-1-8(b) (Supp. 1996).

death. The first was *Hale v. Manion*.²⁰³ In that case, the Hales brought a wrongful death action for the death of their viable unborn child following an automobile accident.²⁰⁴ The Supreme Court of Kansas concluded that, because an action could be maintained by a child after birth for injuries it received *in utero*, the parents had the right to bring an action on its behalf for its death.²⁰⁵

In 1990, the Supreme Court of Kansas decided *Humes v. Clinton*.²⁰⁶ In that case, the parents of a stillborn, nonviable fetus brought a wrongful death action against a doctor and a manufacturer of an intrauterine device.²⁰⁷ The court found “viability an appropriate condition precedent to liability for wrongful death” and held that “an unborn, nonviable fetus is not a ‘person’ within the definition of the wrongful death act and is incapable of bringing an action on its own behalf.”²⁰⁸

M. Kentucky

There is only one case decided in Kentucky involving recovery for fetal wrongful death and prenatal injuries.²⁰⁹ In *Mitchell v. Couch*,²¹⁰ the father of a stillborn viable fetus brought a wrongful death action against the negligent driver that caused the death of the child and its mother.²¹¹ The court concluded that a

²⁰³ 368 P.2d 1 (Kan. 1962).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 3. The Kansas Code provides that “[i]f the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom if the former might have maintained the action had he or she lived . . . against the wrongdoer.” KAN. STAT. ANN. § 60-1901 (1994) (previously codified at KAN. STAT. ANN. § 60-3203 (1961)).

²⁰⁶ 792 P.2d 1032 (Kan. 1990) (interpreting KAN. STAT. ANN. § 60-1901 (1994)).

²⁰⁷ *Id.* at 1033.

²⁰⁸ *Id.* at 1037.

²⁰⁹ In 1969, *Orange v. State Farm Automobile Insurance Co.* was decided in which the court held that a viable unborn child was a legal person with a separate existence of its own and was therefore a member of the “family” or “household” class that was excluded from coverage in an insurance policy. 443 S.W.2d 650 (Ky. 1969).

²¹⁰ 285 S.W.2d 901 (Ky. 1955).

²¹¹ *Id.* at 903.

right of recovery existed for the stillbirth of a viable fetus.²¹²

N. Louisiana

The first case to be decided in Louisiana on the issue of recovery for prenatal torts was *Cooper v. Blanck*.²¹³ In *Cooper*, a mother brought a cause of action for the wrongful death of her child occurring several days after birth as the result of prenatal injuries.²¹⁴ The Court of Appeals of Louisiana held that an action may be maintained for the wrongful death of a child injured prenatally and born alive.²¹⁵

In 1980, three cases decided by Courts of Appeals established that a cause of action existed for the stillbirth of a child due to injuries tortiously inflicted while in the womb.²¹⁶ The next year, the issue came before the Supreme Court of Louisiana in *Danos v. St. Pierre*.²¹⁷ The court first held that there could be no

²¹² *Id.* at 906.

²¹³ 39 So. 2d 352 (La. 1923).

²¹⁴ *Id.* at 353. Louisiana statute provides:

Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. Damages may include loss of consortium, service, and society, and shall be recoverable by the same with respective categories of persons who would have had a cause of action for wrongful death of an injured person.

LA. CIV. CODE ANN. art. 2315 (West 1979 & Supp. 1996).

²¹⁵ *Cooper*, 39 So. 2d at 360. Justice Westerfield was particularly eloquent in this opinion, stating:

The maternal instinct is one of the great elemental passions of life. Its gratification often marks the difference between a happy, peaceful and contented existence and a leaden footed march through life's pathway, far sweeter than the music of the spheres, or the soft cadences of 'An Aeolian Harp when swept by the fingers of the night wind' to the mother's ears are the first plaintive notes of the 'heir of all the ages.'

Id.

²¹⁶ See *Diefenderfer v. Louisiana Farm Bureau Mut. Ins. Co.*, 383 So. 2d 1032 (La. 1980); *Wascom v. American Indem. Corp.*, 383 So. 2d 1037 (La. 1980); *Deason v. State Farm Mut. Auto. Ins. Co.*, 386 So. 2d 146 (La. 1980).

²¹⁷ 402 So. 2d 633 (La. 1981).

recovery for the wrongful death of a stillborn fetus.²¹⁸ However, on rehearing the court reversed and held that “the arguments favoring recovery more fully satisfy logical reasoning and application of the natural law” and that parents could recover wrongful death damages for the stillbirth of their child.²¹⁹

O. *Maryland*

There are several Maryland cases involving the question of recovery for prenatal injuries. The first is *Damasiewicz v. Gorsuch*,²²⁰ decided by the Court of Appeals of Maryland in 1951. In *Damasiewicz*, an infant brought a cause of action for injuries sustained in an automobile accident while he was viable in the womb.²²¹ The court held that an infant injured while viable in the womb has a cause of action against the responsible party after birth.²²²

The next significant case, *State v. Sherman*,²²³ was a wrongful death action for the death of a viable fetus in the womb that occurred as the result of an automobile accident in the ninth month of gestation.²²⁴ The court held that “under the plain words of the death statute . . . the action survives, or permits the parents to recover, notwithstanding the death of the child.”²²⁵

²¹⁸ *Id.* at 636. The court based its ruling on article 28 of the Louisiana Code, which states that “[c]hildren born dead are considered as if they had never been born or conceived.” LA. CIV. CODE ANN. art. 28 (West 1979).

²¹⁹ *Danos*, 402 So. 2d at 639.

²²⁰ 79 A.2d 550 (Md. 1951).

²²¹ *Id.* The accident caused the infant to be born prematurely and suffer from loss of sight in both eyes. *Id.*

²²² *Id.* at 560.

²²³ 198 A.2d 71 (Md. 1964).

²²⁴ *Id.* at 72.

²²⁵ *Id.* at 73. The “death statute” mentioned is section 1 of article 67 of the Maryland Code, which read, in part:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the . . . person who would have been liable had death not ensued, . . . shall be liable to an action for damages, notwithstanding

The next case, *Group Health Association, Inc. v. Blumenthal*, was decided in 1983.²²⁶ That case was a wrongful death action on behalf of a nonviable fetus that was born prematurely and then died later due to medical malpractice.²²⁷ The court held that when a child is born alive after receiving prenatal injuries and then dies, a right of action exists regardless of viability at the time of the injuries.²²⁸

The final case in this area is *Kandel v. White*.²²⁹ *Kandel* was a wrongful death action brought on behalf of a nonviable stillborn fetus.²³⁰ The court held that:

to deny a nonviable [stillborn] fetus a cause of action is . . . simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive.²³¹

In summary, Maryland courts have allowed a cause of action for the wrongful death of a fetus that is born alive, regardless of viability at the time of the injury, and for the death of a viable fetus *en ventre sa mere*. However, Maryland courts have rejected recovery for the death of a nonviable fetus that is not born alive.

the death of the person injured.

MD. ANN. CODE art. 67, § 1 (1957) (current version at MD. CODE ANN. CTS. & JUD. PROC. § 3-902 (1995)).

²²⁶ 453 A.2d 1198 (Md. 1983) (interpreting MD. CODE ANN., CTS. & JUD. PROC. § 3-902 (1995) (previously codified at MD. ANN. CODE art. 67 § 1 (1957))).

²²⁷ *Id.* at 1201.

²²⁸ *Id.* at 1206. Specifically, the court stated that “the concept of viability has no role in a case, such as this, where the child is born alive.” *Id.*

²²⁹ 663 A.2d 1264 (Md. 1995) (interpreting MD. CODE ANN., CTS. & JUD. PROC. § 3-902 (1995) (previously codified at MD. ANN. CODE art. 67 § 1 (1957))).

²³⁰ *Id.* at 1265.

²³¹ *Id.* at 1270 (quoting *Wallace v. Wallace*, 421 A.2d 134, 136-37 (N.H. 1980)).

P. *Massachusetts*

*Dietrich v. Inhabitants of Northhampton*²³² was the first decision by an American court on the issue of prenatal injuries. *Dietrich* involved an infant that was injured prenatally, was born prematurely, and died only minutes after its birth.²³³ The court, in an opinion by Justice Holmes, held that there was no right of recovery for the death of an infant resulting from a prenatal injury.²³⁴

This remained the law in Massachusetts until *Keyes v. Construction Service, Inc.*²³⁵ was decided in 1960. *Keyes* involved a wrongful death action on behalf of an infant that was injured while viable in the womb. The infant was born prematurely and died shortly after birth.²³⁶ The court held that, due to the growing body of precedent allowing recovery in such circumstances and the progress made in medical science since the *Dietrich* decision, a cause of action would lie if the child is viable when injured and is subsequently born alive.²³⁷

In *Torigian v. Watertown News Co.*,²³⁸ a mother brought a wrongful death action on behalf of her child who was injured before viability, was born alive, and who died two and one-half hours later.²³⁹ The court held that an action could be maintained on behalf of a child who was injured while not viable but who was subsequently born alive.²⁴⁰

²³² 138 Mass. 14 (1884).

²³³ *Id.* at 15.

²³⁴ *Id.* at 17.

²³⁵ 165 N.E.2d 912 (Mass. 1960).

²³⁶ *Id.* at 913.

²³⁷ *Id.* at 915.

²³⁸ 225 N.E.2d 926 (Mass. 1967).

²³⁹ *Id.*

²⁴⁰ *Id.* at 927. The Massachusetts statute provides, in part:

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted . . . shall be liable in damage.

MASS. ANN. LAWS ch. 229, § 2 (Law. Co-op. 1986 & Supp. 1996).

Five years later, in *Leccese v. McDonough*,²⁴¹ the father of a viable fetus that died *in utero* as a result of medical malpractice brought a wrongful death action against the doctors responsible.²⁴² The court held that extending the definition of the word “person” in the applicable statute to include a fetus not born alive was best left to the legislature.²⁴³ However, just three years later, the court came to the opposite conclusion in *Mone v. Greyhound Lines, Inc.*,²⁴⁴ holding that a viable fetus was a “person” within the meaning of the wrongful death statute and that a cause of action could be maintained for its death *en ventre sa mere*.²⁴⁵

The last case in this series is *Thibert v. Milka*.²⁴⁶ The father of a nonviable, stillborn fetus brought a wrongful death action against the negligent driver of a truck.²⁴⁷ The court held that “where a nonviable fetus is stillborn . . . the fetus could not have had a separate existence There is no separate cause of action for its death.”²⁴⁸

In summary, Massachusetts allows a wrongful death action where the infant is born alive, regardless of viability, and where the fetus is viable, but dies in the womb. The courts of Massachusetts deny recovery, however, for the death of a nonviable fetus *en ventre sa mere*.

Q. Michigan

In *Newman v. City of Detroit*, an action was brought for the death of a

²⁴¹ 279 N.E.2d 339 (Mass. 1972) (interpreting MASS. ANN. LAWS ch. 229, § 2 (Law. Co-op. 1986 & Supp. 1996)).

²⁴² *Id.* at 340.

²⁴³ *Id.* at 341.

²⁴⁴ 331 N.E.2d 916 (Mass. 1975) (interpreting MASS. ANN. LAWS ch. 229, § 2 (Law. Cop-op 1986 & Supp. 1996)).

²⁴⁵ *Id.* at 917.

²⁴⁶ 646 N.E.2d 1025 (Mass. 1995) (interpreting MASS. ANN. LAWS ch. 229, § 2 (Law Co-op 1986 & Supp. 1996)).

²⁴⁷ *Id.* at 1025. The truck was carrying a backhoe that slid off the back of the truck and struck the automobile driven by his wife who was sixteen weeks pregnant. *Id.*

²⁴⁸ *Id.* at 1027.

child who died after birth due to injuries he received in the womb.²⁴⁹ The Supreme Court of Michigan held that an action for prenatal injuries resulting in death did not exist under the common law or under any statute.²⁵⁰

The next significant case was *Estate of Powers v. City of Troy*, which involved the stillbirth of a fetus in the sixth month of development.²⁵¹ The Supreme Court of Michigan held that there could be no cause of action for the wrongful death of a viable infant that is not born alive, stating that the legislature never intended the word “person” to include a fetal child.²⁵²

In 1971, the Supreme Court of Michigan began to undo the precedent set in *Newman* and *Powers* with the case of *Womack v. Buchhorn*.²⁵³ In that case, an eight-year old boy brought an action for injuries he sustained in an automobile accident during his fourth month of development in the womb.²⁵⁴ The court seized the opportunity to overrule *Newman*, stating, “[i]n the light of the present state of science and the overwhelming weight of judicial authority, this Court now overrules *Newman*. We hold that an action does lie at common law for negligently inflicted prenatal injury.”²⁵⁵

Just one month later, the court was given the opportunity to reconsider

²⁴⁹ 274 N.W.2d 710 (Mich. 1937).

²⁵⁰ *Id.* at 711. The plaintiff brought suit under the Survival Act. See MICH. COMP. LAWS § 14040 (1929).

²⁵¹ 156 N.W.2d 530 (Mich. 1968).

²⁵² *Id.* at 532-33. The “death act” is section 600.2922 of the Michigan Code, which provided that “[w]henever the death of a Person or injuries resulting in death shall be caused by wrongful act . . . then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages.” MICH. COMP. LAWS ANN. § 600.2922 (1961) (current version at MICH. COMP. LAWS ANN. § 600.2922 (1988)). The current version of the “death act” provides:

Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages.

MICH. COMP. LAWS ANN. § 600.2922 (1988).

²⁵³ 187 N.W.2d 218 (Mich. 1971).

²⁵⁴ *Id.* at 219.

²⁵⁵ *Id.* at 222.

Powers. In *O'Neill v. Morse*,²⁵⁶ in which a wrongful death action was brought for the stillbirth of a viable fetus, the facts were “indistinguishable” from those in *Powers*.²⁵⁷ The court again took advantage of the opportunity to overrule outdated case law and held that a cause of action would lie for the death of a viable fetus in the womb.²⁵⁸

In *Toth v. Gore*, the Supreme Court of Michigan was asked to decide whether wrongful death recovery could be had for a stillborn nonviable fetus.²⁵⁹ In *Toth*, the administrator of the estate of a nonviable fetus that was stillborn as a result of an automobile accident brought a wrongful death action.²⁶⁰ The court drew the line of recovery at viability and held that a right of action did not exist for the death of a nonviable fetus injured in the womb unless it was later born alive.²⁶¹

The last relevant case, *Jarvis v. Providence Hospital*, involved a novel set of facts.²⁶² That case involved a wrongful death action for negligence which occurred when the fetus was not yet viable, but which did not result in an injury to the fetus until five months later when it was viable.²⁶³ The court held that the fetus was viable when injured and, under *O'Neill*, recovery could be had regardless of the fact that the conduct causing the injury occurred while the fetus

²⁵⁶ 188 N.W.2d 785 (Mich. 1971) (interpreting MICH. COMP. LAWS ANN. § 600.2922 (1961)).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 787-88.

²⁵⁹ 237 N.W.2d 297 (Mich. 1975) (interpreting MICH. COMP. LAWS ANN. § 600.2922 (1988)).

²⁶⁰ *Id.* at 298.

²⁶¹ *Id.* at 300. In 1989, the Court of Appeals held that a cause of action could be maintained for the wrongful death of a nonviable fetus that was killed in the womb. *Fryover v. Forbes*, 439 N.W.2d 284 (Mich. Ct. App. 1989). However, that decision was reversed by the Supreme Court of Michigan because it conflicted with *Toth*. *Fryover v. Forbes*, 446 N.W.2d 292 (Mich. 1989).

²⁶² *Jarvis v. Providence Hosp.*, 444 N.W.2d 236 (Mich. 1989) (interpreting MICH. COMP. LAWS ANN. § 600.2922 (1988)).

²⁶³ *Id.* at 237. The mother cut herself on a vial that contained a bilirubin control substance when the fetus was not viable. The hospital informed the mother that there was no risk of infection. However, five months later, the mother was informed that she had contracted hepatitis and one week later, the fetus was stillborn. *Id.*

was not yet viable.²⁶⁴

In summary, Michigan allows recovery when the fetus is born alive, regardless of viability at the time of the injury, and when a viable fetus dies in the womb. A wrongful death action on behalf of a nonviable fetus not born alive has been rejected twice.

R. *Minnesota*

Minnesota courts have considered the issue of prenatal torts only once, in *Verkennes v. Corniea*.²⁶⁵ *Verkennes*, decided in 1949, involved an action on behalf of a child that died just prior to delivery. The Supreme Court of Minnesota in that case became the first state to allow a cause of action for the wrongful death of a viable fetus in the womb.²⁶⁶ *Verkennes* began the gradual move from the outdated view that a child in the womb is merely a part of the mother to the modern view that a viable fetus leads an existence separate from the mother.

S. *Mississippi*

In Mississippi there is only one significant case pertaining to prenatal torts. That case, *Rainey v. Horn*,²⁶⁷ involved the wrongful death of a viable fetus en ventre sa mere due to misconduct on the part of the mother's treating physician.²⁶⁸ The Supreme Court of Mississippi held that:

an unborn child, after it reaches the prenatal age of viability when the destruction of the life of its mother does not necessarily mean the end of its life also, and when, if separated from its mother would be so far a matured human being that it would live and grow mentally and physically, is a person; and if such child

²⁶⁴ *Id.* at 238.

²⁶⁵ 38 N.W.2d 838 (Minn. 1949).

²⁶⁶ *See id.* The action was based on section 573.02 of the Minnesota Code, which read, in part, that "[w]hen death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action, had he lived for an injury caused by the same act or omission." MINN. STAT. ANN. § 573.02 (1943).

²⁶⁷ 72 So. 2d 434 (Miss. 1954).

²⁶⁸ *Id.* at 435.

dies before birth as the result of the negligent act of another, an action may be maintained for its death under the wrongful death statute.²⁶⁹

T. *Montana*

In Montana, there are two cases dealing with the issue of prenatal injuries. The first, *Kuhnke v. Fisher*, was decided by the Supreme Court of Montana in 1984 and involved a wrongful death action on behalf of a viable fetus due to alleged medical malpractice.²⁷⁰ The court, in interpreting the Montana wrongful death act, held that the definition of “minor child” does not encompass an unborn child whether viable or not.²⁷¹

Three years after the *Kuhnke* decision, the legislature amended the wrongful death statutes.²⁷² The first case to come before the court after the

²⁶⁹ *Id.* at 439-440. The Mississippi Code provides:

Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission, . . . as would, if death had not ensued, have entitled the party injured or damages thereby to maintain an action and recover damages in respect thereof . . . the person or corporation, or both that would have been liable if death had not ensued . . . shall be liable for damages.

MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1996) (corresponds to MISS. CODE ANN. § 1453 (1942)).

²⁷⁰ 683 P.2d 916, 917 (Mont. 1984).

²⁷¹ *Id.* at 919. The Montana Code provided, in part, that “[e]ither parent may maintain an action for the injury or death of a minor child and a guardian for injury or death of a ward when such injury or death is caused by the wrongful act or neglect of another.” MONT. CODE ANN. § 27-1-512 (1975).

²⁷² At the time of the *Kuhnke* decision, there were two wrongful death statutes. Chapter 27, article 1, section 512 of the Montana Code created an action by a parent or guardian for the injury or death of a child or ward. MONT. CODE ANN. § 27-1-512 (1947). This was the statute in question in *Kuhnke*. The other wrongful death statute was chapter 27, article 1, section 513, which provided, “[w]hen the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action . . . against the person causing the death.” MONT. CODE ANN. § 27-1-513 (1947) (current version at MONT CODE ANN. § 27-1-513 (1995)). In 1987, these statutes were changed so that all references to the death of a minor child in section 512 were removed and all distinctions between minor and adult were replaced with the word “person” in section 513, which now provides, “[w]hen injuries to and the death of one person are caused by the wrongful act or neglect of another, the personal representative of the decedent’s estate may maintain an action for damages against the person causing the death.” MONT. CODE ANN. § 27-1-513 (1995).

amendments was *Strzelczyk v. Jett*,²⁷³ decided in 1994. In *Jett*, the mother of a stillborn viable fetus brought a wrongful death action against the physician who treated her during her pregnancy.²⁷⁴ The court decided to recognize a claim for the wrongful death of a stillborn viable fetus based on the changes in the wrongful death statutes and on Montana legislation that deemed “a child conceived but not yet born” to be an existing person “so far as may be necessary for its interests.”²⁷⁵

U. Nevada

Nevada courts have addressed the issue of fetal wrongful death only once in *White v. Yup*.²⁷⁶ In that case, the mother of a viable fetus that had been killed in an automobile accident brought a wrongful death action against the negligent driver.²⁷⁷ The Supreme Court of Nevada first concluded that a child who suffers prenatal injuries may maintain an action for those injuries after birth.²⁷⁸ The court then went on to hold that an action does exist for the stillbirth of a viable fetus under the wrongful death act,²⁷⁹ stating that “[i]t is no less a loss to the survivors where, as here, the child died before birth; and it is clear that the Legislature

²⁷³ 870 P.2d 730 (Mont. 1994).

²⁷⁴ *Id.* at 731.

²⁷⁵ *Id.* at 732-33.

²⁷⁶ 458 P.2d 617 (Nev. 1969).

²⁷⁷ *Id.* at 617-18.

²⁷⁸ *Id.* at 621. Specifically, the court stated that:

Without belaboring the point by an analysis of each of the cases in which recovery was denied, it is sufficient to say that if, by the negligence or the willful misconduct of someone, an unborn child must go through life crippled, blind, subject to fits, or otherwise changed from a normal human being, one must be impressed by the harshness of the result.

Id.

²⁷⁹ The Nevada Code provided:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case, the persons who . . . would have been liable if death had not ensued shall be liable to an action for damages.

NEV. REV. STAT. ANN. § 41.080 (Michie 1957).

intended that whatever loss there is should be compensated.”²⁸⁰

V. *New Hampshire*

The first time a New Hampshire court faced this issue was in 1957 in *Poliquin v. MacDonald*.²⁸¹ There, the mother of a stillborn viable fetus brought a wrongful death action against the negligent driver who had caused the death of the unborn child.²⁸² The court held that “a fetus having reached that period of pre-natal maturity where it is capable of independent life apart from its mother is a person and if such child dies in the womb as the result of another’s negligence, an action for recovery may be maintained in its behalf.”²⁸³

The second case, *Bennett v. Hymers*, was decided in 1958.²⁸⁴ That case involved an action on behalf of an infant who was injured while not yet viable and who was subsequently born alive.²⁸⁵ The court held:

an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of the injury. We so decide because we see no logical reason for not extending the protection of the law of torts to it and are impressed by the harshness of the opposite result.²⁸⁶

The final significant case in New Hampshire involving prenatal injuries

²⁸⁰ *White*, 458 N.W.2d at 623.

²⁸¹ 135 A.2d 249 (N.H. 1957).

²⁸² *Id.*

²⁸³ *Id.* at 251. The wrongful death action was brought under section 556:7 of the New Hampshire Code, which provides that “[i]f a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator.” N.H. REV. STAT. ANN. § 556:7 (1955).

²⁸⁴ 147 A.2d 108 (N.H. 1958).

²⁸⁵ *Id.* at 109.

²⁸⁶ *Id.* at 110.

is *Wallace v. Wallace*.²⁸⁷ *Wallace* was a wrongful death action brought on behalf of a nonviable fetus that was stillborn as the result of an automobile accident.²⁸⁸ The court concluded that drawing the line of demarcation for fetal wrongful death recovery at the point of viability was appropriate.²⁸⁹ Accordingly, no cause of action exists for the wrongful death of a nonviable fetus that is not born alive.²⁹⁰

W. *New Mexico*

There are two New Mexico cases dealing with fetal wrongful death. The first, *Salazar v. St. Vincent Hospital*, was decided by the Court of Appeals of New Mexico in 1980.²⁹¹ That case involved an action for the wrongful death of a viable fetus en ventre sa mere resulting from alleged medical malpractice.²⁹² The court concluded that a right of action for the stillbirth of a viable fetus existed under the wrongful death statute.²⁹³

²⁸⁷ 421 A.2d 134 (N.H. 1980).

²⁸⁸ *Id.* at 135.

²⁸⁹ *Id.* at 137.

²⁹⁰ *Id.* The court in this case made the much-quoted statement that:
to deny a nonviable fetus a cause of action is not to deny that life begins with conception. It is simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive. In other words, life may begin at conception but causes of action do not.
Id. at 136-37.

²⁹¹ 619 P.2d 826 (N.M. Ct. App. 1980).

²⁹² *Id.*

²⁹³ *Id.* at 830. The New Mexico Code provides:
Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as would amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages.
N.M. STAT. ANN. § 41-2-1 (Michie 1996).

In the other New Mexico case, *Miller v. Kirk*,²⁹⁴ the mother of a nonviable fetus that died in the womb after an automobile accident brought a wrongful death action against the other driver.²⁹⁵ The court held that no action exists for the wrongful death of a nonviable fetus en ventre sa mere.²⁹⁶

X. North Carolina

North Carolina only recently decided a case on the issue of recovery for prenatal injuries. In *Gay v. Thompson*,²⁹⁷ the father of a viable fetus that was tortiously killed in the womb brought a wrongful death action against his wife's obstetrician.²⁹⁸ The court, while condoning actions brought by infants born alive who are impaired by prenatal injuries, refused to recognize a right of action when the prenatal injury results in the death of the fetus in the womb.²⁹⁹

In 1968, the issue was revisited in *Stetson v. Easterling*.³⁰⁰ *Stetson* involved a wrongful death action brought by the father of an infant who sustained injuries during birth which resulted in the infant's death several months later.³⁰¹ The court acknowledged that the infant, had he lived, could have maintained an action for the injuries he suffered during birth.³⁰² However, the court refused to allow recovery for the baby's wrongful death, despite the fact that he was born

²⁹⁴ 905 P.2d 194 (N.M. 1995).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 197.

²⁹⁷ 146 S.E.2d 425 (N.C. 1966).

²⁹⁸ *Id.* at 425-26.

²⁹⁹ *Id.* at 429. The North Carolina Code provides, in part:

When the death of a person is caused by wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable . . . shall be liable to an action for damages.

N.C. GEN. STAT. § 28A-18-2 (1984) (previously codified at N.C. GEN. STAT. § 28-173(a) (1959)).

³⁰⁰ 161 S.E.2d 531 (N.C. 1968) (interpreting N.C. GEN. STAT. § 28-173 (1959) (current version at N.C. GEN. STAT. § 28A-18-2 (1984))).

³⁰¹ *Id.*

³⁰² *Id.* at 534.

alive.³⁰³ The court based its decision on the grounds that “plaintiff’s allegations are insufficient to show that [the infant’s] estate has suffered pecuniary loss on account of his death.”³⁰⁴

In 1975, the Court of Appeals reaffirmed *Gay*, but clouded the viability of the *Stetson* decision. The case, *Cardwell v. Welch*, was an action to recover for the wrongful death of a viable but stillborn fetus.³⁰⁵ The court reasoned:

by speaking of the death of a ‘person’ and by creating a cause of action to be brought by ‘the executor, administrator or collector of the decedent,’ the Legislature was thinking solely in terms of and intended to create a cause of action only for the wrongful death of one who by live birth had attained a recognized individual so as to have become a ‘person’ as that word is commonly understood.³⁰⁶

This seems to conflict with the rule in *Stetson* that no recovery can be had for the death of an infant who is born alive but who later dies from injuries suffered prenatally.

Whatever confusion *Caldwell* may have caused was dispelled when *DiDonato v. Wortman*³⁰⁷ was decided in 1987. In that case, the father of a viable fetus that was stillborn as the result of negligent prenatal care brought a wrongful death action against the negligent physician.³⁰⁸ The court abandoned its earlier decisions denying recovery for the wrongful death of a viable fetus en ventre sa mere, and held that:

[t]he language of our wrongful death statute, its legislative history, and recognition of the statute’s broadly remedial

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ 213 S.E.2d 382 (N.C. 1975) (interpreting N.C. GEN. STAT. § 28-173 (1973) (current version at N.C. GEN. STAT. § 28A-18-2 (1984))).

³⁰⁶ *Id.* at 383. This decision was re-affirmed by the Court of Appeals in the case of *Yow v. Nance*. 224 S.E.2d 292 (N.C. 1976).

³⁰⁷ 358 S.E.2d 489 (N.C. 1987) (interpreting N.C. GEN. STAT. § 28A-18-2 (1984) (previously codified at N.C. GEN. STAT. § 28-173 (1981))).

³⁰⁸ *Id.*

objectives compel us to conclude that any uncertainty in the meaning of the word 'person' should be resolved in favor of permitting an action to recover for the destruction of a viable fetus en ventre sa mere.³⁰⁹

In summary, North Carolina recognizes a cause of action for prenatal injuries, for the death of an infant after sustaining injuries in the womb and then being born alive, and for the wrongful death of a viable fetus en ventre sa mere. The issue of recovery for the stillbirth of a nonviable fetus has not yet been addressed.

Y. *North Dakota*

There is only one significant North Dakota case regarding the issue of fetal wrongful death. *Hopkins v. McBane*³¹⁰ involved an action brought by the mother of a viable fetus that was stillborn, allegedly as the result of negligence on behalf of her treating physician.³¹¹ The Supreme Court of North Dakota, after concluding that a cause of action for prenatal injuries would be recognized for a child who is born alive,³¹² went on to authorize "a wrongful-death action against one whose tortious conduct causes the death of a viable unborn child."³¹³

Z. *Ohio*

Ohio courts have adjudicated several cases within the realm of prenatal injuries and fetal wrongful death. The first, *Williams v. Marion Rapid Transit*, involved an infant's right to recover for personal injuries inflicted while in the

³⁰⁹ *Id.* at 493.

³¹⁰ 359 N.W.2d 862 (N.D. 1984).

³¹¹ *Id.* at 863.

³¹² *Id.* at 864.

³¹³ *Id.* at 865. The North Dakota Code provides:

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages.

N.D. CENT. CODE § 32-21-01 (1996).

womb.³¹⁴ The Supreme Court of Ohio determined that:

If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed on its person while in the womb of its mother.³¹⁵

The next case, *Jasinsky v. Potts*,³¹⁶ involved a wrongful death action brought by the father of an infant who was injured during his eighth month of prenatal development, was born alive, and then died three months later.³¹⁷ The court held that recovery can be had for the death of a viable fetus injured en ventre sa mere and subsequently born alive.³¹⁸

In 1959, *Stidam v. Ashmore* was decided.³¹⁹ *Stidam* was a wrongful death action on behalf of a viable fetus that was negligently killed in the womb.³²⁰ The Court of Appeals concluded that when a viable fetus is stillborn as a result of a tortfeasor's negligence, the fetus' administrator may maintain a wrongful death

³¹⁴ 87 N.E.2d 334 (Ohio 1949).

³¹⁵ *Id.* at 339 (quoting *Montreal Tramways v. LeVeille*, 4 D.L.R. 337 (Can. 1933)). Currently, the Ohio Code provides, in pertinent part:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued . . . shall be liable to an action for damages.

OHIO REV. CODE ANN. § 2125.10 (Baldwin 1994).

³¹⁶ 92 N.E.2d 809 (Ohio 1950) (interpreting OHIO REV. CODE ANN. § 10509-166 (Baldwin 1942) (current version at OHIO REV. CODE ANN. § 2125-01 (Baldwin 1994))).

³¹⁷ *Id.*

³¹⁸ *Id.* at 812.

³¹⁹ 167 N.E.2d 106 (Ohio 1959).

³²⁰ *Id.* at 107.

action on its behalf.³²¹

The final relevant Ohio case, *Egan v. Smith*,³²² was decided in 1993. That case, involved the wrongful death of a nonviable fetus in the womb.³²³ The court refused to push the line of demarcation back from viability to conception, thereby rejecting a cause of action for the wrongful death of a nonviable fetus en ventre sa mere.³²⁴

AA. Oklahoma

Oklahoma first addressed the issue of recovery for prenatal injuries and fetal wrongful death in *Howell v. Rushing*.³²⁵ In *Howell*, the parents of a fetus that was tortiously killed *in utero* brought a wrongful death action for their loss.³²⁶ The court ruled that no cause of action existed for the wrongful death of a fetus en ventre sa mere.³²⁷ When the Supreme Court was presented with this issue again in 1967, it chose not to abandon *Howell*.³²⁸

³²¹ *Id.* The court stated:

We are unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none. Or, to adapt the words of the Supreme Court . . . it would be absurd if recovery could be had for such injuries, unless those injuries were so severe as to cause death before birth. Such a distinction could lead to bizarre results.

Id. This decision was validated in *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985).

³²² 622 N.E.2d 1191 (Ohio 1993).

³²³ *Id.* at 1192.

³²⁴ *Id.* at 1193-94.

³²⁵ 261 P.2d 217 (Okla. 1953).

³²⁶ *Id.*

³²⁷ *Id.* The Oklahoma Code provides, in part:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter . . . if the former might have maintained an action had he lived, against the latter . . . for an injury for the same act or omission.

OKLA. STAT. ANN. tit. 12, § 1053 (West 1981).

³²⁸ *See Padillow v. Elrod*, 424 P.2d 16 (Okla. 1967).

In 1976, the court was given another opportunity to reconsider *Howell*.³²⁹ In that case, the court, recognizing the right of an infant to bring an action for injuries received while in the womb, decided that “[i]t is time this jurisdiction recognizes the right of a viable unborn child to maintain a cause of action for injury and wrongful death. *Howell* . . . and *Padillow* . . . are expressly overruled as to that issue.”³³⁰

The final Oklahoma case of note is *Guyer v. Hugo Publishing Co.*³³¹ That case involved a wrongful death action on behalf of a nonviable fetus that was stillborn as a result of an automobile accident.³³² The Court of Appeals held that a wrongful death action does not exist for the death of a nonviable fetus *en ventre sa mere*.³³³

BB. Oregon

In Oregon, only two cases have been decided on the issue of recovery for prenatal injuries. The first, *Mallison v. Pomeroy*,³³⁴ involved an infant’s action for prenatal injuries sustained during viability.³³⁵ The court held that when a viable fetus is tortiously injured in the womb, it may maintain an action for those injuries following birth.³³⁶

The second and most recent Oregon case regarding prenatal injuries was *Libbee v. Permanente Clinic*.³³⁷ In *Libbee*, the mother of a full-term fetus that

³²⁹ *Evans v. Olson*, 550 P.2d 924 (Okla. 1976).

³³⁰ *Id.*

³³¹ 830 P.2d 1393 (Okla. 1992).

³³² *Id.*

³³³ *Id.* at 1395.

³³⁴ 291 P.2d 225 (Or. 1955).

³³⁵ *Id.*

³³⁶ *Id.* at 226.

³³⁷ 518 P.2d 636 (Or. 1973).

died in the womb sought wrongful death damages from the hospital responsible.³³⁸ The court, concluded that a viable fetus can be the object of wrongful death recovery, even if not born alive.³³⁹

CC. *Pennsylvania*

In Pennsylvania, there is considerable case law regarding the issue of recovery for prenatal injuries. The first significant case was *Sinkler v. Kneale*,³⁴⁰ in which an infant sought damages for injuries she received during her first month of fetal development that caused her to be born Mongoloid.³⁴¹ The court held that a cause of action existed for prenatal injuries inflicted on an unborn child, regardless of whether or not the fetus was viable at the time of the injury.³⁴²

Four years later, in *Carrol v. Skloff*,³⁴³ the court was asked to decide whether recovery for wrongful death could be had for the death of a stillborn fetus.³⁴⁴ The court held that the legislature never intended to create a cause of

³³⁸ *Id.* at 636-37. The Oregon Code currently provides, in pertinent part:

When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent . . . may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for injury done by the same act or omission.

OR. REV. STAT. § 30.020 (1995).

³³⁹ *Libbee*, 518 P.2d at 640.

³⁴⁰ 164 A.2d 93 (Pa. 1960).

³⁴¹ *Id.* at 94.

³⁴² *Id.* at 95-96.

³⁴³ 202 A.2d 9 (Pa. 1964) (interpreting 20 PA. CONS. STAT. ANN. § 320.601 (1937) (current version at 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1996))).

³⁴⁴ The Pennsylvania Code currently provides, in part:

An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime.

42 PA. CONS. STAT. ANN. § 8301(a) (1982 & Supp. 1996).

The Pennsylvania Code also provides that “[a]ll causes of action or proceedings, real or personal,

action for an unborn fetus and that the overwhelming authority supported denial of recovery for the death of a fetus never born alive.³⁴⁵

Carrol remained controlling until 1985 when the Supreme Court of Pennsylvania decided *Amadio v. Levin*.³⁴⁶ In *Amadio*, the parents of a stillborn but otherwise viable fetus brought a wrongful death action against negligent physicians.³⁴⁷ The court concluded that, “the time has arrived for us to join our twenty-eight sister states and the District of Columbia and recognize that survival and wrongful death actions lie by the estates of stillborn children for fatal injuries they received while viable children en ventre sa mere.”³⁴⁸

The next pertinent Pennsylvania case was decided by a superior court of Pennsylvania in 1989.³⁴⁹ That case was a wrongful death and survival action on behalf of triplet nonviable fetuses who were injured in the womb, born alive, and died within twenty-four hours of birth.³⁵⁰ The court held that, “we cannot decide that fetuses born prior to attaining viability should now be accorded the same

shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.” 42 PA. CONS. STAT. ANN. § 8302 (1982).

³⁴⁵ *Carrol*, 202 A.2d at 11. Although, the fetus in this case was not viable, the court does not engage in a discussion of viability; in fact, the issue of viability is completely ignored. However, two years later, the issue of viability was addressed in *Marko v. Philadelphia Transportation Co.*, which involved the stillbirth of a viable fetus. 216 A.2d 502 (Pa. 1966). The plaintiff tried to distinguish the case from *Carrol* on the grounds that *Carrol* involved a nonviable fetus, while *Marko* involved a viable one. *Id.* at 503. However, the court stated that, “the [plaintiff’s] contention is without merit,” and that “viability was incidental and not controlling.” *Id.* The court went on to hold that no cause of action exists for the death of a viable fetus en ventre sa mere. *Id.* This holding was reaffirmed in *Scott v. Kopp*. 431 A.2d 959 (Pa. 1981).

³⁴⁶ 501 A.2d 1085 (Pa. 1985) (interpreting 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1996)).

³⁴⁷ *Id.* at 1085-86.

³⁴⁸ *Id.* at 1086-87. A survival action refers to an action for personal injuries inflicted on the decedent which, rather than being extinguished on the decedent’s death, survives the decedent and which can then be brought by the decedent’s personal representative. BLACK’S LAW DICTIONARY, *supra* note 8, at 1446. A wrongful death action, on the other hand, is not an action on behalf of the decedent, but an action that accrues to the decedent’s beneficiaries by virtue of the death of the decedent. *Id.* at 1612.

³⁴⁹ 567 A.2d 1095 (Pa. 1989).

³⁵⁰ *Id.* at 1096.

rights that children who have attained viability have been accorded.”³⁵¹ Thus, the court refused to recognize a cause of action for the death of a fetus injured in the womb and born alive prior to viability.³⁵²

The final significant case decided in Pennsylvania involving fetal wrongful death is *Coveleski v. Bubnis*.³⁵³ In that case, the mother of a nonviable fetus that died in the womb as a result of an automobile accident brought a wrongful death and survival action.³⁵⁴ The court held that drawing the line for recovery at the point of viability was proper and that no right of action existed for the death of a fetus in the womb prior to that point.³⁵⁵

In summary, Pennsylvania recognizes a cause of action for prenatal injuries when the child is born alive regardless of when the injuries were inflicted, for the death of an infant injured while viable and subsequently born alive, and for the stillbirth of a viable fetus. Pennsylvania courts have denied recovery for the death of a fetus that was injured while not viable and then born alive, and for the death of a nonviable fetus en ventre sa mere.

DD. Rhode Island

The first time Rhode Island courts ruled on the issue was in 1901 in *Gorman v. Budlong*.³⁵⁶ *Gorman* involved an action to recover damages for prenatal injuries inflicted on a fetus that was subsequently born alive. The court adopted the *Dietrich*³⁵⁷ rule that a negligence action may not be maintained on behalf of a fetus, nor may the next-of-kin maintain a wrongful death action for its prenatal injuries, regardless of the viability of the fetus, or whether the fetus was born alive.³⁵⁸

³⁵¹ *Id.* at 1098.

³⁵² *Id.*

³⁵³ 571 A.2d 433 (Pa. 1990) (interpreting 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1996)).

³⁵⁴ *Id.* at 434.

³⁵⁵ *Id.* at 436. This decision was affirmed in *McCaskill v. Philadelphia Housing Authority*, 615 A.2d 382 (Pa. 1992).

³⁵⁶ 49 A. 704 (R.I. 1901).

³⁵⁷ *Dietrich v. Inhabitants of Northhampton*, 52 Am.R. 242 (1844).

³⁵⁸ *Id.* at 17.

This remained the law in Rhode Island for sixty-five years, until *Sylvia v. Gobeille*.³⁵⁹ That case, which involved an action brought by an infant who was born with physical defects as a result of a physician's negligence, was a direct challenge to *Gorman*.³⁶⁰ The court seized the opportunity to overrule *Gorman* and held that "a child born alive has a right of action in tort against a negligent wrongdoer for prenatal injuries."³⁶¹

Ten years later, the court was faced with a wrongful death action for the stillbirth of a viable fetus.³⁶² The court held that recovery was available under the wrongful death statute for the death of a viable fetus en ventre sa mere.³⁶³ However, the court also stated:

[i]n *Sylvia*, we were unable logically to conclude that a claim for injury inflicted prior to viability is any less meritorious than one sustained after. Similarly, in the present instance, logic does not permit the insistence on viability as the line of demarcation between those for whom an action will lie and those who are without rights under the statute.³⁶⁴

The court went on to say that "as our holding in this case indicates, the decedent, whether viable or nonviable, was a 'person' within the meaning of the Wrongful

³⁵⁹ 220 A.2d 222 (R.I. 1966).

³⁶⁰ *Id.*

³⁶¹ *Id.* at 224. The court also stated, "[i]n our judgment there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion." *Id.* at 223. This rejection of the viability standard, although unimportant in the *Sylvia* decision, became increasingly significant in later cases.

³⁶² *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976). The Rhode Island Code provides: Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who . . . would have been liable if death had not ensued shall be liable to an action for damages.

R.I. GEN. LAWS § 10-7-1 (1985).

³⁶³ *Presley*, 365 A.2d at 754.

³⁶⁴ *Id.*

Death Act.”³⁶⁵ The rejection of the viability standard led to many questions about the scope of this case. Specifically, there was speculation as to whether Rhode Island now recognized a cause of action for the wrongful death of a nonviable fetus *en ventre sa mere*. A close reading of the opinion indicates, that, in fact, the Supreme Court of Rhode Island intended to create a cause of action for the death of an unborn child at any moment after conception.

However, in 1991, the question of whether recovery for a stillborn, nonviable fetus could be had was answered in the negative in *Miccolis v. Amica Mutual Insurance Co.*³⁶⁶ In *Miccolis*, the court declined to recognize a right of action for the death of a nonviable fetus in the womb, rejecting any indications to the contrary contained within earlier opinions.³⁶⁷ Specifically, the court stated:

we note that the overwhelming majority view in this country is that a nonviable fetus has no right to bring an action for wrongful death. The language of the plurality opinion of *Presley* to the contrary is merely dictum and has no precedential value in respect to the instant case. We do not believe that the Legislature intended a nonviable fetus to be defined as a ‘person’ within the meaning of the wrongful-death statute.³⁶⁸

In summary, Rhode Island recognizes a cause of action for prenatal injuries, regardless of viability at the time of the injury, if the fetus is subsequently born alive and for the death of a viable fetus in the womb. However, wrongful death recovery for a nonviable fetus that is not born alive has been denied.

EE. South Carolina

The courts of South Carolina first contemplated the issue of prenatal injuries in 1958. That case, *West v. McCoy*,³⁶⁹ was a wrongful death action for the death of a fetus in its fifth month of prenatal development due to an

³⁶⁵ *Id.*

³⁶⁶ 587 A.2d 67 (R.I. 1991).

³⁶⁷ *Id.* at 71.

³⁶⁸ *Id.*

³⁶⁹ 105 S.E.2d 88 (S.C. 1958).

automobile accident.³⁷⁰ The Supreme Court of South Carolina concluded that a child is not regarded as a person until it is born alive and ruled that no action existed under the wrongful death statute for the stillbirth of an unborn child.³⁷¹

Two years later, the court was presented with another case involving prenatal injuries. That case, *Hall v. Murphy*,³⁷² involved a negligence action on behalf of an infant that was injured while viable in the womb, born alive and died four hours later.³⁷³ The court held that, "a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries."³⁷⁴ Therefore, the court concluded, if the child died, the right of action would survive to its personal representative.³⁷⁵

In 1964, two cases dealing with fetal wrongful death were decided within one month of each other. The first, *Todd v. Sandridge Construction Co.*,³⁷⁶ was a federal case in which the father of a viable fetus that was stillborn as the result of an automobile accident brought a cause of action for its wrongful death.³⁷⁷ The court distinguished this case from *West* on the grounds that *West* involved the death of a fetus prior to viability, while the child in this case was viable at the

³⁷⁰ *Id.* at 88.

³⁷¹ *Id.* at 90. The South Carolina Code provided (and currently provides), in pertinent part: Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages.

S.C. CODE ANN. § 10-1951 (Law. Co-op. 1952) (current version at S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1993)).

³⁷² 113 S.E.2d 790 (S.C. 1960) (interpreting S.C. CODE ANN. § 10-1951 (Law. Co-op. 1952) (current version at S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1993))).

³⁷³ *Id.* at 791.

³⁷⁴ *Id.* at 793.

³⁷⁵ *Id.*

³⁷⁶ 341 F.2d 75 (4th Cir. 1964) (interpreting S.C. CODE ANN. § 10-1951 (Law. Co-op. 1952) (current version at S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1993))).

³⁷⁷ *Id.* at 76.

time of its death.³⁷⁸ Due to the obvious injustice that would result in allowing recovery where the child is born alive, but denying recovery in the more severe instance where the child dies prior to birth, the court held that recovery would be allowed where a viable fetus is killed in the womb.³⁷⁹

The other case, decided one month after *Todd*, was a state case involving the same question of law.³⁸⁰ In that case, the Supreme Court of South Carolina came to the same conclusion as the United States Court of Appeals, holding that a wrongful death action would lie for the death of a viable infant, tortiously killed in the womb.³⁸¹

FF. Vermont

There is only one significant Vermont case in the area of fetal wrongful death. That case, *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*,³⁸² involved a wrongful death action brought on behalf of a viable, but stillborn, fetus.³⁸³ The court held that a wrongful death action can be maintained for the death of a viable fetus in the womb.³⁸⁴

GG. Washington

The issue of recovery for prenatal injuries was first addressed by the

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 77-78.

³⁸⁰ *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964) (interpreting S.C. CODE ANN. § 10-1951 (Law. Co-op. 1962) (current version at S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1993))).

³⁸¹ *Id.* at 45.

³⁸² 425 A.2d 92 (Vt. 1980).

³⁸³ *Id.* at 93. The Vermont Code currently provides:

When the death of a person is caused by the wrongful act, neglect or default of a person or corporation, and the act, neglect or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the person or corporation liable to such action shall be liable to an action for damages.

VT. STAT. ANN. tit. 14, § 1491 (1989).

³⁸⁴ *Vaillancourt*, 425 A.2d at 94.

Supreme Court of Washington in *Seattle First National Bank v. Rankin*.³⁸⁵ In that case, a child brought an action to recover for injuries sustained prior to birth that resulted in the child being born with a form of cerebral palsy.³⁸⁶ The court took the position in “accord with the clear trend of recent cases” and held that the child could recover for her prenatal injuries.³⁸⁷

In 1975, the Supreme Court of Washington faced the question of whether the parents of a viable fetus that was negligently killed in the womb could recover for its wrongful death.³⁸⁸ The court in *Moen v. Hanson*,³⁸⁹ concluded that a cause of action could be maintained for the wrongful death of a viable fetus en ventre sa mere because “[d]enial of recovery to an unborn child tortiously killed, on the arbitrary grounds that the child did not survive the tort long enough to be born alive, is eminently illogical.”³⁹⁰ In 1994, the court decided that a cause of action could also be maintained under the survival statute in the same circumstances.³⁹¹

HH. *Wisconsin*

The first important Wisconsin case, *Lipps v. Milwaukee Electric Railway & Light Co.*,³⁹² involved an infant’s action for prenatal injuries received before

³⁸⁵ 367 P.2d 835 (Wash. 1962).

³⁸⁶ *Id.* at 837.

³⁸⁷ *Id.* at 838.

³⁸⁸ *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975). The Washington Code provides, in part, that “[t]he mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support.” WASH. REV. CODE ANN. § 4.24.010 (West 1988).

³⁸⁹ 537 P.2d 266 (Wash. 1975).

³⁹⁰ *Id.* at 268.

³⁹¹ *Cavazos v. Franklin*, 867 P.2d 674 (Wash. 1994). The Washington Code provides in pertinent part that “[a]ll causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise.” WASH. REV. CODE ANN. § 4.20.046 (1988 & Supp. 1996).

³⁹² 159 N.W. 916 (Wis. 1916).

it was viable in the womb.³⁹³ The court held that an infant could not recover for prenatal injuries it sustained while not yet viable because a nonviable fetus is incapable of separate existence from its mother.³⁹⁴

In *Puhl v. Milwaukee Automobile Insurance Co.*, the Supreme Court of Wisconsin was again presented with the question of whether an infant that was injured while nonviable in the womb could maintain an action for those injuries after birth.³⁹⁵ The court concluded that there was insufficient proof of causation to sustain an award of damages and that there was no need to decide the bigger issue regarding prenatal injuries.³⁹⁶ However, the court, noting that the issue was an important one took the opportunity to “point out the present status of the law.”³⁹⁷ The court overruled *Lipps*, rejected the viability standard, and stated that the child is “no more a part of its mother before it becomes viable than it is after viability.”³⁹⁸ This holding was limited to cases in which a child born alive was seeking to recover for prenatal injuries.

The last relevant case is *Kwaterski v. State Farm Mutual Automobile Insurance Co.*³⁹⁹ That case involved a wrongful death action brought by the parents of a viable fetus that was stillborn as the result of an automobile accident.⁴⁰⁰ The Supreme Court of Wisconsin held that a stillborn viable fetus can be the object of a wrongful death action.⁴⁰¹

³⁹³ *Id.*

³⁹⁴ *Id.* at 917.

³⁹⁵ 99 N.W.2d 163 (Wis. 1959).

³⁹⁶ *Id.* at 169.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 170.

³⁹⁹ 148 N.W.2d 107 (Wis. 1967).

⁴⁰⁰ *Id.* at 108. The Wisconsin Code provides:

Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages . . . then . . . the person who would have been liable, if death had not ensued, shall be liable to an action for damages.

WIS. STAT. ANN. § 895.03 (West 1983).

⁴⁰¹ *Kwaterski*, 148 N.W.2d at 112.

IV. STATES THAT ALLOW RECOVERY FOR THE DEATH OF A NONVIABLE FETUS NOT BORN ALIVE

A. *Georgia*

The first case to address the issue in Georgia was *Tucker v. Carmichael & Sons*.⁴⁰² That case was an action on behalf of an infant to recover damages for prenatal injuries allegedly caused by the defendant's negligent operation of a vehicle.⁴⁰³ The Supreme Court of Georgia held that the infant could maintain an action for prenatal injuries, stating:

life begins when the child is able to stir in the mother's womb. It can have a legacy, can own an estate, and a guardian can be assigned to it. . . . It would therefore be illogical, unrealistic, and unjust -- both to the child and to society -- for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.⁴⁰⁴

The most important Georgia case in this area of the law is undoubtedly *Porter v. Lassiter*.⁴⁰⁵ That case involved a wrongful death action by a mother whose nonviable unborn child was stillborn as a result of an automobile accident.⁴⁰⁶ The Court of Appeals determined that:

a suit may be maintained by a mother for the loss of a child that was 'quick' in her womb at the time of the [injury] The court does not believe it necessary for the child to be 'viable' provided that it was 'quick,' that is able to move in its mother's womb.⁴⁰⁷

⁴⁰² 65 S.E.2d 909 (Ga. 1951).

⁴⁰³ *Id.* at 909-10.

⁴⁰⁴ *Id.* at 910-11.

⁴⁰⁵ 87 S.E.2d 100 (Ga. Ct. App. 1955).

⁴⁰⁶ *Id.* at 101.

⁴⁰⁷ *Id.* at 103.

As a result of the *Porter* decision, Georgia became the first state to allow wrongful death recovery for the death of an unborn fetus that may not be viable at the time of the tortious act.⁴⁰⁸

The next year, the Supreme Court of Georgia decided *Hornbuckle v. Plantation Pipe Line Co.*⁴⁰⁹ In *Hornbuckle*, an action was brought on behalf of a child who sustained prenatal injuries in a car accident while not yet quick in the womb.⁴¹⁰ The accident resulted in the child being physically deformed.⁴¹¹ The court held that “if a child is born after a tortious injury sustained at any period after conception, he has a cause of action.”⁴¹²

B. Missouri

Missouri courts have been very active in the area of prenatal torts. In *Buel v. United Railway Co.*, the court held that an unborn child was a not a separate entity from its mother and therefore could not maintain an action for injuries received while in the womb.⁴¹³

That remained the law in Missouri for forty years until the Supreme Court

⁴⁰⁸ Currently, three other states allow recovery for the wrongful death of a nonviable fetus. See also *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996); *Conner v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995); *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995).

⁴⁰⁹ 93 S.E.2d 727 (Ga. 1956).

⁴¹⁰ *Id.* at 728.

⁴¹¹ *Id.* The child was born with a deformed right foot, right ankle, and right leg. *Id.*

⁴¹² *Id.* There are two other notable cases in Georgia that relates to this issue of fetal wrongful death. The first is *Gulf Life Insurance Co. v. Brown*. 351 S.E.2d 267 (Ga. Ct. App. 1986). In that case, the Court of Appeals was asked to grant the insurance company summary judgment based on their contention that a stillborn child was not a “person” so as to be covered under the insurance policy. *Id.* The court refused to decide whether the stillborn child was a “person” for purposes of the policy, saying that it was a question of fact for the jury, not a question of law. *Id.*

The second case, *McAuley v. Wills*, was an action for the wrongful death of a fetus that died as a result of injuries to the mother prior to conception. 303 S.E.2d 258 (Ga. 1983). The action was barred by the statute of limitations, but on the issue of pre-conception injuries the court said that “to the extent that the trial court ruled that a person owes no duty of care toward an unconceived child, we must disagree. Cases cited [earlier] show that, at least in some situations, a person should be under a duty of care toward an unconceived child.” *Id.* at 260.

⁴¹³ 154 S.W. 71, 72 (Mo. 1913).

of Missouri decided *Steggall v. Morris*.⁴¹⁴ *Steggall* also involved the death of a child shortly after birth as a result of injuries sustained while viable in the womb.⁴¹⁵ The court overruled *Buel*, stating that “it is but natural justice that a child born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother,” and that the tort-feasor should also be liable if those injuries cause death.⁴¹⁶

The next significant Missouri case that dealt with prenatal injuries was *State ex rel. Hardin v. Sanders*.⁴¹⁷ In that case, a couple brought a wrongful death action for the stillbirth of their viable fetus following an automobile accident.⁴¹⁸ The court held that “[i]t is our view that a fetus is not a ‘person’ within the meaning of our wrongful death statute until there has been a live birth.”⁴¹⁹

However, this decision was fairly short-lived. In 1983, the Supreme Court of Missouri reversed *Hardin* in *O’Grady v. Brown*.⁴²⁰ In *O’Grady* the parents of a viable fetus, that was stillborn in the ninth month of gestation, brought a wrongful death action against the negligent doctor and hospital.⁴²¹ The court held that the term “person” as used in section 537.080 of the Missouri Code includes the human fetus en ventre sa mere and allowed an action for the stillbirth

⁴¹⁴ 258 S.W.2d 577 (Mo. 1953) (interpreting MO. ANN. STAT. § 537.080 (Vernon 1939) (current version at MO. ANN. STAT. § 536.080 (Vernon 1988 & Supp. 1996))).

⁴¹⁵ *Id.* at 538.

⁴¹⁶ *Id.* at 581 (quoting *Montreal Tramways v. Leveille*, 4 D.L.R. 337, loc. cit. 345 (1933)).

⁴¹⁷ 538 S.W.2d 336 (Mo. 1976) (interpreting MO. ANN. STAT. § 537.080 (Vernon 1967)).

⁴¹⁸ *Id.* at 337.

⁴¹⁹ *Id.* at 338.

⁴²⁰ 654 S.W.2d 904 (Mo. 1983).

⁴²¹ *Id.* at 906. The Missouri Code provides, in part:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages.

MO. ANN. STAT. § 536.080 (Vernon 1988 & Supp. 1996).

of a viable fetus.⁴²²

In 1990, the Supreme Court of Missouri decided *Rambo v. Lawson*.⁴²³ *Rambo* involved a wrongful death action brought on behalf of a nonviable fetus that died in the womb as the result of an automobile accident.⁴²⁴ The court declined to extend the line of demarcation for recovery beyond the point of viability, thus rejecting recovery for the death of a nonviable fetus in the womb.⁴²⁵

In *Connor v. Monkem Co.*,⁴²⁶ which involved the death of a nonviable fetus in the fourth month of fetal development, the court, in another quick reversal, reversed *Rambo* and allowed recovery.⁴²⁷ The court based its decision on section 1.205 of the Missouri Code, which was enacted by the legislature in 1988, but which the court found unpersuasive five years earlier in *Rambo*.⁴²⁸ That

⁴²² *O'Grady*, 654 S.W.2d at 910.

⁴²³ 799 S.W.2d 62 (Mo. 1990).

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 63. In 1986, the Missouri legislature passed a statute which reads:

1. The general assembly of this state finds that:

- (1) The life of each human being begins at conception;
- (2) Unborn children have protectable interests in life, health and well-being;
- (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. ANN. STAT. § 1.205 (Supp. 1996).

However, the court quickly dismissed this statute, stating, "[w]e find no indication in the text that this bill was designed to amend the wrongful death statutes, which the legislature could easily have done had such been its intention." *Rambo*, 799 S.W.2d at 64.

⁴²⁶ 898 S.W.2d 89 (Mo. 1995).

⁴²⁷ *Id.* at 92.

⁴²⁸ *Id.*

section expresses the intention of the Missouri legislature that the courts read all Missouri statutes in accord with the interpretation that life begins at conception and that parents of unborn children have protectable interests in that child's life.⁴²⁹ The court stated that "we cannot avoid the conclusion that the legislature intended the courts to interpret 'person' within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability."⁴³⁰

C. *South Dakota*

In South Dakota there exists a situation unlike any other jurisdiction in the United States. Prior to 1984, that state's wrongful death statute was very similar to those of many other states.⁴³¹ However, in 1984 the statute was amended to include a provision regarding the wrongful death of unborn children.⁴³² The amendment provided that unborn children would be expressly included in the statute, with no mention of a viability or live birth standard.⁴³³

⁴²⁹ *Id.*

⁴³⁰ *Id.* The court distinguished this case from *Rambo* by noting that the incident that gave rise to the lawsuit in *Rambo* occurred prior to the effective date of the statute and therefore it "is not to be followed for incidents arising subsequent to the effective date of that section." *Connor v. Monkem Company, Inc.*, 898 S.W.2d at 93.

⁴³¹ The South Dakota wrongful death statute provided:

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if death had not ensued, then and in every such case, the . . . person who, would have been liable, if death had not ensued . . . shall be liable, to an action for damages.

S.D. CODIFIED LAWS ANN. § 21-5-1 (1947) (current version at S.D. CODIFIED LAWS ANN. § 12-5-1 (1987)).

⁴³² The South Dakota wrongful death statute now provides, in pertinent part:

Whenever the death or injury of a person, including an unborn child, shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages with respect thereto, if death had not ensued, then and in every such case, . . . the person who, would have been liable, if death had not ensued . . . shall be liable, to an action for damages.

S.D. CODIFIED LAWS ANN. § 21-5-1 (1987).

⁴³³ *Id.*

In 1986, the Supreme Court of South Dakota was asked to interpret the pre-amendment statute with regard to a viable, stillborn fetus.⁴³⁴ The court held that, due to the “clear, overwhelming and growing majority of jurisdictions” permitting actions in such cases, a cause of action for the death of a viable, unborn fetus did exist under the wrongful death statute, even prior to the 1984 amendment.⁴³⁵

In 1996, the Supreme Court of South Dakota decided *Wiersma v. Maple Leaf Farms*, the first case arising under the amended wrongful death statute.⁴³⁶ In that case, the parents of a fetus that was killed in its seventh week of prenatal development brought a cause of action for its wrongful death.⁴³⁷ The court held that the words “including an unborn child”⁴³⁸ referred to a fetus in all stages of prenatal development, not just to a viable fetus or one later born alive.⁴³⁹ Accordingly, an action can be maintained for the death of a nonviable fetus en ventre sa mere.⁴⁴⁰

D. West Virginia

There are several cases in West Virginia dealing with fetal wrongful death. The first time the issue was addressed was in 1969 in *Panagoulous v.*

⁴³⁴ *Farley v. Mount Marty Hosp. Ass’n., Inc.*, 387 N.W.2d 42 (S.D. 1986).

⁴³⁵ *Id.* at 44. Interestingly, the defendants tried to use the amendment to their advantage, arguing that the amendment evidenced the legislature’s intent to not create a cause of action for the wrongful death of an unborn child until 1984. *Id.* However, this argument was rejected by the court.

⁴³⁶ 543 N.W.2d 787 (S.D. 1996).

⁴³⁷ *Id.* at 789.

⁴³⁸ S.D. CODIFIED LAWS ANN. § 21-5-1 (1987).

⁴³⁹ *Wiersma*, 543 N.W.2d at 790.

⁴⁴⁰ *Id.* at 791. With this decision, South Dakota became only the fourth state to recognize a wrongful death action for the death of a fetus in the womb prior to viability. *See also* *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. 1955) (permitting recovery if the child is “quick” in the womb); *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995) (allowing a wrongful death action for a stillborn fetus prior to viability); *Farley v. Sartin*, 466 S.E.2d 522 (recognizing a right of action for the wrongful death of a nonviable fetus en ventre sa mere).

Martin.⁴⁴¹ In that case, the mother of a stillborn, viable fetus brought an action against the driver of a truck and his employer for the wrongful death of her unborn child resulting from an automobile accident.⁴⁴² The United States District Court for the Southern District of West Virginia first addressed the issue of whether an action could be maintained by the infant for prenatal injuries had he survived.⁴⁴³ On that issue, the court determined that “if the West Virginia Supreme Court of Appeals were to decide a case similar to the present case it would uphold a cause of action for a child seeking to recover damages for injuries suffered while in its mother’s womb.”⁴⁴⁴ The court then went on to conclude that a cause of action for the death of a viable fetus in the womb should also be permitted due to the medical recognition that a viable fetus is an individual capable of a separate existence from its mother.⁴⁴⁵

Two years later, in 1971, the Supreme Court of Appeals of West Virginia addressed this same issue.⁴⁴⁶ That case stemmed from an automobile accident in which the plaintiff’s viable fetus was killed in the womb.⁴⁴⁷ The court held that “an action may be maintained by the personal representative of a viable unborn child for the wrongful death of such child caused by injuries sustained by it while in the womb of its mother resulting from the negligence of the defendant.”⁴⁴⁸

Then, in 1995, the landmark case of *Farley v. Sartin* was decided by the

⁴⁴¹ 295 F.Supp. 220 (S.D.W. Va. 1969).

⁴⁴² *Id.* at 221-22. The West Virginia Code provides, in part:

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages.

W. VA. CODE § 55-7-5 (1994).

⁴⁴³ *Panagopoulous*, 295 F. Supp. at 223.

⁴⁴⁴ *Id.* at 225.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Baldwin v. Butcher*, 184 S.E.2d 428 (W. Va. 1971).

⁴⁴⁷ *Id.* at 429.

⁴⁴⁸ *Id.* at 436.

Supreme Court of Appeals of West Virginia.⁴⁴⁹ In that case, the father of nonviable fetus that was stillborn as the result of an automobile accident brought a wrongful death action against the other driver and his employer.⁴⁵⁰ The court held that drawing the line for wrongful death recovery at the point of viability is inappropriate and without merit and that a nonviable fetus is a “person” in the context of the wrongful death statute,⁴⁵¹ even when not born alive.⁴⁵² Accordingly, the personal representative of a nonviable fetus tortiously killed in the womb can maintain a wrongful death action against the tortfeasor and recover damages.⁴⁵³ With this decision, West Virginia became only the third state (of four) to allow recovery for the wrongful death of a nonviable fetus en ventre sa mere.⁴⁵⁴

V. STATES WITH NO CASE LAW

A. Wyoming

As of the date of this article, no cases had been decided in Wyoming regarding the issue of prenatal injuries and fetal wrongful death.

VI. CONCLUSION

In conclusion, there are three main views regarding recovery for fetal

⁴⁴⁹ 466 S.E.2d 522 (W. Va. 1995).

⁴⁵⁰ *Id.*

⁴⁵¹ W. VA. CODE § 55-7-5 (1994).

⁴⁵² *Farley*, 466 S.E.2d at 532. The court stated:

In jurisdictions where the viability standard is controlling, the tortfeasor remains unaccountable for the full extent of the injuries inflicted by his or her wrongful conduct. In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child has not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.

Id. at 533.

⁴⁵³ *Id.* at 534.

⁴⁵⁴ *See also* Porter v. Lassiter, 87 S.E.2d 100 (Ga. 1955); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).

wrongful death. The minority view, still adhered to in twelve states, holds that there must be a live birth before recovery can be had for death of the infant due to injuries sustained while in the womb. The majority view, which thirty-four states have adopted, allows recovery for the death of a viable fetus in the womb. These states do not require that the fetus be born alive in order for the personal representative to recover for its death due to injuries sustained in the womb. However, these states do limit recovery to fetuses which have obtained viability. The last category of states represent a new trend in this area of the law. These four states of Georgia, Missouri, South Dakota, and West Virginia allow recovery for the death of a fetus in the womb at any point after conception.⁴⁵⁵ These states do not require a live birth for recovery, nor do they require that the fetus have reached the point of viability. Although a number of other states have rejected this idea, it may represent the future in this area of the law.

Jill D. Washburn Helbling

⁴⁵⁵ Georgia requires that the fetus be “quick in the womb,” which may occur before or after viability.

STATES THAT REQUIRE A LIVE BIRTH FOR RECOVERY	STATES THAT ALLOW RECOVERY FOR THE DEATH OF A VIABLE FETUS NOT BORN ALIVE	STATES THAT ALLOW RECOVERY FOR DEATH OF A NONVIABLE FETUS NOT BORN ALIVE
Arkansas*	Alabama**	Georgia** (quick in the womb)
California	Alaska*	Missouri**
Florida	Arizona	South Dakota**
Iowa	Colorado	West Virginia**
Maine	Connecticut**	
Nebraska	Delaware	
New Jersey	District of Columbia	
New York	Hawaii*	
Tennessee	Idaho	
Texas	Illinois**	
Utah	Indiana	
Virginia**	Kansas	
	Kentucky	
	Louisiana**	
	Maryland**	
	Massachusetts**	
	Michigan**	
	Minnesota	
	Mississippi	
	Montana	

	Nevada	
	New Hampshire**	
	New Mexico	
	North Carolina**	
	North Dakota	
	Ohio	
	Oklahoma	
	Oregon	
	Pennsylvania	
	Rhode Island**	
	South Carolina	
	Vermont	
	Washington**	
	Wisconsin	

Wyoming has no case law addressing this issue.

* indicates that the issue has not been addressed by a state court but that a federal court has ruled in this manner.

** indicates that the state allows recovery for the death of an infant born alive resulting from injuries sustained prior to viability.