

# RECOVERY FOR THE WRONGFUL DEATH OF A VIABLE FETUS: *Werling v. Sandy*

## INTRODUCTION

In *Werling v. Sandy*,<sup>1</sup> the Ohio Supreme Court held a viable<sup>2</sup> fetus, negligently injured "*en ventre sa mere*"<sup>3</sup> and subsequently stillborn, may be the basis for a wrongful death action<sup>4</sup> pursuant to Ohio Rev. Code § 2125.01.<sup>5</sup> The court's ruling represented Ohio's explicit acceptance of the trend allowing a wrongful death action for the death of a fetus.<sup>6</sup> Although *Werling* was not a

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<sup>1</sup>17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

<sup>2</sup>Viability has been defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." P. RAMSEY, ETHICS AT THE EDGES OF LIFE 6-8 (1978). A viable fetus is an unborn child which had developed in its mother's womb. BLACK'S LAW DICTIONARY 1404 (5th ed. 1979). In *Roe v. Wade*, 410 U.S. 113, 160 (1973), the Court stated that viability is "usually placed at about seven months (twenty-eight weeks) but may occur earlier, even at twenty-four weeks."

<sup>3</sup>"*En ventre sa mere*" is a term that describes an unborn child as "in its mother's womb." BLACK'S LAW DICTIONARY 479 (5th ed. 1979).

<sup>4</sup>Wrongful death refers to the death of a fetus which occurs due to the negligence of a third party. A wrongful death action is a lawsuit brought on behalf of a deceased person's beneficiaries that alleges death was caused by the negligence of another. The statutory beneficiaries have an original and distinct claim for damages which is not derivative of a claim existing in the decedent. Comment, *Torts-The Right of Recovery for the Tortious Death of the Unborn*, 27 HOW. L.J. 1649, 1649-50 (1984) (hereinafter cited as Comment, *Torts-The Right to Recovery*).

<sup>5</sup>OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1984) provides, in pertinent part:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter . . .

<sup>6</sup>The following cases support the view that a wrongful death action is maintainable for the death of an unborn child: *Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.C. Cir. 1971) (involving viable fetus: applying District of Columbia law); *Todd v. Sandidge Constr. Co.*, 341 F.2d 75 (4th Cir. 1964) (involving a viable fetus; applying South Carolina law); *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974) (involving eight and one half month old fetus); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966) (seven to eight month old viable fetus); *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962) (cause of action granted in case involving a viable fetus that died two weeks before delivery date); *Worgan v. Greggo & Ferrar, Inc.*, 50 Del. 258, 128 A.2d 557 (1956) (viable fetus); *Shirley v. Bacon*, 154 Ga. App. 203, 267 S.E.2d 809 (1980); *Porter v. Lassister*, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (the court allowed a cause of action for wrongful death in a case involving a "quick child," even if nonviable); *Green v. Smith*, 71 Ill. 2d 501, 377 N.E.2d 37 (1978); *Renslow v. Mennonite Hosp.*, 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976) (viable fetus); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (involving thirty-six week old viable fetus); *Maniates v. Grant Hosp.*, 15 Ill. App. 3d 903, 305 N.E.2d 422 (1973) (cause of action granted to survivors of viable fetus that died in the last week of pregnancy); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971) (this case involved a full-term child); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962) (viable fetus); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970) (viable fetus); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955) (full-term viable fetus); *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981); *Diefenderfer v. Louisiana Farm Bureau Mut. Ins. Co.*, 383 So. 2d 1032, cert. granted, 384 So. 2d 985 (La. App. 1980); *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. 1951); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923); *State ex rel Oldham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964) (nine-month old viable fetus); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975) (eight and one-half month old fetus); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) (eight month old fetus); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974) (viable fetus); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949) (the court in

case of first impression in Ohio,<sup>7</sup> it presented the Ohio Supreme Court with the first opportunity to expand the legal rights of the unborn.

### FACTS

Lucinda T. Werling became pregnant during the summer of 1980 and received prenatal obstetrical care.<sup>8</sup> Due to her obesity the treating physicians determined Ms. Werling was an increased labor risk.

On April 30, 1981, Lucinda Werling was admitted to the hospital. A fetal monitor was used to evaluate the heart of the nine-to-ten-month-old fetus. Before delivery, the fetus was alive and viable.<sup>9</sup>

However, the attending physician left the hospital before the delivery of Lucinda Werling's baby. The hospital nursing staff monitored Ms. Werling. Suddenly, the fetal monitor indicated the fetus' heart was not functioning. After a delay, the only available surgeon ordered Ms. Werling be prepared for surgery. The surgeon delivered a stillborn fetus.<sup>10</sup>

Lucinda Werling filed a wrongful death complaint pursuant to Ohio Rev. Code § 2125.01.<sup>11</sup> The complaint alleged that due to the negligence of the two treating physician-obstetricians and the hospital in which the delivery occurred, her fetus was delivered stillborn.<sup>12</sup>

The trial court dismissed the complaint and ruled a cause of action does not exist for the wrongful death of a viable fetus.<sup>13</sup> Despite a conflict with the

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*Verkennes* was the first to allow a wrongful death recovery for the death of a viable but stillborn fetus); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969) (involving an eight month old fetus); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826 (N.M. Ct. App. 1980); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959) (this case marked the first ruling by an Ohio court on the issue of whether a viable fetus has a cause of action for wrongful death when that fetus is delivered stillborn. The court of appeals held that a cause of action does exist, however, both parties agreed to dismiss the motion to certify the record to the Ohio Supreme Court. Therefore, *Werling v. Sandy* was the first opportunity for the Ohio Supreme Court to rule on the issue.); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976) (viable fetus); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976) (the court held that the decedent was a person within the meaning of the wrongful death statute regardless of viability); *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975); *Villancourt v. Medical Center Hosp., Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967) (involving a viable fetus).

<sup>7</sup>In *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959), the Madison County Court of Appeals held that "a cause of action exists for the wrongful death of a viable unborn child which is subsequently stillborn." However, both parties agreed to dismiss a motion to certify the record to the Ohio Supreme Court. *Id.*

<sup>8</sup>17 Ohio St. 3d at 45, 476 N.E.2d at 1053.

<sup>9</sup>*Id.* All parties agreed that the nine-to-ten month-old fetus was alive and viable just before delivery.

<sup>10</sup>*Id.*

<sup>11</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

<sup>12</sup>17 Ohio St. 3d at 45, 476 N.E.2d at 1053.

<sup>13</sup>17 Ohio St. 3d at 46, 476 N.E.2d at 1053.

holding of *Stidam v. Ashmore*,<sup>14</sup> the Court of Appeals for Allen County affirmed the trial court's decision.<sup>15</sup> However, the court of appeals certified the record of the case to the Ohio Supreme Court for review and final determination.

To resolve the certified issue,<sup>16</sup> whether an action for wrongful death exists<sup>17</sup> where the decedent was a stillborn fetus, the Ohio Supreme Court had to determine whether an unborn fetus which dies "*en ventre sa mere*"<sup>18</sup> is a "person" within the meaning of Ohio Rev. Code § 2125.01.<sup>19</sup> Relying on the purpose of the Ohio Wrongful Death Statute<sup>20</sup> and Ohio case law<sup>21</sup> interpreting the rights of the unborn, the *Werling* court ruled that an unborn fetus is a "person" under Ohio Rev. Code § 2125.01.<sup>22</sup>

### STATUTORY ANALYSIS

In *Werling*, the Ohio Supreme Court first analyzed the history and the purpose of a wrongful death cause of action to determine whether such a cause of action exists for the survivors of a viable fetus subsequently delivered stillborn.<sup>23</sup> A cause of action for wrongful death did not exist at common law.<sup>24</sup> In 1851, the Ohio Legislature enacted the first wrongful death statute which has remained almost unchanged and is now known as Ohio Rev Code § 2125.01.<sup>25</sup> The wrongful death statute<sup>26</sup> is the only civil remedy available to

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<sup>14</sup>109 Ohio App. 431, 167 N.E.2d 106 (1959). In *Stidam*, the Madison County Court of Appeals held that a cause of action exists for the wrongful death of a viable fetus which is subsequently stillborn. *Id.* In contrast, in *Werling*, the Allen County Court of Appeals affirmed the trial court decision that ruled a cause of action does not exist for the wrongful death of a viable fetus. 17 Ohio St. 3d at 46, 476 N.E.2d at 1053-54.

<sup>15</sup>17 Ohio St. 3d at 46, 476 N.E.2d at 1053-54.

<sup>16</sup>*Id.* at 46, 476 N.E.2d at 1054.

<sup>17</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

<sup>18</sup>See *supra* note 3.

<sup>19</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

<sup>20</sup>*Id.* The purpose of the wrongful death statute is to provide a remedy whenever there would have been an action in damages had death not ensued. 17 Ohio St. 3d at 47, 476 N.E.2d at 1054.

<sup>21</sup>*Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950) (recognizing wrongful death cause of action for viable fetus injured "*en ventre sa mere*" yet born alive and who died three months later); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949) (allowing recovery for viable fetus injured "*en ventre sa mere*"); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959) (allowing cause of action for the wrongful death of a viable unborn child subsequently stillborn).

<sup>22</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

<sup>23</sup>17 Ohio St. 3d at 46, 476 N.E.2d at 1054.

<sup>24</sup>*Id.* See generally J. MCCORMAC, WRONGFUL DEATH IN OHIO 1-6 (1982); Traci, *Law and Logic: Conflict in Ohio's Wrongful Death Statute*, 4 CLEV. MAR. L. REV. 38, 38-40 (1955) (hereinafter cited as Traci, *Law and Logic*); Parness and Pritchard, *To Be Or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 272-275 (1982) (hereinafter cited as Parness, *To Be Or Not To Be*); Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1656.

<sup>25</sup>The latest amendments effective Feb. 5, 1982 expanded the type of compensatory damages recoverable for a wrongful death action. J. MCCORMAC, WRONGFUL DEATH IN OHIO, 1-6 (1982).

<sup>26</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

compensate the decedent's surviving beneficiaries.<sup>27</sup>

In *Werling*, the Ohio Supreme Court characterized the wrongful death statute as remedial in nature, in that it was designed to alleviate the inequity of the common law rule which denied this cause of action.<sup>28</sup> By characterizing the wrongful death statute as remedial in nature, the *Werling* court could liberally construe the statute to promote justice and social policy.<sup>29</sup>

In *Werling*, the court determined the purpose of the statute<sup>30</sup> was to "provide a remedy whenever there would have been an action in damages had death not ensued."<sup>31</sup> The Ohio Supreme Court also implied that the statute was intended to insure that tortfeasors pay for the consequences of their acts and to deter harmful conduct. This implication was set forth when the court noted "it is logically indefensible as well as unjust to deny an action where the child is stillborn, and yet permit the action where the child survives birth but only for a short period of time."<sup>32</sup>

Since the court realized that the denial of a cause of action for the wrongful death of a viable fetus allows a tortfeasor responsible for the death of a fetus to escape liability while a tortfeasor who only injures a fetus is held liable,<sup>33</sup> the *Werling* court determined that an action for the wrongful death of a viable fetus is consistent with the clear purpose of the wrongful death statute and furthers the remedial nature of the statute.<sup>34</sup> The court in *Werling* noted,

To hold otherwise would only serve to reward the tortfeasor by allowing

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<sup>27</sup> 17 Ohio St. 3d at 46, 476 N.E.2d at 1054. See *Keaton v. Ribbeck*, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979) (the Ohio Supreme Court specifically ruled that there is no common-law action for wrongful death); *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946) (recognizing that the wrongful death statute in Ohio is an innovation of the principles of common law and affords the only civil remedy to compensate others for death resulting from injuries).

<sup>28</sup> 17 Ohio St. 3d at 47, 476 N.E.2d at 1054.

<sup>29</sup> See Comment, *Tort-The Right of Recovery*, *supra* note 4, at 1658, indicating that a wrongful death statute is designed to remedy the inequity of the common law. As a remedy, a wrongful death statute should be liberally construed to cover the wrongful death of an unborn child because the legislature generally recognizes and protects the rights of the unborn in other legislation. *Britt v. Sears*, 150 Ind. App. 487, 488, 277 N.E.2d 20, 21 (1971). However, other courts construe the wrongful death statute as being in derogation of the common law and strictly construe the statute. See Comment, *Torts-The Right of Recovery*, *supra* note 4. In denying the right to maintain a wrongful death action for the death of an unborn child, some courts contend that the statute is intended to cover only the death of a person who has been alive and the fact that the legislature did not specifically include an unborn child implies the statute does not apply to an unborn child. *Hogan v. McDaniel*, 204 Tenn. 235, 237, 319 S.W.2d 221, 223 (1958).

<sup>30</sup> 17 Ohio St. 3d at 47, 476 N.E.2d at 1054.

<sup>31</sup> *Id.*

<sup>32</sup> 17 Ohio St. 3d at 48, 476 N.E.2d at 1055. See Note, *Recovery for the Wrongful Death of a Viable Fetus in Missouri*, 52 UMKC L. REV. 692, 700.01 (1984) (hereinafter cited as Note, *Recovery for Wrongful Death*). The Missouri Supreme Court determined that the wrongful death statute is designed to provide compensation to a limited class of plaintiffs for the loss of the "companionship, comfort, instruction, guidance, counsel . . . and support of one who would have been alive but for the defendant's wrong." *Id.* at 701.

<sup>33</sup> *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949). The Ohio Supreme Court held that a viable child injured while "*en ventre sa mere*" has a cause of action. *Id.*

<sup>34</sup> 17 Ohio St. 3d at 48, 476 N.E.2d at 1055.

him to escape liability upon an increase in the severity of the harm, if such harm results in death to the child. In other words, the greater the harm inflicted, the better the opportunity that a defendant will be exonerated. This result is clearly not acceptable under the statute.<sup>35</sup>

In holding that a cause of action exists for the wrongful death of a viable fetus, the *Werling* court intended to fulfill the purpose of the statute and justly compensate parents for the loss of parenthood.<sup>36</sup> The *Werling* court reached this decision by noting that the action for wrongful death is for the exclusive benefit of statutory beneficiaries<sup>37</sup> and in the instant case, it is the parents who suffer mental distress and loss of society due to the death of the fetus.<sup>38</sup>

The *Werling* court also answered the issue of whether a viable fetus is a person within the meaning of the Ohio Wrongful Death Statute by recognizing that the rights of the unborn child were protected in other areas of Ohio law.<sup>39</sup> Unborn children have been recognized as acquiring inheritance rights in Ohio Rev. Code § 2105.14.<sup>40</sup> The Ohio Statute Against Perpetuities<sup>41</sup> has been interpreted to include a child in gestation who is subsequently born alive as a life in being throughout gestation.<sup>42</sup> The Uniform Anatomical Gift Act<sup>43</sup> includes in its definition of decedent a stillborn fetus.<sup>44</sup> In addition, the Uniform Parentage Act<sup>45</sup> allows the personal representative of an unborn child to bring an action on behalf of the infant to establish a father-child relationship.<sup>46</sup>

<sup>35</sup>*Id.* See Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 360 (1971) (hereinafter cited as Note, *The Law and the Unborn Child*).

<sup>36</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1054.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* The *Werling* court noted that its decision was directed to compensate parents for the loss of parenthood. *Id.* Loss of society refers to a broad range of mutual benefits that each family member receives from the others continued existence including love, affection, care, attention, companionship and comfort. BLACK'S LAW DICTIONARY 1247 (5th ed. 1979). The *Werling* court did not discuss damages. Therefore, for the purposes of this casenote, it is not necessary to further analyze the damages recoverable in a wrongful death action.

<sup>39</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1054-55. See generally Note, *The Law and the Unborn Child*, *supra* note 35, at 351-354; Parness, *To Be Or Not To Be*, *supra* note 24, at 263-72 (examines six areas of law affecting the unborn: inheritance, trusts, crime, torts, birth law and custody); Hartye, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276, 285 (1976-1977) (hereinafter cited as Hartye, *Tort Recovery*).

<sup>40</sup>OHIO REV. CODE ANN. § 2125.14 (Page 1976) provides:

Descendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him; but in no other case can a person inherit unless living at the time of the death of the intestate.

<sup>41</sup>OHIO REV. CODE ANN. § 2131.08 (Page 1976) provides:

No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest . . .

<sup>42</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1055 (citing *Phillips v. Herron*, 55 Ohio St. 478, 478, 45 N.E. 720,720 (1896)).

<sup>43</sup>OHIO REV. CODE ANN. § 2108.01(B) (Page 1976).

<sup>44</sup>*Id.* The statute provides: (B) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

<sup>45</sup>OHIO REV. CODE ANN. § 3111.04 (Page 1976).

<sup>46</sup>*State v. Van Dorn*, 56 Ohio App. 82, 83, 10 N.E.2d 14, 15 (1937). The Court of Appeals of Crawford

The fact that the Ohio Legislature has enacted legislation, other than the wrongful death statute, that expressly recognizes and protects certain rights of an unborn child indicates a desire on the part of the legislature to provide protection for unborn children.<sup>47</sup> This supports the conclusion of the *Werling* court that the wrongful death statute should apply to the unborn child.<sup>48</sup>

#### CASE LAW ANALYSIS

Although a wrongful death action is entirely statutory,<sup>49</sup> the *Werling* court reviewed two previous Ohio Supreme Court decisions concerning the rights of the unborn to determine whether a fetus is a "person" within the meaning of the wrongful death statute.<sup>50</sup> The previous decisions concerned the rights of an unborn child in cause of action for prenatal injury and for the wrongful death of a child born alive but subsequently dying as a result of prenatal injuries.<sup>51</sup> The *Werling* court noted that a review of these analogous decisions would assist the court in the resolution of the issue presented in the instant case.<sup>52</sup>

In *Williams v. Marion Rapid Transit, Inc.*,<sup>53</sup> the Ohio Supreme Court was presented with the issue of whether a cause of action existed in Ohio for a living child injured while "*en ventre sa mere*."<sup>54</sup> The *Williams* court noted that in the absence of a statute the general rule with respect to the rights of the unborn child is that a prenatal injury affords no basis for an action in damages.<sup>55</sup> This general rule resulted from many years of precedent withholding recovery.<sup>56</sup> The rationale in support of denying recovery for prenatal injury included a lack of precedent, the theory that an unborn child is a part of its

County held that a right of action exists under the statute irrespective of whether the child is stillborn or born alive.

<sup>47</sup>*Britt v. Sears*, 150 Ind. App. 487, 488, 277 N.E.2d 20, 21 (1971); *O'Neill v. Morse*, 385 Mich. 130, 131, 188 N.W.2d 785, 786 (1971). For a discussion of state laws and state policies involving the unborn see *Parness, To Be Or Not To Be*, *supra* note 24, at 263.

<sup>48</sup>*Parness, To Be or Not to Be*, *supra* note 24, at 263.

<sup>49</sup>See generally J. MCCORMAC, *WRONGFUL DEATH IN OHIO* 1-6 (1982); Traci, *Law and Logic*, *supra* note 24, at 39; *Parness, To Be Or Not To Be*, *supra* note 24, at 272.

<sup>50</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1055. See *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949); see generally *Peterson v. Nationwide Mutual Ins. Co.*, 175 Ohio St. 551, 197 N.E.2d 194 (1964) (the court held that an unborn viable child capable of life outside its mother's womb was a "person" within family compensation clause of automobile liability policy).

<sup>51</sup>*Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

<sup>52</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1055.

<sup>53</sup>152 Ohio St. 114, 87 N.E.2d 334 (1949).

<sup>54</sup>*Id.* at 116, 87 N.E.2d at 334.

<sup>55</sup>*Id.* See generally Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death and Wrongful Birth: Time For A New Framework*, 22 J. FAM. L. 677, 678-86 (1984) (hereinafter cited as Collins, *An Overview*).

<sup>56</sup>152 Ohio St. at 118-119, 87 N.E.2d at 336.

mother until birth and therefore has no judicial existence and the belief that such a cause of action would allow fraudulent claims.<sup>57</sup>

However, the *Williams* court held that the viable fetus was entitled to be heard as a "person" within the Ohio Constitution Article I, Section 16.<sup>58</sup> Apparently, the *Williams* court rejected the rationale expressed by previous courts that denied recovery for prenatal injuries.<sup>59</sup> As a result, a viable fetus, injured while "*en ventre sa mere*," could institute a cause of action for damages.<sup>60</sup> Specifically, the syllabus of *Williams*, presents the proposition that:

Injuries wrongfully inflicted upon an unborn viable child capable of existing independently of the mother are injuries "done him in his . . . person" within the meaning of Article I, Section 16 of the Constitution and, subsequent to his birth, he may maintain an action to recover damages for the injury so inflicted.<sup>61</sup>

The opinion in *Williams* marked Ohio's acceptance of the trend to allow recovery to a surviving child for prenatal injuries.<sup>62</sup> Presently, all United States jurisdictions allow a cause of action for prenatal injuries.<sup>63</sup> The court in *Werling* reviewed the holding of *Williams* to find support for an expansion of the rights of an unborn fetus in the area of tort law.<sup>64</sup> Consequently, the *Werling* court cited part of Judge Matthias' opinion in *Williams* to emphasize the refusal of the Ohio Supreme Court to sustain the traditional view that the infant is a part of the mother until birth and has no existence in law until birth.<sup>65</sup>

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<sup>57</sup>Comment, *The Necessity of Granting a Cause of Action to an Unborn Viable Fetus Under the Pennsylvania Wrongful Death and Survival Acts*, 21 DUQ. L. REV. 1017, 1018-1019 (1983) (hereinafter cited as Comment, *The Necessity of Granting a Cause of Action*). Courts denying recovery for the wrongful death of a viable fetus offer a similar rationale including the belief that proof of such a claim would be speculative and that the action should be created by the legislature instead of being recognized by the courts. *Id.* See generally Goichman and Hirsh, *The Expanding Rights of the Fetus: An Evolution Not a Revolution*, 30 MED. TRIAL TECH. Q. 212, 213 (1983) (hereinafter cited as Goichman, *The Expanding Rights*).

<sup>58</sup>OHIO CONST. art. I 16. This section provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial and delay.

<sup>59</sup>For a discussion of the rationale in favor of recovery for prenatal injuries see Hartye, *Tort Recovery*, *supra* note 39, at 278-280.

<sup>60</sup>152 Ohio St. at 114, 87 N.E.2d at 334.

<sup>61</sup>*Id.*

<sup>62</sup>See Note, *Recovery for Wrongful Death*, *supra* note 32, at 696.

<sup>63</sup>See Annot., 40 A.L.R.3d 1222, 1230 (1971) for a collection of state cases recognizing a cause of action for prenatal injuries.

<sup>64</sup>17 Ohio St. 3d at 47, 476 N.E.2d at 1055.

<sup>65</sup>*Id.* Specifically, Judge Matthias, writing for a unanimous court in *Williams* stated:

To hold that the plaintiff (child) in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified. 152 Ohio St. at 128-129, 87 N.E.2d at 340.

After determining that Ohio clearly recognizes a cause of action for the prenatal injuries of a living child, the *Werling* court noted that the Ohio Supreme Court in *Jasinsky v. Potts*<sup>66</sup> recognized the validity of a wrongful death action on behalf of a child who was born alive but died three months later due to prenatal injuries.<sup>67</sup> The court's opinion in *Jasinsky* was logically based on the principle established in *Williams v. Marion Rapid Transit, Inc.*,<sup>68</sup> that an unborn child was a "person" within Article I, Section 16 of the Ohio Constitution.<sup>69</sup>

Relying on the Ohio Supreme Court decisions in *Williams*<sup>70</sup> and *Jasinsky*<sup>71</sup> the court in *Werling* established a foundation for their ultimate holding that a cause of action exists under the wrongful death statute for a viable fetus delivered stillborn.<sup>72</sup> The *Werling* court reasoned that since a viable fetus is considered a separate legal entity for purposes of a prenatal injury suit as in *Williams*<sup>73</sup> then it follows that when a viable fetus is delivered stillborn a cause of action is warranted.<sup>74</sup> In addition, the *Werling* court noted it is illogical and unjust to permit an action where the child survives birth but only for a short time as in *Jasinsky*,<sup>75</sup> yet deny recovery where the child is stillborn.<sup>76</sup>

According to the court in *Werling*, this illogical requirement of live birth is an artificial demarcation which the court expressly rejected as a requirement for a wrongful death suit.<sup>77</sup> Although the Ohio Supreme Court did not render the decision in *Stidam v. Ashmore*,<sup>78</sup> the *Werling* court noted the absurdity of the requirement of birth in *Stidam* as illustrated by the following hypothetical:

Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of one and not for the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither.<sup>79</sup>

<sup>66</sup>153 Ohio St. 529, 92 N.E.2d 809 (1950). For an expanded discussion of *Jasinsky* see Note, *Death, Damages, Application of Wrongful Death Statute to Death from Pre-Natal Injury*, 19 U. CIN. L. REV. 526 (1950) (hereinafter cited as Note, *Death, Damages*).

<sup>67</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055; 153 Ohio St. at 529, 92 N.E.2d at 809.

<sup>68</sup>152 Ohio St. 114, 87 N.E.2d 334 (1949).

<sup>69</sup>See Note, *Death, Damages*, *supra* note 66, at 526.

<sup>70</sup>152 Ohio St. 114, 87 N.E.2d 334 (1949).

<sup>71</sup>153 Ohio St. 529, 92 N.E.2d 809 (1950).

<sup>72</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055.

<sup>73</sup>152 Ohio St. 114, 87 N.E.2d 334 (1949).

<sup>74</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055.

<sup>75</sup>153 Ohio St. 529, 92 N.E.2d 809 (1950).

<sup>76</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055.

<sup>77</sup>*Id.* See *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959).

<sup>78</sup>109 Ohio App. 431, 167 N.E.2d 106 (1959). For more expanded discussion of *Stidam* see Note, *Cause of Action for Wrongful Death of Viable Fetus*, 21 OHIO ST. L.J. 677 (1960).

<sup>79</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055. *Stidam*, 109 Ohio App. at 434, 167 N.E.2d at 108.

In *Stidam*,<sup>80</sup> the court of appeals stated that Ohio's wrongful death statute,<sup>81</sup> grants a derivative right.<sup>82</sup> To determine whether that right exists for a particular claimant, the court must establish that the injury would have entitled the injured party to maintain an action if death had not ensued.<sup>83</sup> With respect to a viable fetus, the *Stidam* court determined that had death not ensued the child would have been entitled to maintain an action.<sup>84</sup> The Ohio Supreme Court in *Werling* accepted this rationale of *Stidam* and concluded that logic requires that a viable fetus which is negligently injured "*en ventre sa mere*" and subsequently stillborn can be the basis of a wrongful death action.<sup>85</sup>

As previously discussed, the *Werling* court based its decision on Ohio statutes<sup>86</sup> and case law<sup>87</sup> that indicated the unborn fetus had legal rights in the area of tort law.<sup>88</sup> However, a review of Ohio criminal law indicated a viable fetus was not a "person" within the meaning of Ohio's former vehicular homicide statute.<sup>89</sup> The *Werling* court distinguished this holding by recognizing the definition of a word in a criminal statute does not necessarily have the same meaning in a civil statute.<sup>90</sup> Therefore, the *Werling* court rules the criminal law interpretation of "person" was not controlling in the instant case.<sup>91</sup>

Following its review of applicable Ohio statutes and case law, the court in *Werling* compared its acceptance of the viability standard as a basis for a wrongful death action with other United States jurisdictions.<sup>92</sup> Approximately thirty states allow recovery for the wrongful death of a viable fetus.<sup>93</sup> Those courts recognize the biological independence of a viable fetus and reject the

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<sup>80</sup>109 Ohio App. 431, 167 N.E.2d 106 (1959).

<sup>81</sup>OHIO REV. CODE ANN. § 2125.01 (Page 1976).

<sup>82</sup>109 Ohio App. at 434, 167 N.E.2d at 108. See Hartye, *Tort Recovery*, *supra* note 39, at 295 for a discussion of *Stidam*. The *Stidam* court stated that prior prenatal injury cases in Ohio, requiring live birth, were not proper precedent as those courts were not presented with the precise issue of live birth as a requirement. Hartye, *Tort Recovery*, *supra* note 39, at 295.

<sup>83</sup>109 Ohio App. at 434, 167 N.E.2d at 108.

<sup>84</sup>*Id.*

<sup>85</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055. See Hartye, *Tort Recovery*, *supra* note 39, at 295 and Comment, *The Necessity of Granting a Cause of Action*, *supra* note 57, at 1019.

<sup>86</sup>See *supra* notes 40-43.

<sup>87</sup>See *supra* note 50.

<sup>88</sup>17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

<sup>89</sup>OHIO REV. CODE ANN. § 4511.181 (Page 1976). See *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971).

<sup>90</sup>17 Ohio St. 3d at 49, 476 N.E.2d at 1056. See Comment, *The Expanding Rights*, *supra* note 57, at 227.

<sup>91</sup>17 Ohio St. 3d at 49, 476 N.E.2d at 1056.

<sup>92</sup>*Id.*

<sup>93</sup>See *supra* note 6. The first American case allowing recovery for prenatal injury in the death of a child before its birth was *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949). See Annot., 84 A.L.R.3d 411, 422 (1978) for a collection of cases recognizing a cause of action for a viable fetus. See generally, Note, *Recovery for Wrongful Death*, *supra* note 32, at 697; Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1650; and Collins, *An Overview*, *supra* note 55, at 710.

live-birth requirement.<sup>94</sup> Only nine states deny recovery for the wrongful death of a viable fetus.<sup>95</sup>

Several states base recovery on a standard other than viability. The Rhode Island, Alabama and Louisiana courts adopted the causation test.<sup>96</sup> That test permits conditional recovery for an injury sustained by a child at any time before birth; the prerequisite being that the injury was the proximate result of a wrongful act.<sup>97</sup> Indiana requires that a child be full-term for a cause of action to exist.<sup>98</sup> Georgia allows recovery provided the fetus is quick,<sup>99</sup> even if non-viable. In addition, although not adopted by any jurisdiction, some commentators advocate the standard of the fetus' cerebral development.<sup>100</sup>

### ANALYSIS OF THE WERLING STANDARD

In *Werling*, the Ohio Supreme Court expressly adopted the viability standard as a requirement for a wrongful death action on behalf of an unborn child.<sup>101</sup> As a result, Ohio joined the majority by adopting the viability standard.<sup>102</sup> However, the *Werling* court and several commentators<sup>103</sup> have noted the presence of problems associated with the use of the viability standard.<sup>104</sup> For example, the term "viable" is elusive because not all fetuses attain this stage in development at the same point in gestation.<sup>105</sup> Also, the concept of viability is difficult to apply due to the sophistication of medical science that allows a child to be conceived outside the womb.<sup>106</sup>

<sup>94</sup>See Note, *Recovery for Wrongful Death*, *supra* note 32, at 697.

<sup>95</sup>Courts that deny recovery base their decision on the argument that a fetus is not a person within the meaning of the statute and recovery would be too speculative to award pecuniary damages. See *Kilmer v. Hicks*, 22 Ariz. App. 552, 529 P.2d 706 (1974), *overruled*, 144 Ariz. 479, 698 P.2d 726 (1985); *Justus v. Atchison*, 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 301 N.Y.S.2d 65 (1969); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966); *Marko v. Philadelphia Transp. Co.*, 420 Pa. 124, 216 A.2d 502 (1966); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

<sup>96</sup>*Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Danos v. St. Pierre*, 383 So. 2d 1019 (La. Ct. App. 1980); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976). See Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 590 (1965) (hereinafter cited as Gordon, *The Unborn Plaintiff*); Goichman, *The Expanding Rights*, *supra* note 57, at 217; Collins, *An Overview*, *supra* note 55, at 689.

<sup>97</sup>Gordon, *The Unborn Plaintiff*, *supra* note 96, at 590-91.

<sup>98</sup>*Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971).

<sup>99</sup>"Quick" child is one that has developed so that it moves within the mother's womb. BLACK'S LAW DICTIONARY 1122 (5th ed. 1979).

<sup>100</sup>Milby, *The New Biology and the Question of Personhood: Implications for Abortion*, 9 AM. J. LAW & MED. 31, 41 (1983).

<sup>101</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1055.

<sup>102</sup>*Id.* See *supra* note 6.

<sup>103</sup>See generally Note, *Recovery for Wrongful Death*, *supra* note 32, at 692 and Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1649.

<sup>104</sup>17 Ohio St. 3d at 48, 476 N.E.2d at 1056.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* See generally Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554 (1961-62) (hereinafter cited as Note, *The Impact*).

In *Roe v. Wade*,<sup>107</sup> the United States Supreme Court stated that viability is "usually placed at about seven months (twenty-eight weeks) but may occur earlier, even as early as twenty-four weeks."<sup>108</sup> This definition illustrates the inaccuracy of the viability standard. If anything, the viability standard appears to be another form of "artificial demarcation" to enable courts to decide when to grant recovery to an unborn child.<sup>109</sup> It is apparent that as medical science changes, the point of viability will also change.<sup>110</sup> Justice Douglas shared those concerns in *Werling*.<sup>111</sup> He concurred with the holding of the majority to allow a cause of action but he stressed the importance of a precise definition of viability.<sup>112</sup> Specifically, Justice Douglas expressed concern that the "open-endedness" of the *Werling* decision would encourage multifarious actions instituted to determine when the Ohio Supreme Court believes viability begins.<sup>113</sup> In addition, in his separate concurrence, Justice Douglas warned that the *Werling* decision and its relationship to *Roe* would present difficult questions in the future.<sup>114</sup>

In light of modern medicine, the viability standard of *Werling* indicates that such a standard is illogical and unjust. Medical advancements have led to the conclusion that the crucial period of intrauterine development is during the first trimester, a period before viability.<sup>115</sup> During the first trimester the fetus is most susceptible to environmental influences and to injury.<sup>116</sup> Medical authorities indicate that congenital defects caused by environmental factors can be sustained only in the earliest stages of the pre-viable period.<sup>117</sup> Therefore, a viability limitation would deny recovery to a nonviable fetus which may possibly be a denial of the most meritorious claims.<sup>118</sup>

The adoption of the causation test would alleviate this injustice. That test

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<sup>107</sup>410 U.S. 113 (1973) (the Supreme Court held that the unborn child was not a person within the meaning of the fourteenth amendment). See Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1661-62.

<sup>108</sup>410 U.S. at 160.

<sup>109</sup>See Hartye, *Tort Recovery*, *supra* note 39, at 282.

<sup>110</sup>*Id.*

<sup>111</sup>17 Ohio St. 3d at 50, 476 N.E.2d at 1057. Justice Douglas concurred with the majority in a separate opinion.

<sup>112</sup>17 Ohio St. 3d at 50, 476 N.E.2d at 1057.

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>See Gordon, *The Unborn Plaintiff*, *supra* note 96, at 589. For example, medical knowledge has emphasized that the fetus is most susceptible to environmental influences during the first trimester. *Id.* The effects of radiation, infectious disease, and nutrition all indicate that healthy fetal development may depend on factors existing at the time of or before conception. *Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* See Note, *The Impact*, *supra* note 106, at 563 discussing medical authorities that indicate congenital defects caused by environmental factors can be sustained only within the earliest stages of the pre-viable period.

<sup>118</sup>*Id.*

assumes the fetus is a separate person.<sup>119</sup> Due to modern medical science, biological separability begins at conception and not at viability therefore legal separability should begin at conception.<sup>120</sup> Under the causation theory, the test is whether the damage sustained is the proximate result of a wrongful act.<sup>121</sup>

Because the *Werling* court refused to designate as a "person" a fetus incapable of independently surviving a pre-mature birth it failed to adopt the causation test.<sup>122</sup> Also, the *Werling* court believed the adoption of the viability standard made the decision in *Werling* consistent with *Roe v. Wade*.<sup>123</sup> In *Roe*, the United States Supreme Court held that a fetus was not a "person" under the fourteenth amendment.<sup>124</sup> According to *Roe*, since the fetus has the capability of maintaining life outside the mother's womb at the point of viability, a state has a legitimate interest to protect potential life.<sup>125</sup>

However, the Supreme Court's decision in *Roe v. Wade* has been misinterpreted in many cases concerning the recognition of an unborn fetus as a person.<sup>126</sup> Although the Court in *Roe* held that a fetus was not a person under the fourteenth amendment, that Court noted, in dicta, that the decision did not preclude state action in protecting the unborn in other areas, such as wrongful death, where the state may have an interest.<sup>127</sup> Therefore, the concern that the adoption of the causation test would be in conflict with *Roe v. Wade* is unwarranted.

Both the viability standard and the live-birth requirement are artificial demarcations to determine the point at which the unborn fetus is entitled to legal protection in tort law.<sup>128</sup> As a result, both standards result in an injustice to a nonviable fetus who is negligently injured while "*en ventre sa mere*." A nonviable fetus would probably have survived had it not been for a tortfeasor's wrongful act, for as long as a fetus is alive in the uterus it is capable of entering

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<sup>119</sup>For a discussion of the rationale expressed to dispose of the viability standard and to adopt the causation standard see Hartye, *Tort Recovery*, *supra* note 39, at 281.

<sup>120</sup>See Hartye, *Tort Recovery*, *supra* note 39, at 282 advocating the theory that biological separability clearly begins at conception and not viability.

<sup>121</sup>*Id.* See Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61, 71 (1960).

<sup>122</sup>17 Ohio St. 3d at 49, 476 N.E.2d at 1056.

<sup>123</sup>*Id.* The *Werling* court stated that their decision was "entirely consistent with *Roe* to the effect that a viable fetus is a person entitled to protection and may be a basis for recovery under the wrongful death statute." *Id.*

<sup>124</sup>17 Ohio St. 3d at 49, 476 N.E.2d at 1056 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>125</sup>410 U.S. at 163.

<sup>126</sup>See Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1649. "An extension of *Roe* into the area of tort recovery for the wrongful death of a fetus denies the fetus the status of a "person" within the meaning of state wrongful death statutes and essentially grants a tortfeasor immunity from liability for his wrongful act." *Id.* at 1675.

<sup>127</sup>See Comment, *Torts-The Right of Recovery*, *supra* note 4, at 1674.

<sup>128</sup>*Id.* at 1682.

the viability stage.<sup>129</sup> The refusal of the Ohio Supreme Court to adopt the causation test in a wrongful death action will lead to results similar to those occurring in prenatal recovery before the rejection of the live-birth requirement.<sup>130</sup> The illogical and unjust result will be the extension of liability to one who merely injures a fetus yet no liability imposed on a tortfeasor whose misconduct caused the death of a fetus.<sup>131</sup> The logic of the rationale in *Werling* should have been extended to include the nonviable fetus. A fetus should be recognized as a "person" within the meaning of the Ohio Wrongful Death Statute<sup>132</sup> from the point of conception, not viability.

### CONCLUSION

The case of *Werling v. Sandy* serves to expand tort recovery for the unborn child in a direction consistent with the majority of United States jurisdictions. *Werling* allows recovery for the wrongful death of a viable fetus which is negligently injured "*en ventre sa mere*" and subsequently stillborn. The Ohio Supreme Court's holding that a viable fetus is a "person" within the meaning of the Ohio Wrongful Death Statute was based on an analysis of the purpose of the statute and other pertinent Ohio statutes and case law interpreting the rights of the unborn child.

The *Werling* court determined the purpose of the statute was to provide a remedy where there would have been an action for damages had death not ensued. The court in *Werling* fulfilled this purpose by allowing parents to institute an action for the wrongful death of their viable fetus. In addition, the *Werling* court found support for its holding in previous Ohio case law allowing a cause of action for prenatal injuries and for the wrongful death of a child that survives birth yet dies shortly thereafter. These decisions served as a foundation for the court to make the next logical step in determining the rights of the unborn child, namely, allowing a cause of action for the wrongful death of a viable fetus subsequently delivered stillborn.

The *Werling* court specifically adopted the viability standard to determine the point at which the unborn fetus is entitled to protection in tort law. The *Werling* court refused to recognize a nonviable fetus as a person within the meaning of the wrongful death statute. In the future, the rationale used to extend recovery to the viable fetus should be considered with respect to the nonviable fetus to ensure legal protection whenever a wrongful act has been committed.

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<sup>129</sup>*Id.* at 1679 noting that a fetus that is alive in the uterus is connected to maternal circulation and is capable of being brought to the point of viability, no matter what its age.

<sup>130</sup>*Id.* Those results include a penalty imposed against a tortfeasor who injures a fetus yet no penalty against a tortfeasor who causes the death of a fetus. *Id.*

<sup>131</sup>*Id.*

<sup>132</sup>OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1984).

