

**PERSON V. POTENTIAL: JUDICIAL STRUGGLES TO
DECIDE CLAIMS ARISING FROM THE DEATH OF AN
EMBRYO OR FETUS[†] AND MICHIGAN'S STRUGGLE TO
SETTLE THE QUESTION**

Dena M. Marks^{*}

I. INTRODUCTION - OVERVIEW AND SCOPE

“Death is well understood; it’s life that isn’t.”¹ We recognize death, but state by state, courts struggle to understand life when called on to determine whether their states’ wrongful death acts apply after the death of an embryo or fetus.² These struggles arise because, for the most part, state legislatures have failed to clarify³ whether a cause of action may be maintained under their wrongful death acts for the death of an embryo or fetus.⁴ This failure has led to inconsistent and unfair results, often allowing the tortfeasor to benefit from causing the greater harm of death, when the tortfeasor would have been liable if only injury had resulted.⁵

[†] Embryo: “In humans, the developing organism from conception until approximately the end of the second month.” STEDMAN’S MEDICAL DICTIONARY 501 (25th ed. 1990). Fetus: “In humans, the product of conception from the end of the eighth week to the moment of birth.” *Id.* at 573.

^{*} Associate Professor and Assistant Dean, J.D. Program, Thomas M. Cooley Law School, Oakland (MI) Campus.

1. Members of the Famous Quotes and Famous Sayings Network, *Famous Quotes and Famous Sayings Network*, <http://home.att.net/~quotesexchange/> (last visited Nov. 21, 2003) (attributing the quotation to Tony Follari).

2. Appellate courts in nearly every state have been called on to decide whether a cause of action for wrongful death can be maintained after the death of an embryo or fetus, *See infra* notes 34-428 and accompanying text. Yet only four, and arguably five, states have specifically passed legislation to provide the answer to that question. *See infra* notes 358-85, 429-39 and accompanying text.

3. In Michigan, lack of clarity is not the result of legislative inaction, it is the product of misguided legislative action. *See infra* notes 440-74 and accompanying text.

4. *See infra* notes 37-384 and accompanying text.

5. *See, e.g., Gorke v. LeClerc*, 181 A.2d 448, 451 (Conn. Super. Ct. 1962).

In Part II of this article, the history and purpose of wrongful death acts are examined. Part III examines, state by state, the inconsistent results caused by legislative failure to act. Part IV focuses on the inconsistent results within one jurisdiction, Michigan, and examines that state's legislative attempt to provide the guidance called for in the article. Part V suggests a redrafted version of the Michigan statute, to clearly provide the guidance needed by the court. Finally, Part VI challenges state legislatures to respond to the problem by passing legislation that clarifies and directs the courts how to understand life, as it applies to embryonic or fetal death.

II. BACKGROUND

A. Purpose of Wrongful Death Acts

Wrongful death acts developed because, under English common law, a personal injury action did not survive the victim's death.⁶ As a result, there was "no compensation for the victim's dependents or heirs,"⁷ making it "cheaper for the defendant to kill the plaintiff than to injure him."⁸ In England, this inequity was first remedied with the passage of the Fatal Accidents Act of 1846.⁹ This Act was commonly known as Lord Campbell's Act, and it created the basis for modern-day wrongful death statutes in the United States.¹⁰ Lord Campbell's Act permitted a claim to be brought "for the benefit of the wife, husband, parent or child of the person whose death shall have been so caused" by the tortfeasor.¹¹ Now, in every state, if a person dies as a result of the defendant's wrongdoing, a cause of action is available.¹²

6. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON TORTS § 125A at 940 (5th ed. 1984).

7. *Farley v. Sartin*, 466 S.E.2d 522, 525 (W. Va. 1995) (relying on KEETON, ET. AL., *supra* note 6, § 127 at 945).

8. KEETON, *supra* note 6, § 127 at 945.

9. *Id.* The "Act permitted recovery of damages by the close relatives of a victim who was tortiously killed." *Farley*, 466 S.E.2d at 525.

10. *Id.* at 525 (noting that New York enacted the first state wrongful death statute in 1847).

11. *O'Neill v. Morse*, 188 N.W.2d 785, 793 (Mich. 1971) (quoting *Hyatt v. Adams*, 16 Mich. 180, 194 (1867)). Thus, "the English Parliament rectified the disparity between a tortfeasor's liability for injuries and for the more egregious harm, death." *Farley*, 466 S.E.2d at 525.

12. KEETON, *supra* note 6, § 127 at 945. In some jurisdictions, the action that would have been the decedent's is preserved as a survival action. *Id.* § 125A at 942. The injury to the decedent's survivors is preserved as a wrongful death action. *Id.* at 940-41. Some jurisdictions have combined the two types of injuries into one statute usually referring to the action as a wrongful death action. *Id.* at 942. Unless otherwise noted, in this article, the cause of action referred to and analyzed is a wrongful death action, even if the jurisdiction also has a survival statute.

*B. Wrongful Death Claims for the In Utero Death of an Embryo or Fetus*¹³

Even after wrongful death statutes were enacted, courts continued to deny recovery for the death of an unborn embryo or fetus.¹⁴ In denying recovery, the courts stated that the unborn embryo or fetus was merely a part of the mother, and not a person, and a defendant could not owe a duty if the unborn fetus or embryo was not a person in existence.¹⁵ Under this view, no court permitted a wrongful death claim, unless the child was first born alive.¹⁶

C. Born Alive

The born-alive rule persisted in wrongful death actions even after the courts began allowing recovery for other injuries incurred prenatally.¹⁷ The courts used four theories to deny a cause of action for the wrongful death of an unborn embryo or fetus: lack of precedent,¹⁸ the single entity theory,¹⁹ potential for fraudulent claims or double recovery,²⁰ or an inability to expand the scope of liability created by the legislature in enacting the wrongful death statute.²¹ Some jurisdictions still require a live birth before a wrongful death cause of action is allowed.²²

13. In general, the common law did not permit a cause of action for any tort committed against the unborn. *Farley*, 466 S.E.2d at 526. This changed in 1946 when the court, in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), held a claim could be brought on behalf of a child after she was born for injuries that she suffered as a viable fetus. *Id.* at 143. Before that, courts had denied tort recovery for these injuries based on the “assumption that a child en ventre sa mere has no juridical existence, and is so intimately united with its mother as to be a ‘part’ of her and as a consequence is not to be regarded as a separate, distinct, and individual entity.” *Id.* at 139. This article deals only with causes of action where the injury to the unborn embryo or fetus was death.

14. See, e.g., *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14 (1884), *overruled by*, *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967).

15. *Bonbrest*, 65 F. Supp. at 139.

16. The first published case in the United States to recognize a wrongful death cause of action without a live birth was *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).

17. See, e.g., *Stern v. Miller*, 348 So. 2d 303, 305-06 (Fla. 1977).

18. *Farley*, 466 S.E.2d at 529. See also *White v. Yup*, 458 P2d 617, 623 (Nev. 1969); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107, 111 (Wis. 1967).

19. *Farley*, 466 S.E.2d at 529.

20. *Id.* See also *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916, 919 (Mass. 1975).

21. *Farley*, 466 S.E.2d at 530.

22. See *infra* notes 34-119 and accompanying text.

D. Viability²³

In 1949, the Minnesota Supreme Court was the first to reject the born-alive rule, in favor of the viability rule.²⁴ In *Verkennes v. Corniea*²⁵ the court held that a viable fetus was not a single entity with its mother because it was capable of life separate and independent from her.²⁶ The court said that the mother may die, but the child may still live on.²⁷ The single-entity theory was, therefore, found to be irreconcilable with medical reality²⁸ and was rejected by the court.²⁹ Over time, most jurisdictions have adopted the viability rule in wrongful death actions.³⁰

E. Previability

Recently, some jurisdictions have allowed a wrongful death claim even when the tortfeasor's action resulted in the death of an embryo or previable fetus.³¹ Some of these jurisdictions have done so as a result of legislation specifically enacted to create a cause of action for the death of an embryo or fetus,³² while others were a result of a court's interpretation of the jurisdiction's general wrongful death act.³³

III. JURISDICTIONAL BREAKDOWN BY VIEW APPLIED IN A WRONGFUL DEATH CLAIM FOR AN EMBRYO OR FETUS

A. Born Alive

Although these jurisdictions are in a minority, arguably, there are fourteen jurisdictions that still bar a cause of action for the death of a fetus unless the fetus is ultimately born alive.³⁴

23. "Capability of living; the state of being viable; usually connotes a fetus that has reached 500 g in weight and 20 gestational weeks." *STEDMAN'S MEDICAL DICTIONARY* 1714 (25th ed. 1990).

24. *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).

25. *Id.*

26. *Id.* at 841.

27. *Id.* at 840.

28. *Id.*

29. *Id.* at 841.

30. *See infra* notes 120-349 and accompanying text.

31. *See infra* notes 350-85 and accompanying text.

32. *See infra* notes 358-75 and accompanying text.

33. *See infra* notes 354-57, 376-85 and accompanying text.

34. *See infra* notes 35-119 and accompanying text.

1. Alaska

Alaska has no published opinions discussing whether a viable fetus is a person under the state's wrongful death act.³⁵ But in *Mace v. Jung*,³⁶ the federal district court held that a preivable fetus was not a person under Alaska's wrongful death act.³⁷ In its analysis, the court first recognized that until 1946 a wrongful death action was unavailable for the death of a fetus; the child had to be born alive.³⁸ The court then looked to outside jurisdictions and concluded that, although there was a growing trend permitting a cause of action for the death of a viable fetus, it found no basis for allowing recovery for a preivable fetus's death.³⁹ Thus, the court denied this cause of action and left intact the prevailing rule that a child must be born alive before a wrongful death claim could be maintained.⁴⁰

2. California

*Justus v. Atchinson*⁴¹ involved the deaths of two full-term fetuses.⁴² Although the court recognized that many jurisdictions would permit a wrongful death cause of action under these circumstances,⁴³ the court stated that it could not recognize a cause of action here because the cause of action was merely "a creature of statute . . . [that] 'exists only so far and in favor of such person as the legislative power may declare.'"⁴⁴ Further, the court stated that the wrongful death act permitted recovery only for the death of "a person,"⁴⁵ and the court reasoned that, because the common law interpretation of person did not include a fetus, and because "the word 'person' as used in the Fourteenth Amendment does not include the unborn,"⁴⁶ the legislature did not

35. See *Mace v. Jung*, 210 F. Supp. 706, 707 (D. Alaska 1962).

36. *Id.*

37. *Id.* at 708.

38. *Id.* at 707.

39. *Id.*

40. *Id.* at 707, 708.

41. *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977), *overruled in part by* *Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) (overruling the *Atchinson* court's holdings on the "claim of shock" cause of action).

42. *Id.* at 125.

43. *Id.*

44. *Id.* at 129 (quoting *Pritchard v. Whitney Estate Co.*, 129 P. 989, 992 (Cal. 1913)). The *Justus* court also stated that the wrongful death act should not be liberally construed to fulfill a remedial purpose because it is in abrogation of the common law, and, therefore, it must be strictly construed. *Id.* at 133.

45. *Id.* at 129.

46. *Id.* at 131 (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)).

intend the word person in the wrongful death act to include an unborn fetus.⁴⁷ Finally, the court reasoned that the statute could not create a cause of action for the death of these stillborn fetuses because the legislature did not “confer legal personality on unborn fetuses” in the wrongful death act.⁴⁸ Instead of including these unborn fetuses in the wrongful death act, the legislature “impliedly but plainly exclude[d]” them.⁴⁹

3. Florida

Similarly, the Florida courts have concluded that a live birth is required to create a cause of action for wrongful death.⁵⁰ In *Stern v. Miller*,⁵¹ a viable fetus⁵² was stillborn following an automobile accident.⁵³ The court held that the wrongful death act did not create a cause of action for a stillborn fetus.⁵⁴ That court stated that, although many jurisdictions would have allowed this claim, and although the wrongful death statute was remedial and should be interpreted liberally, it was constrained to interpret the statute consistent with legislative intent.⁵⁵ In evaluating legislative intent, the court noted that the legislature had enacted other legislation that specifically provided for an unborn child, but in the wrongful death act, it did not.⁵⁶ Therefore, the court concluded that the legislature’s intent was to exclude a cause of action under the wrongful death act for the death of an unborn fetus.⁵⁷ The court further reasoned that because the legislature knew of the court’s previous exclusion of these claims under the earlier act, if it had intended unborn fetuses to have a cause of action under the amended wrongful death act, it would have specifically provided for that in the amendment.⁵⁸

47. *Id.* at 133-34.

48. *Id.* at 132.

49. *Id.* The court relied primarily on the legislature’s enactment of statutes where fetal rights were specifically granted: tort recovery for prenatal injury; property rights; and penal statutes. *Id.*

50. *See, e.g., Stern v. Miller*, 348 So.2d 303 (Fla. 1977).

51. *Id.*

52. The fetus was of seven-months gestational age. *Id.* at 304.

53. *Id.* at 305.

54. *Id.* at 307. The court had previously interpreted Florida’s Wrongful Death of Minors Act, section 768.03 and denied a cause of action for the death of a stillborn fetus. *Id.* at 305. That act was repealed in 1972, and the one now being interpreted by the court was enacted. *Id.* at 306. The 1972 act created one “general action for the wrongful death of any ‘person.’” *Id.*

55. *Id.* at 308.

56. *Id.* at 306-07.

57. *Id.* at 307.

58. *Id.* at 308.

4. Indiana

In Indiana, the child wrongful death statute does not create a cause of action, unless there is a live birth.⁵⁹ In *Bolin v. Wingert*, although the fetus was pre-viable at the time of its death, the Indiana Supreme Court did not do a viability analysis to determine whether a wrongful death action could be maintained.⁶⁰ Rather, the court looked solely at the language of the state's Child Wrongful Death Statute.⁶¹ The court said that because the wrongful death act was in derogation of the common law, it should be strictly construed.⁶² The court reasoned that, because the legislature failed to provide specifically for a cause of action for the death of an unborn fetus, unlike its action in enacting parts of the penal code, the legislature's intent was to exclude a cause of action under this statute, unless there was a live birth.⁶³

5. Iowa

Iowa death statutes are survival statutes, and they do not "create a new cause of action in a decedent's survivors."⁶⁴ Therefore, in Iowa, only those born alive have "attained a recognized individual identity" required to maintain a cause of action under the state's death act.⁶⁵ In *Weitl v. Moes*, the court held that the stillbirth of a viable fetus did not create a cause of action because it was not a death of a person.⁶⁶ In its analysis, the court began by stating that, at common law, an unborn fetus was not a person.⁶⁷ The court reasoned that because a wrongful death claim was in derogation of the common law, created only by legislation, if the legislature had also intended to abrogate the common-law meaning

59. *Bolin v. Wingert*, 764 N.E.2d 201, 207 (Ind. 2002).

60. The court stated that the two parties disagreed about the applicability of the statute because the defendant claimed that the fetus must be viable before there was a cause of action, and the plaintiff claimed that the statute was applicable for the death of any unborn child. *Id.* at 204. But in its analysis, the court disregarded the issue of the fetus' viability. *Id.* at 206-08.

61. IND. CODE § 34-1-1-8(e) (1993), *repealed* (see IND. CODE § 34-23-2-1 (1999)). *Bolin*, 764 N.E.2d at 206-08.

62. *Id.* at 207.

63. *Id.*

64. *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (plurality), *overruled in part by* *Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf R.R. Co.*, 335 N.W.2d 148 (Iowa 1983) (holding that minor does not have an independent cause of action from statute for parental consortium, and a minor's damages are not limited to the period of the child's minority).

65. *Weitl*, 311 N.W.2d at 271 (quoting *Cardwell V. Welch*, 213 S.E.2d 382, 383 (N.C. Ct. App. 1975).

66. *Id.* at 272. The stillborn's mother was misdiagnosed and incorrectly treated for bronchitis, which resulted in brain damage, blindness, and stillbirth of the near-term fetus. *Id.* at 261.

67. *Id.* at 271 (relying on *Roe v. Wade*, 410 U.S. 113 (1973)).

of person to include a fetus, it would have specifically done so.⁶⁸ The court further reasoned that there was no legislative intent to include an unborn fetus under this act because the legislature had not taken any action to amend this statute after the court's previous interpretation of this statute, which required a live birth.⁶⁹

6. Maine

In *Shaw v. Jendzejec*,⁷⁰ the Supreme Judicial Court of Maine harshly criticized its own earlier decision⁷¹ requiring a live birth before a wrongful death action could be maintained.⁷² But it concluded "that the force of *stare decisis* compels us to reaffirm" that holding.⁷³ In its reasoning, the court first looked for a legislative response to its earlier decision, and found no statutory amendment.⁷⁴ It also evaluated the "harshness that results from the live-birth rule," and found it insufficient to overrule its prior decision.⁷⁵ Finally, the court analyzed courts' interpretations from other jurisdictions since its earlier decision, and it found that only Montana and Hawaii had yet adopted the viability view.⁷⁶ Based on these findings, the Maine Supreme Court found insufficient reason to recognize a wrongful death cause of action without a live birth.⁷⁷

7. Nebraska

In 1977, the Nebraska Supreme Court confirmed that there must be a live birth before there was a cause of action under the state's wrongful death act,⁷⁸ and that the stillbirth of a viable fetus was insufficient to create a wrongful death cause of action.⁷⁹ The court stated that because a child born dead was not a person within the law of torts, its death could

68. *Id.* at 271. In fact, the court pointed out, that the legislature has done so in penal statutes. *Id.*

69. *Id.* at 272. The court previously excluded a cause of action for the death of a previable fetus under the same statute. *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971).

70. *Shaw v. Jendzejec*, 717 A.2d 367 (Me.1998).

71. *Miton v. Cary Med. Ctr.*, 538 A.2d 252 (Me. 1988).

72. *Shaw*, 717 A.2d at 369-71.

73. *Id.* at 368.

74. *Id.* at 371.

75. *Id.*

76. *Id.* at n.10.

77. *Id.* at 371-72.

78. *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977). The case upheld a 26 year-old decision: *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951).

79. The fetus was eight-months gestational age. *Egbert*, 260 N.W.2d at 481.

not create a cause of action under the state's wrongful death act.⁸⁰ The court further stated that because the cause of action was strictly statutory, and not a "matter of 'evolution' of the common law," only legislative intent in enacting the statute should be used to interpret it.⁸¹ And the court reasoned that the legislature's failure to define an unborn fetus as a person under the act, despite 26 years to do so, indicated the legislature's intent to exclude unborn fetuses under the act.⁸²

8. New Jersey

In New Jersey, the courts have held that because wrongful death was not actionable at common law, the cause of action should only be allowed for the death of a person, as provided in the statute.⁸³ In *Giardina v. Bennett*, the court held that the death of a viable fetus did not create a cause of action under the state's wrongful death act.⁸⁴ The court stated that, at common law, an unborn fetus was "merely a part of his mother without separate existence or personality," and because the legislature had specifically addressed legal protection for the unborn in property and penal statutes, its failure to do so here made it "inferable that the Legislature adopted [the] common law understanding of the concept of a 'person' in the adoption of the Wrongful Death Act."⁸⁵ The court further reasoned that the legislature's failure to amend the Act despite the court's similar, previous interpretations also indicated that the legislature intended to exclude these causes of action under the statute.⁸⁶ The court acknowledged that other jurisdictions allowed a cause of action for viable fetuses, but the court stated that this merely substituted "one bright-line rule, viability, for another, live-birth," and that there was "no compelling underlying policy that would impel [it] to give the statutory term 'person' an expansive interpretation."⁸⁷

9. New York

In New York, there is no wrongful death cause of action for a stillborn fetus.⁸⁸ In *Endres v. Friedbert*, the court affirmed its long-held

80. *Id.* at 481.

81. *Id.* at 482.

82. *Id.*

83. *Giardina v. Bennett*, 545 A.2d 139, 144 (N.J.1988).

84. *Id.*

85. *Id.* at 143, 145.

86. *Id.* at 146.

87. *Id.*

88. *Endresz v. Friedberg*, 248 N.E.2d 901, 902-03 (N.Y. 1969).

interpretation that “the law has never considered the unborn fetus as having a separate ‘juridical existence’ or a legal personality or identity ‘until it sees the light of day.’”⁸⁹ Although the court acknowledged that other jurisdictions permitted a cause of action at viability, the court reasoned that this would only relocate the point at which the cause of action would be recognized, and it would “increase a hundredfold the problems of causation and damages.”⁹⁰ “[A] tangible and concrete event would be the most acceptable and workable boundary. Birth, being a definite, observable and significant event, meets this requirement.”⁹¹ The court also stated that “the damages recoverable by the parents in their own right afford ample redress for the wrong done.”⁹²

10. Tennessee

In *Hamby v. McDaniel*,⁹³ the Supreme Court of Tennessee affirmed its earlier decision⁹⁴ that there is no wrongful death cause of action for a viable, stillborn fetus.⁹⁵ The court said that the wrongful death action is to be “strictly construed against the maintenance of any right of action not expressly provided for [in the act].”⁹⁶ The court said that the use of the word person did not create an “ambiguity in our Wrongful Death Statute[,] [and] [w]e must consider it as it is written, not as we would have it.”⁹⁷ The court also reasoned that because the statute had been amended without changes to include a cause of action for an unborn fetus, it presumed that the legislature approved of its earlier interpretation of the word person as it was used in the statute.⁹⁸

11. Texas

In Texas, the legislature amended the wrongful death act, changing the phrase “death of any person” to “an individual’s death.”⁹⁹ The Texas

89. *Id.* at 904 (citations omitted).

90. *Id.* at 905.

91. *Id.*

92. *Id.*

93. *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977).

94. *Durrett v. Owens*, 371 S.W.2d 433 (Tenn. 1963).

95. *Hamby*, 559 S.W.2d at 777.

96. *Id.* at 776.

97. *Id.* at 776 (quoting *Hogan v. McDaniel*, 319 S.W.2d 221, 225 (Tenn. 1958)).

98. *Id.* The court also relied on its interpretation of the United States Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973). The *Hamby* court interpreted the *Roe* decision to say that the use of the word “person” in the Constitution had “no prenatal application.” *Hamby*, 559 S.W.2d at 777.

99. *Witty v. Am. Gen. Capital Distributions, Inc.*, 727 S.W.2d 503, 504 (Tex. 1987).

Supreme Court held that the substitution was not intended to create a substantive change, and it affirmed its earlier interpretation that the state's wrongful death act did not create a cause of action unless there was a live birth.¹⁰⁰ The court stated that although the statute is remedial, and should be liberally construed, the court "may not rewrite the statute in the guise of construing it."¹⁰¹ The court said that it found no "evidence of legislative intent to include an unborn fetus within the scope of our Wrongful Death Act."¹⁰²

12. Utah

Despite several opportunities, the Supreme Court of Utah has never directly decided whether a viable fetus is a person under the state's wrongful death act.¹⁰³ But it has never allowed recovery in a wrongful death claim for the death of a viable or pre-viable embryo or fetus.¹⁰⁴ In 1942, the Utah Supreme Court held that no damages could be awarded for the loss of an unborn child, but that the mother could recover damages for her injuries as a result of a miscarriage.¹⁰⁵ Although the case did not discuss the gestational age of the fetus or embryo, because there was some dispute about whether the plaintiff was indeed pregnant at all, it is likely that it was not viable.¹⁰⁶

In 1975, the court evaluated a claim brought for the death of a full-term, viable fetus who was stillborn.¹⁰⁷ The court relied on the holding of a 1942 case,¹⁰⁸ but it did not discuss whether the lower court erred in permitting the wrongful death cause of action, because the jury had not found the defendants liable, so no damages were awarded under that theory.¹⁰⁹

In 1996, the court evaluated a claim brought by the would-be grandparents of a fetus.¹¹⁰ Both the fetus and the plaintiffs' pregnant,

100. *Id.*

101. *Id.*

102. *Id.* at 505. The court also held that there were no damages available under the state's survival action. *Id.* at 506. The court stated that damages for the fetus' medical and funeral could be recovered as a part of the mother's damages. *Id.* And it found that any physical pain and suffering the fetus may have suffered were "far too speculative. . . . [and that] there is not even the possibility of proof to support the cause of action." *Id.*

103. See *infra* notes 105-13 and accompanying text.

104. *Id.*

105. *Webb v. Snow*, 132 P.2d 114 (Utah 1942).

106. *Id.* at 118.

107. *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975).

108. *Id.* at 1077 (relying on *Webb* 132 P.2d at 114).

109. *Id.*

110. *State Farm Mut. Auto. Ins. Co. v. Clyde*, 920 P.2d 1183 (Utah 1996).

minor daughter died as a result of a car accident.¹¹¹ The court held that the grandparents had no standing to bring a wrongful death action for the death of the fetus because they were neither the parent nor the guardian of the fetus.¹¹² The court did not decide whether the fetus was a person under the wrongful death act.¹¹³

13. Virginia

In Virginia, there is no wrongful death action for the death of a viable fetus; the child must be born alive.¹¹⁴ In *Lawrence v. Craven Tire Co.*, the court stated that it could not presume that the legislature intended the word person, as used in the wrongful death act, to mean anything more than the word's common understanding.¹¹⁵ The court stated that in other statutes, the legislature had specifically extended the meaning of the word person, but it did not do so here.¹¹⁶ And because the legislature failed to specifically extend the meaning of the word, the court stated, "[w]e are unwilling to hold that a child En ventre sa mere can maintain a common law action for personal injuries."¹¹⁷ Therefore, if the "decendent had no right . . . to maintain an action [because the viable fetus was not a person within the meaning of the wrongful death act] . . . then the right to maintain the present action could not be transmitted to her personal representative."¹¹⁸

14. Wyoming

There are no published cases addressing whether a viable or a previable fetus is a person under Wyoming's wrongful death act.¹¹⁹ So it is unclear whether this jurisdiction would abandon the born-alive rule, but as yet, it has not done so.

111. *Id.* 1184-85.

112. *Id.* at 1186-87.

113. *Id.* at 1187 & n. 4.

114. *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440, 442 (Va. 1969). The court applied the born-alive rule and permitted a cause of action for the death of a previable fetus, who was born alive at 21 weeks gestation, and who died approximately one and one half hours later. *Kalafut v. Gruver*, 389 S.E.2d 681 (Va. 1990) (explaining the reasoning of the *Lawrence* court).

115. *Lawrence*, 169 S.E.2d at 441.

116. *Id.* at 441-42.

117. *Id.* at 441.

118. *Id.*

119. 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. 363, 429 (1996).

B. Viability

The majority of jurisdictions allow a wrongful death action to be maintained for the death of a viable fetus.¹²⁰

1. Alabama

In *Eich v. Town of Gulf Shores*,¹²¹ the Alabama Supreme Court first decided that there was a cause of action for the wrongful death of a viable fetus.¹²² The court stated that the “purpose of our wrongful death statute[] . . . is the preservation of human life.”¹²³ The court reasoned that this purpose would be defeated if this cause of action was denied, so the court, “extending its judicial prerogative,” recognized this cause of action.¹²⁴

But in *Gentry v. Gilmore*,¹²⁵ the court held that there was no wrongful death cause of action for a stillborn, previable fetus.¹²⁶ Here, the court first stated that no jurisdiction permitted a cause of action for a fetus of 13 weeks gestation.¹²⁷ The court also recognized that, following the Supreme Court’s decision in *Roe v. Wade*,¹²⁸ the point of viability is one of significance.¹²⁹ Therefore, the court held that a previable fetus was not a minor child under the applicable wrongful death act.¹³⁰

2. Arizona

In *Summerfield v. Superior Court*,¹³¹ the court held that a stillborn, viable fetus was a person under the state’s wrongful death act.¹³² The court began its analysis by examining “whether [it] was truly bound by legislative intent [in enacting the wrongful death act] or [was] free to apply a modicum of common law policy.”¹³³ The court concluded that there was an uncertainty here as to whether Arizona recognized a

120. See *infra* notes 121-349 and accompanying text.

121. *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974).

122. *Id.* at 355.

123. *Id.* at 356 (citations omitted).

124. *Id.* at 356, 357.

125. *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993).

126. *Id.* at 1244.

127. *Id.*

128. *Roe v. Wade*, 410 U.S. 113 (1973).

129. *Gentry*, 613 So. 2d at 1244.

130. *Id.*

131. *Summerfield v. Superior Court*, 698 P.2d 712, 724 (Ariz. 1985).

132. *Id.*

133. *Id.* at 715.

common law claim for a wrongful death.¹³⁴ The court stated that, even if the legislature “believed that it was creating a new statutory right of action in enacting the Wrongful Death Act, there [was] no evidence to suggest that it intended to occupy the field completely,” so the court concluded that it could apply “common law attributes” in interpreting the wrongful death act.¹³⁵

The court stated that the legislature intended the wrongful death action to compensate survivors.¹³⁶ Additionally, in other laws, the legislature had protected fetal life.¹³⁷ So the court then reasoned that it was appropriate to allow this cause of action because it would compensate the fetus’s survivors and provide protection for fetal life.¹³⁸

The court did not find any conflict with the United States Supreme Court’s ruling in *Roe* because, it concluded, “[t]he word ‘person’ can mean different things in different contexts.”¹³⁹ Further a woman’s right to choose is “very different” than the tortious termination of the pregnancy “against the mother’s will.”¹⁴⁰

Finally, the court stated that legislative inaction here should not be interpreted as an indication that the legislature intended to exclude a viable fetus under the wrongful death act.¹⁴¹

3. Arkansas

In *Aka v. Jefferson Hospital Ass’n, Inc.*,¹⁴² the Arkansas Supreme Court overruled precedent¹⁴³ and held that a viable, stillborn fetus was a person under the state’s wrongful death act.¹⁴⁴ In its reasoning, the court reexamined its prior holding, where it had concluded that legislative action was required to make a viable fetus a person under the wrongful death act.¹⁴⁵

Therefore, in this case, the court looked for that legislative action.¹⁴⁶ Although the Legislature had not amended the wrongful death

134. *Id.* at 716.

135. *Id.* at 717, 718.

136. *Id.* at 721.

137. *Summerfield v. Superior Court*, 698 P.2d 712, 721 (Ariz. 1985).

138. *Id.*

139. *Id.* at 722-23 (referring to *Roe v. Wade*, 410 U.S. 113 (1973)).

140. *Id.*

141. *Id.* at 724.

142. *Aka v. Jefferson Hospital Ass’n Inc.*, 42 S.W.3d 508 (Ark. 2001).

143. *Chatelain v. Kelley*, 910 S.W.2d 215 (Ark. 1995).

144. *Aka*, 42 S.W.3d at 519.

145. *Id.* at 515.

146. *Id.* at 516.

act, in a criminal act, it had defined a person to include “an unborn child in utero at any stage of development.”¹⁴⁷ Further, the court looked at public policy and found that the “people’s passage of Amendment 68 . . . declares that “[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth.”¹⁴⁸ The court concluded that there was, therefore, sufficient reason to break from precedent, and that a viable fetus was a person under the state’s wrongful death act.¹⁴⁹

4. Colorado

In *Espadero v. Feld*,¹⁵⁰ the court held that a viable fetus was a person within the meaning of Colorado’s wrongful death act.¹⁵¹ The court stated that it was likely that the state’s legislature “gave no thought” to whether the word person, as used in this statute, included a fetus.¹⁵² Therefore, the court looked to the legislature’s intent in enacting the wrongful death statute.¹⁵³ The court concluded that the intent was to preserve and protect human life and that if it barred this claim, it would “frustrate the legislature’s intent.”¹⁵⁴ Additionally, it would be inequitable to permit a cause of action for fetal injury suffered by a viable fetus, but deny a cause of action if that injury was so severe that it caused death.¹⁵⁵ The court concluded, therefore, that there was a cause of action for the death of this full-term, viable fetus.¹⁵⁶

5. Connecticut

In *Gorke v. Le Clerc*,¹⁵⁷ the court held that the estate of a stillborn, viable fetus could bring a cause of action for the wrongful death of this fetus.¹⁵⁸ The court relied on two superior court decisions¹⁵⁹ that had allowed recovery for fetal injuries when the child was later born alive.¹⁶⁰

147. *Id.* (quoting ARK. CODE ANN. § 5-1-102,(13)(B)(i)(Mitchie 1999)).

148. *Id.* at 517 (quoting ARK. CONST. amend. 68, § 2).

149. *Id.* at 518.

150. *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986).

151. *Id.* at 1484.

152. *Id.* at 1483.

153. *Id.*

154. *Id.*

155. *Id.* at 1484.

156. *Espadero v. Feld*, 649 F. Supp. 1480, 1484 (D. Colo. 1986).

157. *Gorke v. Le Clerc*, 181 A.2d 448 (Conn. Super. Ct. 1962).

158. *Id.* at 451.

159. *Tursi v. New England Windsor Co.*, 111 A.2d 14 (Conn. Super. Ct. 1955) ; *Prates v. Sears, Roebuck & Co.*, 118 A.2d 633 (Conn. Super. Ct. 1955).

160. *Gorke*, 181 A.2d at 451.

“Implicit in the principle that damages for non-fatal prenatal injuries to a viable fetus are recoverable is a recognition that there exists to such an unborn child a duty of care for the breach of which the wrongdoer may be held liable.”¹⁶¹ The court reasoned that because this fetus was capable of living independently at the time it was injured, it should make “no difference in liability whether the wrongfully inflicted injuries to the viable fetus result[ed] in death just prior to birth or in death just after birth.”¹⁶²

6. Delaware

In *Worgan v. Greggo & Ferrara, Inc.*,¹⁶³ the court held that the administrator for the estate of a stillborn, viable fetus could maintain a wrongful death cause of action.¹⁶⁴ The court examined opinions from outside jurisdictions and noted that most had found that a viable fetus has a separate existence from its mother and, as such, was “entitled to sue either on its own behalf or through an administrator, depending upon whether it survived the accident.”¹⁶⁵ Following these other jurisdictions, the court concluded that a wrongful death claim could be maintained in this case.¹⁶⁶

7. Hawaii

In *Wade v. United States*,¹⁶⁷ the court held that a wrongful death cause of action could be maintained if a stillborn fetus was viable at the time of the death.¹⁶⁸ Having no Hawaii cases on point, the court surveyed other jurisdictions and concluded that “principles of fairness and justice” required it to recognize a cause of action here because it would be unfair to permit a wrongful death cause of action for a child who died right after birth as a result of a prenatal injury, but deny a wrongful death cause of action on behalf of one who died just before his or her birth from the prenatal injury.¹⁶⁹ The court further stated that it made no sense to deny this cause of action because it would only serve

161. *Id.*

162. *Id.*

163. *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956).

164. *Id.* at 557.

165. *Id.* at 558.

166. *Id.*

167. *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990).

168. *Id.* at 1579.

169. *Id.*

to immunize the tortfeasor from liability for causing the greater harm.¹⁷⁰ The court followed the majority of courts in other jurisdictions and held that, in its best estimate, the Hawaii Supreme Court would allow “a cause of action for the wrongful death of a viable fetus who could have sustained life outside the womb,” and that it would “limit the cause of action to [the] wrongful death of a viable fetus only.”¹⁷¹

8. Idaho

In *Volk v. Baldazo*,¹⁷² the Idaho Supreme Court held that there was a cause of action under the wrongful death act for the death of a stillborn, viable fetus.¹⁷³ Here, the court began by stating that before the wrongful death act would apply, there must first be the right “to maintain an action for the injury” if the fetus had survived.¹⁷⁴ The court recognized that the right to bring a cause of action for injury was “to be decided under the common law of torts and [it] is not controlled by legislative intent.”¹⁷⁵ So, based on a majority of opinions from other jurisdictions, the court held that a cause of action for prenatal injuries was available to a viable fetus who was later born alive.¹⁷⁶ Thus, this fetus would have had a cause of action for the injuries suffered if it had been born alive.¹⁷⁷ Next, the court stated that the wrongful death act had two purposes: provide compensation and “deter wrongful conduct.”¹⁷⁸ The court then concluded that if it denied this cause of action, it would subvert these legislative purposes, so it permitted the cause of action.¹⁷⁹

In *Santana v. Zilog, Inc.*,¹⁸⁰ the court held that there was no cause of action for the death of a previable fetus.¹⁸¹ Having no Idaho precedent to follow, the court looked to other jurisdictions for guidance.¹⁸² The court noted that most jurisdictions denied a wrongful death cause of action for a previable fetus.¹⁸³ Although it recognized several reasons

170. *Id.*

171. *Id.* In this case, the viability of the fetuses was at issue. *Id.* at 1579-80.

172. *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982).

173. *Id.* at 15.

174. *Id.* at 13.

175. *Id.*

176. *Id.*

177. *Id.* at 14.

178. *Volk*, 651 P.2d at 15.

179. *Id.*

180. *Santana v. Zilog, Inc.*, 95 F.3d 780 (9th Cir. 1996).

181. *Id.*

182. *Id.* at 783.

183. *Id.*

why other courts held this way, this court focused its analysis on the lack of “clear legislative direction.”¹⁸⁴ The court stated that only five states had recognized this type of claim, and because only one of those did so without “action by the legislature,” this court reasoned that the Idaho courts would have denied this claim until they too had a clear directive from the Idaho legislature.¹⁸⁵

9. Kansas

In *Hale v. Manion*,¹⁸⁶ the court, following precedent from outside jurisdictions, held that a stillborn, viable fetus was a person under the wrongful death act.¹⁸⁷ The court found it unnecessary to set forth its specific reasons for doing so and, instead, referred the reader to scholarly discussions on the subject.¹⁸⁸ But in *Humes v. Clinton*,¹⁸⁹ again following precedent from outside jurisdictions, the court held that there was no cause of action under the wrongful death act for the death of a preivable fetus.¹⁹⁰ The court reasoned that viability was necessary to maintain a wrongful death cause of action because “a nonviable fetus is not capable of living outside its mother’s womb,” so it “never bec[a]me an independent living person” who could have maintained a cause of action if death had not ensued.¹⁹¹ Further, the court stated that extending a cause of action to a preivable fetus was a policy decision best left to the legislature.¹⁹²

10. Kentucky

In *Mitchell v. Couch*,¹⁹³ the court held that a viable, stillborn fetus was a person within the meaning of the wrongful death act.¹⁹⁴ The court stated that “a viable unborn child is an entity within the meaning of the general word ‘person’ . . . because, biologically speaking, such a child is, in fact, a presently existing person, a living human being.”¹⁹⁵

184. *Id.* at 784.

185. *Id.* at 784, 786.

186. *Hale v. Manion*, 368 P.2d 1 (Kan.1962).

187. *Id.* at 3.

188. *Id.*

189. *Humes v. Clinton*, 792 P.2d 1032 (Kan. 1990).

190. *Id.* at 1037.

191. *Id.*

192. *Id.*

193. *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955).

194. *Id.* at 906.

195. *Id.* at 905.

11. Maryland

In *State v. Sherman*,¹⁹⁶ the court held that there was a cause of action for the death of a viable fetus.¹⁹⁷ The court, relying on a decision by the Court of Appeals of Maryland that recognized a child's cause of action for injuries incurred prenatally,¹⁹⁸ stated that it saw no reason why the cause of action "should be cut off because of the child's death before birth" because, it stated, "[t]he cause of action arose at the time of the injury."¹⁹⁹

And in *Group Health Ass'n v. Blumenthal*,²⁰⁰ the court held that a wrongful death cause of action could be maintained when a preivable fetus was born alive.²⁰¹ The court stated that "viability has no role in a case . . . where the child is born alive."²⁰² The court rejected the appellee's argument that this cause of action should be barred by the United States Supreme Court ruling in *Roe v. Wade*.²⁰³ The court stated that recognizing a wrongful death cause of action did "not impinge on the [Supreme] Court's decision in *Roe*" because the fact that the mother could have chosen to abort did "not lessen the alleged negligence leading to the child's premature birth."²⁰⁴

But in *Kandel v. White*,²⁰⁵ the court did not extend the cause of action to include a stillborn, preivable fetus.²⁰⁶ The court stated that there could be no wrongful death cause of action unless there was an "independent living person."²⁰⁷ And because a preivable stillborn fetus did not and could not live apart from its mother, no wrongful death action could be maintained.²⁰⁸

12. Massachusetts

In *Mone v. Greyhound Lines, Inc.*,²⁰⁹ the Massachusetts Supreme Court held for the first time that a viable fetus was a person under the

196. *State v. Sherman*, 198 A.2d 71 (Md. 1964).

197. *Id.* at 73.

198. *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951).

199. *Sherman*, 198 A.2d at 73.

200. *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198 (Md. 1983).

201. *Id.* at 1207.

202. *Id.* at 1206.

203. *Id.* at 1206 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

204. *Id.* at 1207.

205. *Kandel v. White*, 663 A.2d 1264 (Md. 1995).

206. *Id.* at 1267.

207. *Id.*

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

209. *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975).

state's wrongful death act.²¹⁰ Previously, the court had rejected the viability rule because it had no precedent to allow it; "it would be more appropriate for the Legislature to make such a change" and it would "subject the court to speculation and would not be easily administered under our statute."²¹¹ But here, the court reasoned that because the majority of jurisdictions now allowed a cause of action when a fetus was viable, there was precedent to rely on.²¹² Further, the court stated that it also had precedent to alter its "interpretation of statutory language[] in an area now considered a part of the common law."²¹³ Finally, the court said that "the nature of damages recoverable cannot justify denying a right of action."²¹⁴ Therefore, the court concluded that it could find neither "reason nor logic" to deny a cause of action for the death of this viable fetus.²¹⁵

In *Torigian v. Watertown News Co.*,²¹⁶ a previable fetus was born alive and died within a few hours.²¹⁷ The court, stating that in "the vast majority of cases where the present issue has arisen, recovery has been allowed," held that there was a cause of action under the wrongful death act.²¹⁸

Finally, in *Thibert v. Milka*,²¹⁹ the court confirmed its two prior decisions, but refused to extend its interpretation of person to a previable fetus that was not born alive.²²⁰ The court reasoned that to have a cause of action, the fetus must have had a "separate existence" from its mother, but "[w]here a nonviable fetus is stillborn, . . . the fetus could not have had an independent existence," and "therefore, [there is] no separate cause of action for its death."²²¹

13. Minnesota

In *Verkennes v. Corniea*,²²² the Supreme Court of Minnesota held

210. *Id.* at 920.

211. *Id.* at 917.

212. *Id.* at 918.

213. *Id.* at 919. To do so, the court relied on *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972), and *Diaz v. Eli Lily & Co.*, 300 N.E.2d 555 (Mass. 1973).

214. *Mone*, 331 N.E. 2d at 919.

215. *Id.*

216. *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967).

217. *Id.*

218. *Id.* at 927.

219. *Thibert v. Milka*, 646 N.E.2d. 1025 (Mass. 1995).

220. *Id.* at 1026.

221. *Id.* at 1027.

222. *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).

that there was a wrongful death cause of action for a stillborn, viable fetus.²²³ As a novel issue in 1949, the court recognized that a majority of courts would not recognize this cause of action, so it looked to the writings of legal scholars and the reasoning used by courts permitting a cause of action for prenatal torts, and stated that “where independent existence is possible and life destroyed[,] . . . a cause of action arises.”²²⁴

14. Mississippi

In *Rainey v. Horn*,²²⁵ the Mississippi Supreme Court held that a wrongful death cause of action was available for a stillborn, viable fetus.²²⁶ The court stated that “[w]hile the action in this case is a statutory one, . . . we look to the common law to determine the question before us.”²²⁷ The court reasoned that because a viable fetus was capable of an “independent existence from its mother,” it was “entitled to the protection of its person.”²²⁸

15. Montana

In *Strzelczyk v. Jett*,²²⁹ the Supreme Court of Montana held that a viable fetus was a person under the state’s wrongful death act.²³⁰ Under a different statute, the court had previously denied a cause of action for a stillborn, viable fetus, finding that it was not a minor child under the applicable statute.²³¹ In its interpretation of the present statute, the court then relied on the definition of an unborn child taken from another statute, which stated that “[a] child conceived but not yet born is . . . an *existing person*, so far as may be necessary for its interests in the event of its subsequent birth.”²³² Based on this definition, the court concluded that a stillborn, viable fetus was also a person under the state’s wrongful death act.²³³

Despite the *Strzelczyk* court’s reliance on this very broad definition

223. *Id.* at 841.

224. *Id.* at 840, 841.

225. *Rainey v. Horn*, 72 So.2d 434 (Miss. 1954).

226. *Id.* at 439-40.

227. *Id.* at 439.

228. *Id.*

229. *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994).

230. *Id.* at 733.

231. *Id.* at 731. In *Kuhnke v. Fisher* 683 P.2d 916, 919 (Mont. 1984), the court held that a stillborn, viable fetus was not a “minor child” under the wrongful death act.

232. *Strzelczyk*, 870 P.2d at 732 (citations omitted) (emphasis in original).

233. *Id.* at 733.

of an “existing person,” the court later denied a cause of action for a previable fetus that was not born alive.²³⁴ In *Blackburn v. Blue Mountain Women’s Clinic*, the court, relying on its opinion in *Kuhnke v. Fisher*,²³⁵ concluded without discussion that there was no cause of action for the death of a previable fetus.²³⁶

16. Nevada

In *White v. Yup*,²³⁷ the Nevada Supreme Court held that there was a wrongful death cause of action for the stillbirth of a viable fetus.²³⁸ First, the court, following the majority of other jurisdictions,²³⁹ held that Nevada recognized a cause of action for prenatal injuries.²⁴⁰ Second, the court examined opinions from other jurisdictions and held, “based on the trend of modern authority,” that there was a cause of action for the death of a viable fetus.²⁴¹

17. New Hampshire

In *Poliquin v. MacDonald*,²⁴² the New Hampshire Supreme 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 . . . [but] if a fetus is non-viable at the time of injury and dies in the womb its representative can maintain no action” under the wrongful death act.²⁴³ The court stated that because “[t]he common law ha[d] always been most solicitous for the welfare of the fetus in connection with its inheritance rights as well as protecting it under the criminal law, . . . a child [who] can live separate and apart from its mother” should be permitted to recover for prenatal injuries.²⁴⁴ And if it dies as a result of those injuries suffered prenatally while it was viable, “an action for

234. *Blackburn v. Blue Mountain Women’s Clinic*, 951 P.2d 1 (Mont. 1997).

235. *Kuhnke v. Fisher*, 683 P.2d 916, 919 (Mont. 1984).

236. *Blackburn*, 951 P.2d at 6. It should be noted that it was a viable fetus that died in *Kuhnke*, and according to this court’s opinion in *Strzelczyk v. Jett*, the statutory basis for the claim brought in *Kuhnke* was amended in 1987. *Strzelczyk*, 870 P.2d at 732.

237. *White v. Yup*, 458 P.2d 617 (Nev. 1969).

238. *Id.* at 623-24.

239. The court did not specify its basis for the holding other than the weight of authority. *Id.* at 621.

240. *Id.*

241. *Id.* at 623.

242. *Poliquin v. MacDonald*, 135 A.2d 249 (N.H. 1957).

243. *Id.* at 251 (citations omitted).

244. *Id.*

recovery may be maintained on its behalf.”²⁴⁵

But in *Wallace v. Wallace*,²⁴⁶ the court held that there was no wrongful death claim available for a stillborn, previable fetus.²⁴⁷ The court stated that the question it had to answer was not “when life begins” but when the court should recognize a cause of action.²⁴⁸ “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”²⁴⁹ “In other words, life may begin with conception, but causes of action do not.”²⁵⁰

18. New Mexico

In *Salazar v. St. Vincent Hospital*,²⁵¹ the court held that a viable fetus was a person under the state’s wrongful death act.²⁵² The court, rather than relying on a common-law argument, evaluated the state’s criminal statutes in effect at the time that the wrongful death act was created.²⁵³ The court stated that because a viable fetus was protected “in legislation which dealt with offenses against ‘lives and persons,’” the legislature intended for a viable fetus to be “protected by legislation dealing with lives and persons.”²⁵⁴

In 1995, the New Mexico Supreme Court held that a previable fetus who was born alive was not a person under the state’s wrongful death act.²⁵⁵ “On this issue, we find no clear legislative directive.”²⁵⁶ Therefore, relying on persuasive precedent, the court held that “[a] nonviable fetus is incapable of living outside its mother’s womb and cannot be regarded as a separate entity capable of maintaining an independent action in its own right.”²⁵⁷ The court reasoned that absent a directive from the legislature, “we consider it sound statutory

245. *Id.*

246. *Wallace v. Wallace*, 421 A.2d 134 (N.H. 1980).

247. *Id.* at 137.

248. *Id.* at 136.

249. *Id.* The court said that legislative inaction should not be considered, and it noted that “it would be incongruous for a mother to have . . . [the] right to deliberately destroy a nonviable fetus and at the same time for a third person to be subject to liability . . . [for] negligent acts.” *Id.* at 137 (citations omitted).

250. *Id.*

251. *Salazar v. St. Vincent Hospital*, 619 P.2d 826 (N.M. Ct. App. 1980).

252. *Id.* at 830.

253. *Id.* at 829-30.

254. *Id.* at 830.

255. *Miller v. Kirk*, 905 P.2d 194 (N.M. 1995).

256. *Id.* at 195.

257. *Id.* at 197.

interpretation to limit the right to maintain an action to a viable fetus.”²⁵⁸

19. North Carolina

In 1987, overruling two court of appeals opinions, the North Carolina Supreme Court held that a viable fetus was a person under the state’s wrongful death act.²⁵⁹ Although the legislature had not amended the statute since the prior decisions, the court stated that its inaction and silence did not imply its approval.²⁶⁰ The court stated that, therefore, there was no apparent legislative intent, and it turned to the plain meaning of the statute.²⁶¹ The court again concluded that the words used provided no “clear-cut answer” to whether a viable fetus was a person, so it turned to common law claims for injuries to fetuses.²⁶² “It would be logical and consistent with these decisions, and would further the policy of deterring dangerous conduct that underlies them, to allow such claims when the fetus does not survive.”²⁶³ Further, the court analyzed the recent legislative revision in another statute that stated that “human life is inherently valuable,”²⁶⁴ and it concluded that a wrongful death action should be allowed here.²⁶⁵ Despite reaching this conclusion, the court limited the damages available in the action, specifically excluding as too speculative damages for lost income, loss of services, and loss of society and companionship.²⁶⁶

20. North Dakota

When the North Dakota Supreme Court heard *Hopkins v. McBane*,²⁶⁷ a wrongful death claim, it had not yet decided whether it would allow a cause of action for prenatal torts if the child was later born alive.²⁶⁸ Here, the court concluded that it would allow both claims.²⁶⁹ In its reasoning, the court relied on the “nearly unanimous

258. *Id.*

259. *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987) (overruling *Yow v. Nance*, 224 S.E.2d 292 (N.C. Ct. App. 1976); *Cardwell v. Welch*, 213 S.E.2d 382 (N.C. Ct. App. 1975)).

260. *Id.* at 490.

261. *Id.*

262. *Id.* at 491-92.

263. *Id.* at 491.

264. *Id.* (quoting N.C.G.S. § 28A-18-2).

265. *Id.* at 493-94.

266. *Id.* at 494.

267. *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984). The case was heard again by the court in 1988 on procedural and damages issues. *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988).

268. *Hopkins*, 359 N.W.2d at 864.

269. *Id.* at 864, 865.

weight of authority” and recognized without discussion that it would permit a cause of action for a prenatal tort if it was followed by a live birth.²⁷⁰ After settling that issue, the court, attempting to determine legislative intent in the wrongful death statute, looked to a different statute, which provided a definition of when an unborn child was to be deemed a person.²⁷¹ The court stated that the legislative intent in that statute was to “ensure and to protect the interests of a child subsequent to its conception but prior to its birth.”²⁷² The court then extended the legislative intent expressed in that statute to the applicable wrongful death statute, and it held that it should recognize a cause of action for the wrongful death of a stillborn, viable fetus.²⁷³

21. Ohio

In *Werling v. Sandy*,²⁷⁴ the Ohio Supreme Court held for the first time that there was a wrongful death action brought on behalf of a stillborn, viable fetus.²⁷⁵ Ohio had already recognized that a child born alive could bring a cause of action for injuries he or she suffered prenatally.²⁷⁶ Thus, the court stated that to deny this claim would only benefit the tortfeasor for causing the greater harm of death.²⁷⁷ And it would thwart the remedial nature of the wrongful death act.²⁷⁸ The court also stated that its decision was consistent with the United States Supreme Court’s holding in *Roe v. Wade*²⁷⁹ because the line of demarcation here, like in *Roe*, was viability.²⁸⁰

In 1993, an Ohio court of appeals was asked to recognize a cause of action for the stillbirth of previable fetus.²⁸¹ The plaintiff requested that the court adopt the “quickness” test used in Georgia.²⁸² Although the court of appeals seemed motivated to accept the plaintiff’s argument, it left the decision to its state supreme court, and it denied the cause of

270. *Id.* at 864.

271. *Id.*

272. *Id.*

273. *Id.* at 865.

274. *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985).

275. *Id.* at 1056.

276. *Id.* at 1055.

277. *Id.*

278. *Id.*

279. *Roe v. Wade*, 410 U.S. 113 (1973).

280. *Werling*, 476 N.E. 2d at 1056.

281. *Egan v. Smith*, 622 N.E.2d 1191 (Ohio Ct. App. 1993).

282. *Id.* at 1193. *See infra* notes 354-57 and accompanying text.

action.²⁸³

22. Oklahoma

In *Evans v. Olson*,²⁸⁴ the Oklahoma Supreme Court overruled its previous decisions²⁸⁵ and held there was a wrongful death cause of action for the stillbirth of a viable fetus.²⁸⁶ The court stated that a wrongful death cause of action could be maintained if the decedent would have had a right to bring an action if he or she had survived the injury.²⁸⁷ The court then reasoned that because a child who was later born alive could bring a claim for injuries suffered prenatally, a cause of action could also be maintained by the fetus's estate in a wrongful death claim.²⁸⁸

In *Guyer v. Hugo Publishing Co.*,²⁸⁹ the court held that there was no wrongful death cause of action for the miscarriage of a previable fetus.²⁹⁰ The court stated that binding case law still compelled it to exclude this cause of action under the wrongful death act because *Evans*²⁹¹ only changed case law regarding viable fetuses.²⁹² Therefore, it was bound to hold that there was no wrongful death cause of action for a miscarried, previable fetus.²⁹³

But in *Nealis v. Baird*,²⁹⁴ the court held that a born alive, previable fetus was "one" under the wrongful death act.²⁹⁵ The court stated that a live birth conveyed legal status to the previable fetus, even if he was unable to sustain life.²⁹⁶ The court found no conflict between this holding and a woman's constitutional right to an abortion because "[w]here both the state and the mother have identical interests in

283. *Egan*, 622 N.E.2d at 1193-94. The court stated: "[T]here is . . . no reason why the State's compelling interest in protecting human life should not extend throughout pregnancy rather than coming into existence only at the point of viability." *Id.* at 1194 (quoting *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 494 (1989)).

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

285. *Howell v. Rushing*, 261 P.2d 217 (Okla. 1953); *Padillow v. Elrod*, 424 P.2d 16 (Okla. 1967).

286. *Evans*, 550 P.2d at 925.

287. *Id.* at 927.

288. *Id.* at 927-28.

289. *Guyer v. Hugo Publishing Co.*, 830 P.2d 1393 (Okla. Ct. App. 1991).

290. *Id.* at 1394.

291. *Evans*, 550 P.2d at 924.

292. *Guyer*, 830 P.2d at 1394.

293. *Id.*

294. *Nealis v. Baird*, 996 P.2d 438, 455 (Okla. 1999).

295. *Id.* at 452-53.

296. *Id.* at 453, 454.

preserving the child's life and in vindicating harm resulting in its death, *Roe* poses no legal obstacle."²⁹⁷

23. Oregon

In *Libbee v. Permanente Clinic*,²⁹⁸ the court, following the majority of other jurisdictions, held that there was a wrongful death cause of action for the death of a stillborn, viable fetus.²⁹⁹ The court also stated that this holding was consistent with its previous holding³⁰⁰ that a child later born alive could recover for injuries suffered prenatally, at least when the child was viable at the time the injury occurred.³⁰¹ Further, the court stated that its position was consistent with the United States Supreme Court's decision in *Roe v. Wade*,³⁰² because it too was relying on viability to create the cause of action here.³⁰³

In *LaDu v. Oregon Clinic., P.C.*,³⁰⁴ an Oregon court of appeals, *en banc*, held that a previable fetus was not a person under the Oregon wrongful death act.³⁰⁵ In interpreting the word "person" used in the act, the court stated that the plain meaning of the word at the time the statute was enacted did not include a previable fetus.³⁰⁶ Further, even under statutes that allow an unborn to inherit a share of an estate, it must still be born alive before it inherits, so the rights conferred to the unborn under these statutes did not lead the court to conclude that the legislature intended the word person to include a previable fetus.³⁰⁷ Finally, the court examined the anti-abortion statute in effect when the wrongful death act was created, but it found no contextual relevance.³⁰⁸ Therefore, the court concluded that the wrongful death statute did not provide a cause of action for the death of a previable fetus.³⁰⁹

297. *Id.* at 455.

298. *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974).

299. *Id.* at 640.

300. *Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955).

301. *Libbee*, 518 P.2d at 639.

302. 410 U.S. 113 (1973).

303. *Libbee*, 518 P.2d at 640.

304. *LaDu v. Oregon Clinic., P.C.*, 998 P.2d 733 (Or. Ct. App. 2000).

305. *Id.* at 738.

306. *Id.* at 735.

307. *Id.* at 736.

308. *Id.*

309. *Id.*

24. Pennsylvania

In *Amadio v. Levin*,³¹⁰ a divided Pennsylvania Supreme Court held for the first time that there was a wrongful death cause of action for the stillbirth of a viable fetus.³¹¹ In very broad language, the majority opinion stated that it had “acknowledge[d] a child en ventre sa mere to be an ‘individual,’ ‘having existence as a separate creature from the moment of conception.’”³¹² The court stated that it would “[n]o longer sanction a legal doctrine that enables a tortfeasor who causes death to escape full liability.”³¹³

But in *Coveleski v. Bubnis*,³¹⁴ the Pennsylvania Supreme Court held that there was no cause of action for the death of a previable fetus.³¹⁵ The court, relying on cases from other jurisdictions, rejected the claim and stated that it would wait for legislative direction before expanding the cause of action to a previable fetus.³¹⁶ Thus, the court stated that in Pennsylvania the death of a fetus could be the basis for a wrongful death claim only if the fetus was born alive or if the fetus was “capable of an independent existence at the time of death.”³¹⁷

25. Rhode Island

In *Presley v. Newport Hospital*,³¹⁸ the Rhode Island Supreme Court first considered whether a cause of action for the death of a viable fetus could be brought under the state’s wrongful death act.³¹⁹ Here, the court held that it could.³²⁰ The court reasoned that because it recognized a cause of action for prenatal injuries, it found no “perceptible reason why there should be a legally recognized difference between a death that occurs immediately before birth and one that occurs immediately after.”³²¹ Additionally, the court said that “it makes poor sense to sanction a legal doctrine that enables the tortfeasor whose deed brings

310. *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985).

311. *Id.* at 1089.

312. *Id.* at 1087.

313. *Id.* at 1088.

314. *Coveleski v. Bubnis*, 634 A.2d 608 (Pa. 1993).

315. *Id.* at 610.

316. *Id.* The court pointed out that the Illinois legislature had done just that. *Id.*

317. *Id.* See also *Hudak v. Georgy*, 634 A.2d 600 (Pa. 1993) (holding that there was a cause of action under the wrongful death act for triplets that were previable at the time of birth, but who were born alive and survived for a short period of time).

318. *Presley v. Newport Hospital*, 365 A.2d 748 (R.I. 1976).

319. *Id.*

320. *Id.* at 754.

321. *Id.* at 753.

about a stillbirth to escape liability but that renders one whose wrongdoing is less severe answerable . . . because his victim survives birth.”³²² Although it was, obviously, not necessary in this case, the court stated that “the decedent, whether viable or nonviable, was a ‘person’ within the meaning of the Wrongful Death Act.”³²³

Although this clear statement would imply that the court was not requiring that the fetus be viable,³²⁴ in *Miccolis v. Amica Mut. Ins., Co.*,³²⁵ the court held that a previable fetus was not a person under the Wrongful Death Act.³²⁶ There the court stated:

[T]he 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* . . . is merely dictum and has no precedential value, . . . [and] [w]e do not believe that the Legislature intended a nonviable fetus to be defined as a “person” within the meaning of the wrongful-death statute.³²⁷

26. South Carolina

In *Fowler v. Woodward*,³²⁸ the court held that a stillborn, viable fetus was a person under the wrongful death act. The court relied on its previous decision in a prenatal tort case where the child was later born alive, which stated that a fetus “capable of independent life apart from its mother is a *person*.”³²⁹ The court reasoned that if it is a person for purposes of bringing a prenatal injury claim after birth, it is a person entitled to “maintain an action . . . if death had not ensued,” as required under the state’s wrongful death act.³³⁰ The court concluded that the death of a viable fetus fulfilled all the requirements set out in the wrongful death act.³³¹

But in *Crosby v. Glasscock Trucking Co.*,³³² the court held that there was no cause of action for a stillborn, previable fetus.³³³

322. *Id.*

323. *Id.* at 754.

324. In fact, the court stated that it was disregarding the allegation of viability. *Id.*

325. *Miccolis v. Amica Mut. Ins., Co.*, 587 A.2d 67 (R.I. 1991).

326. *Id.* at 71.

327. *Id.* (citations omitted).

328. *Fowler v. Woodward*, 138 S.E.2d 42, 45 (S.C. 1964).

329. *Id.* at 44 (quoting *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960)) (emphasis in the original).

330. *Id.* (quoting S.C. CODE ANN. § 10-1951 (Law Co-Op 1962)).

331. *Id.*

332. *Crosby v. Glasscock Trucking Co.*, 532 S.E.2d 856 (S.C. 2000).

333. *Id.* at 857.

Consistent with the majority of jurisdictions, this court reasoned that only by legislative action could it extend a wrongful death action to include a preivable fetus.³³⁴ In *dictum*, and in response to a dissenting opinion, the court stated that if this fetus had been born alive, that alone was evidence that it was viable because it lived independent from its mother.³³⁵

27. Vermont

In *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*,³³⁶ the Vermont Supreme Court first held that a stillborn, viable fetus was a person under the wrongful death act.³³⁷ The court recognized that there was a split in authority, but it reasoned that the cause of action should be recognized because once a fetus reached viability, there was no reason to permit a cause of action if the death occurred just after birth, but to deny it if it occurred just before birth.³³⁸ Further, after viability, the fetus was a “presently existing person” because it had the ability to survive separately from its mother.³³⁹ Finally, the court recognized that to deny this claim would permit the tortfeasor to benefit from the greater harm caused (death), when the tortfeasor would be liable for the lesser harm (injury) caused to a fetus at this stage of development.³⁴⁰

28. Washington

In *Moen v. Hanson*,³⁴¹ the *en banc* Washington Supreme Court, analyzing a claim for the wrongful death of a stillborn, viable fetus, first acknowledged that this was being brought as a wrongful death action, and not as a survival action.³⁴² The court held that this fetus was a minor child within the meaning of the state’s wrongful death act.³⁴³ The court stated that there was no “lower age limitation . . . implied” by the term minor child used to create this cause of action, which was enacted for the

334. *Id.*

335. *Id.*

336. *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 425 A.2d 92 (Vt. 1980).

337. *Id.* at 94-95.

338. *Id.*

339. *Id.* (quoting *White v. Yup*, 458 P.2d 617, 622 (Nev. 1969)).

340. *Id.* at 94-95.

341. *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975).

342. *Id.* at 266. A Washington court of appeals held that a stillborn, viable fetus was also a person under the state’s survival statute in *Cavazos v. Franklin*, 867 P.2d 674 (Wash. Ct. App. 1994).

343. *Moen*, 537 P.2d at 268.

benefit of the parents.³⁴⁴ Further, it stated that most jurisdictions have recognized this cause of action for a viable fetus and that problems that may arise related to causation and damages should not prevent the cause of action.³⁴⁵

29. Wisconsin

In *Kwaterski v. State Farm Mutual Automobile Ins. Co.*,³⁴⁶ the Wisconsin Supreme Court held that a stillborn, viable fetus was a person under the state's wrongful death act.³⁴⁷ The court, finding that most jurisdictions would recognize this cause of action,³⁴⁸ stated that there were four reasons to allow recovery here. (1) "A viable child is capable of independent existence and therefore should be recognized as a separate entity entitled to the protection of the law." (2) An unborn child is protected under other laws. (3) To deny the claim would be to allow the tortfeasor to benefit from causing the greater harm, as a cause of action for injuries only would have been available. (4) The family has suffered a loss even if the fetus dies before it is born.³⁴⁹

C. Previability - No Live Birth Requirement

A clear minority of six (arguably seven)³⁵⁰ jurisdictions provide a cause of action for the wrongful death of an embryo or previable fetus.³⁵¹ Of the six, five permit the cause of action at any point during gestation.³⁵² Georgia alone uses "quickenings" as the point when a wrongful death action is recognized.³⁵³

1. Georgia

In *Porter v. Lassiter*,³⁵⁴ the statutory basis for the claim raised provided that a parent could "recover for the homicide of a child."³⁵⁵

344. *Id.* at 267.

345. *Id.* at 267-68.

346. *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W. 2d 107 (Wis. 1967).

347. *Id.* at 111-12.

348. *Id.* at 110.

349. *Id.* at 110-11.

350. Michigan's case and codified law are discussed separately in Section IV. *See infra* notes 386-439 and accompanying text.

351. *See infra* notes 354-85 and accompanying text.

352. *See infra* notes 358-85 and accompanying text.

353. *See infra* notes 354-57 and accompanying text.

354. *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955)

355. *Id.* at 102 (citation to statute omitted).

The court started its analysis by stating that under Georgia's criminal laws, the killing of a "quick" child was murder, while the killing of a child before "quickening" was only a misdemeanor.³⁵⁶ Based on this distinction and the words of the statute creating the cause of action here, the court held that there could be no cause of action for the death of a fetus before it was "quick."³⁵⁷

2. Illinois

An Illinois statute provides, "The state of gestation or development of a human being . . . at death, shall not foreclose maintenance of any cause of action . . . arising from the death of a human being caused by wrongful act, neglect, or default."³⁵⁸ In *Seef v. Sutkus*,³⁵⁹ the fetus was stillborn at 38-weeks gestational age.³⁶⁰ The court there held that loss of society damages were appropriate because the statute defined this fetus as a person, and under Illinois law, loss of society damages were appropriate pecuniary damages under the wrongful death act.³⁶¹

3. Louisiana

In *Danos v. St. Pierre*,³⁶² the Louisiana Supreme Court first held that there was no cause of action for the death of a six or seven month gestational age fetus, but on rehearing, a divided court held that there was.³⁶³ The court stated that to bar this cause of action would "benefit the tortfeasor who causes a more serious injury, since the tortfeasor would have to pay damages if his fault cause[d] a child to be born disabled, but would not have to pay any damages if his fault cause[d] prenatal death."³⁶⁴ The court also relied on a "recent legislative pronouncement . . . that a human being exists from the moment of fertilization and implantation."³⁶⁵ Finally, the court stated "We believe the infant is a child from the moment of its conception . . . and that the injury or killing of it, in its mother's womb, is covered by the statute . . .

356. The court defined a quick unborn child as one who is "so far developed as to move or stir in the mother's womb." *Id.* (citations omitted).

357. *Id.* at 103.

358. 740 ILL. COMP. STAT. 180/2.2 (1989).

359. *Seef v. Sutkus*, 583 N.E.2d 510 (Ill. 1991).

360. *Id.* at 511.

361. *Id.*

362. *Danos v. St. Pierre*, 402 So.2d 633 (La.1981).

363. *Id.* at 639.

364. *Id.* at 638.

365. *Id.*

giv[ing] the bereaved parents a right of action against the guilty parties for their grief, and mental anguish.”³⁶⁶

4. Missouri

In Missouri, a state constitutional provision requires that “[t]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all rights, privileges and immunities available to other persons.”³⁶⁷ Applying this constitutional provision to the state’s wrongful death statute, the Missouri Supreme Court stated: “[W]e 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.”³⁶⁸

5. South Dakota

In South Dakota, there is a cause of action “[w]hensoever the death or injury of a person, including an unborn child, shall be caused by a wrongful act.”³⁶⁹ In *Wiersma v. Maple Leaf Farms*,³⁷⁰ the wrongful death claim involved a fetus of seven-weeks gestational age.³⁷¹ The court held that the language of the statute provided a cause of action for the death of this pre-viable fetus.³⁷² The court reasoned that because the legislature had added the words “including an unborn child” to the statute in 1984, it intended to expand “the class of persons covered by the statute” beyond those born alive and viable fetuses.³⁷³ Further, the court reasoned that when the words of a statute are clear, like the word unborn here, it was confined to interpret those words according to their plain meaning.³⁷⁴ And the court stated that this interpretation created no constitutional issue regarding a woman’s right to abortion because “[a] choice to abort sanctions a mother’s decision, not someone else’s.”³⁷⁵

366. *Id.* at 639 (quoting *Johnson v. South N.O. Lt. & Traction, Co.*, No. 9,048 (Orl. App. 1923) *cert. den.* No. 26,443 (La. 1924)).

367. MO. REV. STAT. § 1.205 (1969).

368. *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995) (*en banc*).

369. S.D. CODIFIED LAWS § 21-5-1 (Mitchie 1984).

370. *Wiersma v. Maple Leaf Farms*, 543 N.W. 2d 787 (S.D. 1996).

371. *Id.* at 789.

372. *Id.* at 791.

373. *Id.* at 790.

374. *Id.* at 790-91.

375. *Id.* at 791.

6. West Virginia

In West Virginia, the term person, as used in the wrongful death act, encompasses a previable embryo or fetus.³⁷⁶ In *Farley v. Sartin*,³⁷⁷ plaintiff's pregnant wife was killed in an auto accident.³⁷⁸ At the time of the accident, she was 18-22 weeks pregnant.³⁷⁹ The court held that the plaintiff could maintain a cause of action for the death of the previable fetus under the state's wrongful death action.³⁸⁰ The court began analyzing the claim by reviewing the purpose of the wrongful death act and cases addressing liability for injuries suffered prenatally.³⁸¹ The court reasoned that because the wrongful death act was intended to prevent a tortfeasor from escaping "all liability when the injuries were severe enough to kill the victim[],"³⁸² and because a child who was later born alive could recover for an injury suffered previability,³⁸³ if it did not permit a wrongful death cause of action for a previable fetus, then it would defeat the intended purpose of the wrongful death act.³⁸⁴ "In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death."³⁸⁵

IV. WRONGFUL DEATH ACTION FOR AN UNBORN EMBRYO OR FETUS IN MICHIGAN

A. *Historically*

In 1894, the Michigan Supreme Court first considered whether damages were available for the death of an unborn embryo or fetus.³⁸⁶ The lower court had permitted the jury to award damages to the mother for the loss of "society, enjoyment, and prospective services" of the unborn embryo or fetus.³⁸⁷ The court reasoned that it "would not be

376. *Farley v. Sartin*, 466 S.E.2d 522, 523 (W.Va. 1995).

377. *Farley*, 466 S.E.2d at 522.

378. *Id.* at 523.

379. *Id.*

380. *Id.*

381. *Id.* at 525-29.

382. *Id.* at 525.

383. *Id.* at 528.

384. *Id.* at 533-34.

385. *Id.* at 533.

386. *Tunncliffe v. Bay Cities Consol. Ry. Co.*, 61 N.W. 11 (Mich. 1894). The court did not discuss the gestational age of this embryo or fetus. *See id.*

387. *Id.* at 12.

competent for the jury to . . . attempt to compensate for the sorrow and grieving of the mother,³⁸⁸ and the court discussed the speculative nature of the damages.³⁸⁹ But the court did state that the mother's own physical pain and mental suffering was compensable, which "involv[ed] to some extent a consideration of the nature of the injury, and cannot exclude from the consideration . . . [the] mental suffering of the mother by reason of such an injury [which] would be more intense than in the case of the ordinary fracture of a limb."³⁹⁰

In a 1968 plurality opinion, the Michigan Supreme Court held that a viable fetus was not a person under the wrongful death statute.³⁹¹ In the main opinion, the court stated that, because the statute was unambiguous and in derogation of the common law, it was constrained to interpret it as it was written.³⁹²

In 1971, in *O'Neill v. Morse*, the Michigan Supreme Court overruled its 1968 plurality decision.³⁹³ The court held that there was a claim under the wrongful death statute for the death of an unborn viable fetus.³⁹⁴ In its reasoning, the court began with its recent decision where it allowed an eight-year-old child to recover for injuries he suffered prenatally.³⁹⁵ The court then stated that because there was a cause of action for prenatal injuries, and because the wrongful death act was intended to preserve an action that the decedent could have brought if he or she had lived, it should permit this wrongful death cause of action for the injuries suffered by this viable, unborn fetus.³⁹⁶ The court also refuted similar contrary reasoning from *Powers v. City of Troy*, that an unborn fetus was not a person.³⁹⁷ The *O'Neill* court stated that birth cannot be the point at which we measure where life begins because "[a]

388. *Id.*

389. *Id.*

390. *Id.*

391. *Powers v. City of Troy*, 156 N.W.2d 530 (Mich. 1968).

392. *Id.* (citing *Hogan v. McDaniel*, 319 S.W.2d 221, 225 (Tenn. 1958)).

393. *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971).

394. *Id.* at 788.

395. *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971).

396. *O'Neill*, 188 N.W.2d at 786. Interestingly, if this reasoning was followed to its logical conclusion, this case would create a cause of action for the death of a previable unborn as well because, in *Womack*, the child was injured at four months gestational age. *Womack*, 187 N.W.2d at 219. Thus, he was injured previability and allowed to recover. *Id.* at 222. Therefore, based on the *O'Neill* court's reasoning, if death occurred as a result of an injury suffered previability, the wrongful death cause of action should be preserved under the common law rule of tort recovery permitted in *O'Neill*. Cf. *Martin v. St. John Hosp. & Med. Ctr. Corp.*, 517 N.W.2d 787 (Mich. Ct. App. 1994) (extending a cause of action for wrongful death for a viable fetus who died in utero as a result of a surgical procedure performed on the mother before the fetus's conception).

397. *O'Neil*, 188 N.W.2d at 786-88.

fetus having died within its mother's womb . . . will not come alive when separated from her. [And] a fetus living within the mother's womb . . . will not die when separated from her, unless the manner, the time[,] or the circumstances of separation constitute a fatal trauma."³⁹⁸

In *Toth v. Goree*,³⁹⁹ a fetus of three months gestational age was miscarried as a result of a car accident.⁴⁰⁰ The court held that a wrongful death cause of action could not be maintained because the fetus was not a person under the law.⁴⁰¹ The court began its analysis by revisiting two Michigan Supreme Court decisions: one that permitted an eight-year-old child to recover for a prenatal injury suffered previability (*Womack*),⁴⁰² and one that permitted a wrongful death cause of action of the death of a viable fetus (*O'Neill*).⁴⁰³ The *Toth* court concluded that the ruling in *Womack* was limited only to prenatal claims suffered previability that were later brought by a child who was born alive,⁴⁰⁴ and that the ruling in the *O'Neill* was limited only to the death of a viable fetuses.⁴⁰⁵ The court also evaluated this claim in light of the Supreme Court's decision in *Roe v. Wade*.⁴⁰⁶ The court reasoned that, in light of *Roe v. Wade*, "[i]f the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage."⁴⁰⁷ Finally, the court stated that because no other jurisdiction had permitted a wrongful death cause of action on behalf of a three-month gestational age, preivable fetus, it could not find a basis to permit one here without legislative action.⁴⁰⁸

In *Jarvis v. Providence Hospital*,⁴⁰⁹ the unborn fetus' mother was

398. *Id.* at 787.

399. *Toth v. Goree*, 237 N.W.2d 297 (Mich. Ct. App. 1975).

400. *Id.*

401. *Id.* at 302. See also *Carter v. Hutzal Hosp.*, 1997 WL 33344935, at *1 (Mich. Ct. App. Aug. 26, 1997) (confirming that "[t]he wrongful death act does not create a cause of action for a nonviable fetus not born alive").

402. *Id.* at 300 (discussing *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971)).

403. *Id.* (discussing *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971)).

404. *Id.* "The only issue in this case [*Womack*] is whether a common-law negligence action can be brought on behalf of a *surviving* child negligently injured during the fourth month of pregnancy." *Id.* (quoting *Womack*, 187 N.W.2d at 219) (emphasis added).

405. *Toth*, 237 N.W.2d at 302. The court in *Toth* stated, "[w]hile much of the language in *O'Neill* is ambiguous as regards viability, it does tend to exclude the nonviable fetus from its discussion." *Id.* at 300-01.

406. *Roe v. Wade*, 410 U.S. 113 (1973).

407. *Toth*, 237 N.W.2d at 303-04.

408. *Id.* at 302.

409. *Jarvis v. Providence Hospital*, 444 N.W.2d 236 (Mich. Ct. App. 1989).

exposed to hepatitis when the fetus was three and one-half months gestational age.⁴¹⁰ When the fetus was of eight months gestational age, the mother contracted hepatitis, and the unborn fetus died as a result.⁴¹¹ The court found that because the fetus was viable at the time of the death, the timing of the injury causing event was irrelevant, and the court held that there was a claim under the wrongful death act for this fetus' death.⁴¹²

A Michigan court again revisited the issue of whether there was a wrongful death cause of action for a previable fetus in *Fryover v. Forbes*.⁴¹³ In *Fryover*, the court summarily overruled the appellate court's holding that a wrongful death action was available for the death of an unborn fetus of 16-weeks gestational age.⁴¹⁴ The court, stated that there was no legislative intent to "create a cause of action for a nonviable fetus not born alive."⁴¹⁵

Despite the court's statement in *Fryover*, which seemed to indicate that either viability or live birth was required, in *McDowell v. Stubbs*⁴¹⁶ the court stated that viability was required before there was a cause of action for the death of a fetus.⁴¹⁷ In *McDowell*, twin fetuses were delivered at approximately 20 weeks gestation.⁴¹⁸ The fetuses had heart rates at one and five minutes after delivery, respectively.⁴¹⁹ One twin had some spontaneous movement.⁴²⁰ Hospital records indicated that the twins were "liveborn."⁴²¹ The twins were not viable at the time of their birth because of their gestational age.⁴²² Because the twins were born alive, the appellate court reasoned that there was no additional requirement that they also be viable.⁴²³ But the Michigan Supreme Court summarily reversed the judgment of the court of appeals,⁴²⁴

410. *Id.* at 237.

411. *Id.*

412. *Id.* at 238-39.

413. *Fryover v. Forbes*, 446 N.W.2d 292 (Mich. 1989).

414. *Fryover v. Forbes*, 439 N.W.2d 284 (Mich. Ct. App. 1989), *rev'd*, 446 N.W.2d 292 (Mich. 1989).

415. *Fryover*, 446 N.W.2d at 292.

416. *Estate of McDowell v. Stubbs*, 564 N.W.2d 463 (Mich. 1997).

417. *Id.*

418. *Estate of McDowell v. Stubbs*, 553 N.W.2d 634, 635 (Mich. Ct. App. 1996), *rev'd*, 564 N.W.2d 463 (Mich. 1997).

419. *Id.* at 635-36.

420. *Id.* at 636.

421. *Id.* at 635.

422. *Id.* at 636.

423. *Id.* at 637-38.

424. *McDowell*, 564 N.W.2d at 463.

without discussing the fact that the twins had been born alive.⁴²⁵ Instead, the court, relying on the decision in *Toth v. Goree*,⁴²⁶ which held that there was no cause of action for the death of a previable fetus that had not been born alive, focused solely on the fact that the McDowell twins were previable at the time that they were born alive, and it decided that there was no cause of action under the wrongful death act.⁴²⁷ In his dissent, Justice Cavanagh pointed out that Michigan followed the born-alive rule in criminal cases, and that the *Toth* court had not departed from the born-alive rule in its decision.⁴²⁸

B. 1999 Amendatory Act

1. History

On March 19, 1997, House Bill No. 4524 was introduced.⁴²⁹ The bill proposed an amendment to Michigan's wrongful death act, by providing a remedy for the death of "an individual," and defining the term "individual" to include "the live unborn offspring of a human being at any time or stage of development from conception to birth."⁴³⁰ The legislature also added 600.2922a, which would have codified the Michigan Supreme Court's decision in *Womack*.⁴³¹ Under this proposed amendment, the personal representative for the estate of the unborn embryo or previable fetus had the same right of recovery under the wrongful death act as was available in the event of the death of a viable

425. *Id.*

426. *Toth v. Goree*, 237 N.W.2d 297 (Mich Ct. App 1975).

427. *McDowell*, 564 N.W.2d at 463.

428. *Id.*

429. H.B. 4524, 1997 Leg., Reg. Sess. (Mich. 1997).

430. *Id.* The amendment would have changed the words "a person" to "an individual." *Id.* House Leg. Analysis, H.B. 4524, April 18, 1992. Both the bill as first proposed and the statute in its final form indicate that this is an "amendatory act." H.B. 4524. Although the final form of the 1999 law does not specifically state this it is amending the general wrongful death act, it need not do so to accomplish that change. See *People ex rel. Harrington v. Wands*, 23 Mich. 385 (1871); *Lucas v. Bd. of Co. Rd. Comm'rs*, 348 N.W.2d 670-71 (Mich. Ct. App. 1984) (stating that "amendment by implication is permitted without republishing or reenacting every previous statute affected by the new law").

431. *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971) (holding that a child who was negligently injured prenatally could bring a cause of action against the tortfeasor). The original wording of section 600.2922a of House Bill 4524 stated, "A person who wrongfully or negligently causes injury to an unborn child is liable for damages. As used in this section, 'unborn child' means the live unborn offspring of a human being at any time or stage of development from conception until birth." H.B. 4524, 1997 Leg., Reg. Sess. (Mich. 1997).

fetus or a person born alive, including the decedent's pain and suffering.⁴³²

By May 1998, all amendments proposed by House Bill No. 4524 were contained in 600.2922a.⁴³³ This substituted bill, passed by the House on May 27, 1998, and by the Senate on June 10, 1998, imposed liability on a tortfeasor for a wrongful or negligent act "against a pregnant individual" resulting "in a miscarriage or stillbirth . . . or physical injury to the embryo or fetus."⁴³⁴ The new law took effect January 1, 1999.⁴³⁵

A bill analysis published after the law was enacted stated that before the law went into effect, there may have been no way "for the [pregnant] woman or her family to secure civil" relief for these damages because "the [current] law allow[ed] wrongful death actions only for persons and viable fetuses."⁴³⁶ Opponents to the new law felt that any law "affording the embryo [or] fetus rights comparable to those now held by persons . . . effectively establish[ed] new rights for fetuses [or] embryos [which] could be subject to constitutional challenge."⁴³⁷ Despite concerns about the bill's focus "on the result of actions to the embryo or fetus, and not on injury to the pregnant woman,"⁴³⁸ the bill's enactment was supported by Right to Life of Michigan and Planned Parenthood Affiliates of Michigan.⁴³⁹

C. Analysis

Although the statute has not yet been interpreted in a published opinion,⁴⁴⁰ the legislature's apparent intent was to provide recovery for the death of an embryo or fetus, without regard to viability.⁴⁴¹ This intent is also consistent with current Michigan tort law that permits a

432. House Leg. Analysis, H.B. 4524, (April 18, 1997).

433. House Leg. Analysis, H.B. 4524, (May 11, 1997).

434. MICH. COMP. LAWS ANN. § 600.2922a (West 2000). Sub. H.B. 4524, 1998 Leg., Reg. Sess. (Mich. 1998).

435. The bill was signed into law on July 1, 1998 and became effective Jan. 1, 1999. Enrolled H.B. 4524, 1998 Leg., Reg. Sess. (Mich. 1998).

436. Senate Fiscal Agency, S.B. 346, p. 3 (Aug. 4, 1998).

437. *Id.* at 4.

438. *Id.* Interestingly, the law was later amended to add the word "death." S.B. 346, 2001 Leg., Reg. Sess. (Mich. 2001). MICH. COMP. LAWS ANN. § 600.2922a (West Supp. 2003).

439. House Leg. Analysis, H.B. 4524, (May 11, 1998). MICH. COMP. LAWS ANN. § 600.2922a, as it was worded when it went into effect on Jan. 1, 1999, contained the same wording as the bill supported by these groups in May of 1998.

440. In fact, in a recent case involving the miscarriage of a fetus of 17 ½ weeks gestational age, neither the parties nor the court raised any discussion about the applicability of this statute. *McClain v. U. of Mich. Bd. of Regents*, 665 N.W.2d 484 (Mich. Ct. App. 2003).

441. See *supra* notes 429-39 and accompanying text.

child, later born alive, to recover for his or her injuries incurred at any point during gestation.⁴⁴² This interpretation would also be consistent with the general intent of the wrongful death act; it would prevent a tortfeasor from benefitting by causing death of, rather than just injury to, the embryo or preivable fetus.⁴⁴³ But in its current form, the act is, at best, overly vague and ambiguous, and at worst, meaningless, as demonstrated by the variety of ways the act has been discussed or classified by legal scholars.

West Publishing has classified this act under the topic Assault and Battery.⁴⁴⁴ In Michigan Civil Jurisprudence, the act is classified under Damages to Pregnant Women.⁴⁴⁵ And in Michigan's Non-Standard Jury Instructions, Civil, the act is in the Stalking chapter and classified as a wrongful act against a pregnant individual.⁴⁴⁶ These interpretations are inconsistent with the apparent legislative intent in enacting this section, but, after analyzing each section of the act, it is not difficult to see how this confusion arose.

1. Numbering

This act is numbered § 600.2922a, and the wrongful death act is numbered 600.2922.⁴⁴⁷ In Michigan, statutory numbering is done by the Legislative Service Bureau⁴⁴⁸ under the authority given it by statute.⁴⁴⁹ In assigning the statutory number, the Legislative Service Bureau evaluates the subject matter of the bill or law and assigns it a number, keeping closely related materials as numerically near to each other as possible.⁴⁵⁰ Here, the bill's connection by numbering to the wrongful

442. *See e.g.* *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971).

443. The "common-sense principles . . . apply equally as well to the death of a nonviable unborn child as they do to a nonviable unborn child who suffers a tortious injury and survives birth and a viable unborn child who suffers a tortious injury and dies en ventre sa mere." *Farley v. Sartin*, 466 S.E.2d 522, 533 (W. Va. 1995).

444. MICH. COMP. LAWS ANN. § 600.2922a (West 2000).

445. 7 MICH. CIV. JUR. DAMAGES § 38 (stating that the tortfeasor is liable for damages resulting in a miscarriage or stillbirth). But the statute must have been intended to remedy more than just harm that the mother incurred because those damages were already compensable before the statute was enacted. *See Tunnicliffe v. Bay Cities Consol. Ry. Co.*, 61 N.W. 11, 12 (Mich. 1894) ("the jury is allowed to consider. . . , for the purposes of compensation, not only the physical pain, but also mental suffering").

446. MICH. NON-STANDARD JURY INSTR. CIVIL § 23:05 (Cumm. Supp. 2003).

447. MICH. COMP. LAWS ANN. § 600.2922 (West 2000).

448. *Id.* at p. III.

449. *Id.* at §4.1105.

450. Telephone Interview with Roger Peters, Legal Editor, Legislative Service Bureau (April 2, 2003).

death act and its legislative history show that the legislature clearly intended this act to amend the wrongful death act to include a cause of action for the stillbirth or death of an embryo or previable fetus.⁴⁵¹

2. Catch line

The act's catch line reads: "Wrongful or negligent act against pregnant individual resulting in miscarriage, stillbirth, or injury to [or death of]⁴⁵² embryo or fetus"⁴⁵³ Although the catch line suggests that this act creates a cause of action for the injuries suffered by a pregnant woman, it is not a part of the statute and it cannot broaden or narrow the meaning of the text of the statute.⁴⁵⁴ Therefore, the words "against [the] pregnant individual," in the catch line cannot narrow the meaning of the words in the text, which specifically creates a cause of action for the "miscarriage, stillbirth . . . or death of the embryo or fetus."⁴⁵⁵

3. Provisions of Sec.2922a(1)

Section one of the act provides: "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to [or the death of]⁴⁵⁶ the embryo or fetus."⁴⁵⁷ Before this law was enacted, a woman already had a cause of action for her own injuries, including those associated with a miscarriage,⁴⁵⁸ and so did a child who suffered a previability prenatal injury and was later born alive.⁴⁵⁹ In interpreting a statute, the courts presume "that the Legislature did not intend to do a useless thing."⁴⁶⁰ So here, the only "useful thing" done by this section was to create a cause of action for the miscarriage, stillbirth, or death of the embryo or previable fetus.⁴⁶¹

451. "An amendment to a statute will generally be considered as a part of the original act and the entire act as amended be given the construction which would be given it if the amendment were a part of the original act." *Perry v. Hogarth*, 246 N.W. 214, 215 (Mich. 1933) (citations omitted).

452. The words "or death of" were added in 2001. *See supra* note 439.

453. MICH. COMP. LAWS ANN. § 600.2922a (West Supp. 2003).

454. *Id.* at § 8.4b.

455. *Id.* at § 600.2922a(1).

456. *Id.* at § 600.2922a. The legislature's addition of these words further indicates its intent.

457. *Id.*

458. *See, e.g.*, *Tunncliffe v. Bay Cities Consol. Ry. Co.*, 61 N.W. 11 (Mich. 1894).

459. *See, e.g.*, *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971).

460. *Recorders Court v. City of Detroit*, 351 N.W.2d 289, 292 (Mich. Ct. App. 1984).

461. Amendments are to be given effect, and the purpose of any amendment is to change the original act to better carry out the purpose for which it was enacted. *Perry v. Hogarth*, 246 N.W. 214, 215 (Mich. 1933).

Upon further analysis, it also becomes clear that this provision was not intended to be read alone, because, although it creates a cause of action, it provides no information about who can bring the cause of action or what damages are available for the miscarriage, stillbirth, or death of an embryo or fetus.

Under the common law, there was no cause of action for the stillbirth or death of a fetus, so the cause of action must be created by statute.⁴⁶² And where a cause of action is only created by statute, the statute creates the exclusive remedy for the wrong, “unless the remedy is plainly inadequate.”⁴⁶³ Read alone, this statute’s remedy is not inadequate, it is missing, unless this act is read in *pari materia*⁴⁶⁴ with the wrongful death act. Here, it is appropriate to read the two acts as being in *pari materia*⁴⁶⁵ because both acts relate to the same common legislative purpose: holding tortfeasors liable for acts that cause death. As such, they should be read together.⁴⁶⁶ This later statute should be read to supplement or compliment the wrongful death act.⁴⁶⁷ And it should be interpreted as showing a legislative policy change intended to permit a cause of action for the stillbirth or death of an embryo or preivable fetus, and the provisions of the state’s general wrongful death act should be used to determine who can bring the cause of action and what damages apply for the liability imposed under section 600.2922a (1).

Accordingly, the most logical interpretation of who would bring the cause of action would be a personal representative,⁴⁶⁸ who could recover damages, including those for the embryo or preivable fetus’s conscious pain and suffering.⁴⁶⁹ This interpretation has created constitutional concerns, as stated by the opponents of the original bill and multiple

462. Powers v. City of Troy, 156 N.W.2d 530, 532-33 (Mich. 1968).

463. Bell v. League Life Ins. Co., 387 N.W.2d 154, 155 (Mich. Ct. App. 1986), *overruled in part* by Smith v. Globe Life Ins. Co., 597 N.W.2d 28 (Mich. 1999).

464. “It is a cannon of construction that statutes that are *in pari materia* may be construed together so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” BLACK’S LAW DICTIONARY 794 (7th ed. 1999).

465. This is appropriate, even though they do not reference each other. County Rd Ass’n v. Bd. of State Canvassers, 282 N.W.2d 774, 780 (Mich. 1979).

466. Remus v. City of Grand Rapids, 265 N.W. 755, 756 (Mich. 1936).

467. See Ziegler v. Witherspoon, 49 N.W.2d 318, 329 (Mich. 1951) (stating that a later act on the same subject should be interpreted as supplementing or complimenting the earlier statute).

468. MICH. COMP. LAWS ANN § 600.2922(2) (West 2000).

469. *Id.* at § 600.2922(6). Survival-type damages should be excluded in a claim based on the death of an embryo or preivable fetus, as they may raise Constitutional concerns. See *infra* notes 452 and accompanying text.

legal scholars.⁴⁷⁰

4. Provisions of 600.2922a (2)(a)(b)(c)

This section of the act sets out exceptions to the liability imposed in section one. It specifically states:

This section does not apply to any of the following:

- (a) An act committed by the pregnant individual.
- (b) A medical procedure performed by physician or other licensed medical professional within the scope of his or her practice and with the pregnant individual's consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.
- (c) The lawful dispensation, administration, or prescription of medication.⁴⁷¹

Analyzed together, it appears that these sections were added to protect a woman's constitutionally protected rights to an abortion. But, if this was the intent, then they are unnecessary, because it is neither wrongful nor negligent for a woman to abort an embryo or pre-viable fetus.⁴⁷² Therefore, section one would never apply, and there would be no need for these exceptions.

5. Provisions of 600.2922a(3)(4)

These two sections provide: "(3) This section does not prohibit a civil action under any other applicable law. (4) As used in this section, 'physician or other licensed medical professional' means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838."

It does not appear that either of these sections creates additional confusion. In fact, section three would be necessary to prevent the exceptions addressed in number two from being too broadly construed.⁴⁷³

470. Senate Fiscal Agency, S.B. 346, Aug. 4, 1998, p. 3. *See, e.g.,* Wendy C. Shapero, *Does a Nonviable Fetus's Right to Bring a Wrongful Death Action Endanger a Woman's Right to Choose?* 27 SW. U. L. REV. 325 (1993).

471. MICH. COMP. LAWS ANN § 600.2922a(2)(a)(b)(c) (West Supp. 2003).

472. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973).

473. Other currently recognized causes of action, including common-law causes of action, are retained against these persons by provision three. *See* *Bristol Window & Door, Inc., v. Hoogenstyn*, 650 N.W.2d 670, 673 (Mich. Ct. App. 2002).

V. REDRAFTED VERSION OF THE ACT

Because of the numerous problems identified in the current version of the act, it should be amended to reflect accurately the legislature's intent in enacting the law. Below is a suggested revision. This version clarifies who may bring the claim and what damages are available, and it protects a woman's constitutional right to choose whether or not she will carry an embryo or fetus to viability by excluding survival-type damages that may be interpreted as granting constitutional personhood to the embryo or fetus.

600.2922a Liability for Wrongful Death of an Embryo or Fetus

(1) Whenever a person's wrongful or negligent act⁴⁷⁴ results in the miscarriage, stillbirth, or death of the embryo or fetus, that person is liable for those damages set forth in subsection (4) of this act.

(2) An action under this section must be brought by, and in the name of, the personal representative of the estate the embryo or fetus.⁴⁷⁵

(3) The person or persons who may be entitled to damages under this section are limited to those who would have been the parents, grandparents, brothers, or sisters of the embryo or fetus.⁴⁷⁶

(4) The court or jury may award damages incurred by the embryo or fetus' estate for reasonable medical, hospital, funeral, and burial expenses; and the court or jury may award damages for the loss of society and companionship suffered by the persons entitled to damages under subsection (3).⁴⁷⁷

(5) This section does not prohibit a civil action under any other applicable law.⁴⁷⁸

474. This wording eliminates the need for current subparts two and three because legal abortions are not wrongful or negligent.

475. By permitting a personal representative to bring the cause of action on behalf of the persons listed in sub-part three, it is clear that the cause of action survives, even if the pregnant woman dies along with the fetus. There are no constitutional rights raised because a legal abortion is neither wrongful or negligent.

476. Under the general wrongful death act, these persons would be entitled to recovery for their losses. MICH. COMP. LAWS ANN § 600.2922(3)(a) (West 2000).

477. By limiting the recoverable damages to those incurred by the persons listed, there is no concern that the embryo or previable fetus is given constitutional rights of personhood because the act would compensate living persons for their loss, without awarding survival-type damages.

478. This provision will retain all other causes of action currently available under statute or common law. See *Bristol Window & Door, Inc., v. Hoogenstyn*, 650 N.W.2d 670, 673 (Mich. Ct. App. 2002).

VI. CONCLUSION

State legislatures need to take action to clarify whether a cause of action can be maintained when an embryo or fetus dies as a result of a wrongful or negligent act. And when they take action, they must do so in a way that clearly states the answer.

Although some believe that allowing a personal representative to bring a cause of action after the death of an embryo or preivable fetus may erode a woman's constitutional right to an abortion, as discussed above, with properly enacted legislation (1) the estate, which suffered financial damages, and would-be family members who were deprived of the future society and companionship may be compensated; (2) no constitutional rights are conveyed to the embryo or preivable fetus; and (3) the pregnant woman's constitutional right to chose whether to carry the preivable embryo or fetus to viability are protected.

To accomplish these things without eroding the woman's right to chose an abortion, the statute should not award any damages that convey any right of personhood: survival-type damages. It should specifically set out the damages recoverable by the estate and family members who had the right to expect that this embryo or fetus would one day be a member of his or her family, and compensate those persons for the injuries they suffered as a result of the tortfeasor's action. If these guidelines are followed, the woman's constitutional right would not be infringed, and it would, instead, be better protected because the tortfeasor would not be allowed to escape liability for his or her action that deprived the woman of her right to chose whether to carry this embryo or preivable fetus to viability.