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NOTE

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INTRODUCTION

At common law, a cause of action for wrongful death was not recognized.¹ Today all American jurisdictions have enacted statutes that create a right to recover for wrongful death.² The courts, however, continue to reach conflicting results in the treatment of recovery for the wrongful death of a fetus³ injured *en ventre sa mere* (in its mother's womb).⁴ Originally, no right of recovery for "prenatal"⁵ injuries was recognized by the courts.⁶ Although such recovery was eventually allowed, the circumstances under which the right was granted varied among the jurisdictions.⁷

In April, 1986, the North Carolina Court of Appeals decided the case of *DiDonato v. Wortman*.⁸ The court held that there can be no cause of action for the wrongful death of a viable⁹ child *en ventre sa mere*, pursuant to section 28A-18-2 of the North Carolina General Statutes.¹⁰

This Note will examine the *DiDonato* decision and its two-pronged approach to the issue of a wrongful death action for a viable unborn fetus. Part I presents the facts of the *DiDonato v. Wortman* case. Part II discusses the history of wrongful death actions, with particular emphasis on wrongful death recovery in North Carolina. In addition, the develop-

1. Note, *Wrongful Death: O'Grady v. Brown* [654 S.W.2d 904 (Mo.)], *Recovery for Wrongful Death of a Viable Fetus in Missouri*, 52 UMKC L. REV. 692, 693 (1984).

2. *Id.* at 696.

3. The word "fetus" is medically defined as "the product of conception from the end of the eighth week to the moment of birth." STEDMAN'S MEDICAL DICTIONARY 521 (24th ed. 1982) [hereinafter cited as STEDMAN'S].

4. BLACK'S LAW DICTIONARY 479 (5th ed. 1979) [hereinafter cited as BLACK'S].

5. "Preceding birth," STEDMAN'S, *supra* note 3, at 1134.

6. Note, *Recovery for Wrongful Death of a Stillborn Fetus Examined*, 21 VILL. L. REV. 994, 994 (1976).

7. *Id.*

8. 80 N.C. App. 117, 341 S.E.2d 58 (1986).

9. The word "viable" denotes a fetus sufficiently developed to live outside of the uterus. STEDMAN'S, *supra* note 3, at 1551.

10. N.C. GEN. STAT. § 28A-18-2(a) reads in pertinent part:

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

ment of wrongful death actions for viable unborn fetuses is traced. Part III analyzes the *DiDonato* decision with special attention to its reliance upon the speculative nature of pecuniary damages and the statutory meaning of "person." This Note concludes that the present trend in the United States indicates that North Carolina should, either judicially or legislatively, change its laws to reflect the majority view allowing recovery for the wrongful death of a viable unborn fetus.

I. THE CASE

A. Facts

In March, 1982, thirty-six-year-old Norma DiDonato became pregnant and was examined by defendants Drs. William Wortman and John Hart.¹¹ Dr. Wortman had treated Norma DiDonato since 1973 and was aware of her family history of diabetes and her long history of infertility. Nevertheless, Dr. Wortman diagnosed Mrs. DiDonato's pregnancy as "no risk."¹² The delivery date was set for October 12, 1982.¹³

On October 26, 1982 (two weeks after the predicted due date), Mrs. DiDonato was given a non-stress test at her own insistence, the results of which indicated that the baby was viable, healthy and reactive and could have been born alive if labor had been induced at that time.¹⁴ Mrs. DiDonato was admitted to the hospital on October 30, 1982, at which time no fetal heartbeat could be detected. After a pelvic examination it was determined that the DiDonato baby was no longer alive.¹⁵ Mrs. DiDonato underwent a Caesarean section delivery of a stillborn twelve-pound, eleven-ounce male fetus.¹⁶

B. Trial Court

Plaintiff Anthony DiDonato, as administrator of the estate of his still-born son, Joseph, filed a wrongful death action in Superior Court, Mecklenburg County.¹⁷ He alleged that because of the family history of diabetes and the presence of increased levels of blood sugar in Norma

11. Brief for Plaintiff-Appellant at 3, *DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986) (No 8SC1015 Mecklenburg County).

12. *Id.*

13. *Id.* Between June 30, 1982 and September 20, 1982 chemical analyses of Mrs. DiDonato's urine revealed the presence of sugar. The finding was recorded on her pregnancy chart and circled. At no time did Wortman or Hart advise Mrs. DiDonato that her due date had been revised from October 12, 1982. Furthermore, the significance of the presence of sugar in her urine or how that fact would affect the health of the fetus and the delivery was never discussed. Mrs. DiDonato was not placed on any medication nor was she advised about any type of glucose tolerance test or any other procedure routinely utilized for diagnosing a diabetic condition. *Id.* at 3-4.

14. *Id.* at 4.

15. *Id.*

16. *Id.*

17. *DiDonato*, 80 N.C. App. at 117, 341 S.E.2d at 58.

DiDonato's blood, the defendants should have, in the exercise of reasonable care, diagnosed and recognized her diabetic condition.¹⁸ The baby should have been delivered before it outgrew its blood and oxygen supply as a consequence of the high blood sugar level. Their failure to do so allegedly resulted in the wrongful death of plaintiff's intestate.¹⁹

Defendants moved to dismiss the wrongful death claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted under the North Carolina Wrongful Death Act.²⁰ The court granted the motion, and the plaintiff appealed.²¹

C. *Appellate Court*

In affirming the trial court's dismissal, the North Carolina Court of Appeals held that the issue of a wrongful death action for a viable unborn fetus is one more appropriately for legislative attention and not for judicial intervention.²² The court reached its holding by looking at the speculative nature of pecuniary damages as set out by the North Carolina Supreme Court and the statutory definition of "person" as interpreted by the North Carolina Court of Appeals.

II. BACKGROUND

A. *Development of the Wrongful Death Act*

The development of the present North Carolina Wrongful Death Act has been a long and complex process. The creation of an action for wrongful death can be traced to dissatisfaction with two ancient rules which prohibited recovery for civil injury amounting to death.²³ The first rule, which originated in 1607, basically held that if a tort amounted to a felony, the injured party's right of action was barred.²⁴ The felony rule later influenced²⁵ Lord Ellenborough to lay down a broader common law rule which, in essence, stated that in a civil court, the death of a human being cannot be complained of as an injury.²⁶ Because these rules

18. *Id.* at 117, 341 S.E.2d at 59.

19. *Id.* at 118, 341 S.E.2d at 59.

20. Brief, *supra* note 11, at 2; see also N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1985).

21. *DiDonato*, 80 N.C. App. at 117, 341 S.E.2d at 58.

22. *Id.* at 119, 341 S.E.2d at 60.

23. See generally 3 HOLDSWORTH, A HISTORY OF ENGLISH 334 (5th ed. 1973).

24. *Id.* at 331 [hereinafter referred to as "the felony rule"].

25. Authorities are not sure exactly how the influence occurred but the influence is suggested in *Osborn v. Gillett*, 8 L.R.-Ex 96 (1873).

26. *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808) (plaintiff was allowed recovery for the death after suing the owners of an overturned stagecoach for the death of his wife). Lord Ellenborough was sitting at *nisi prius*.

prohibited recovery in civil actions for the injury or death of a person, plaintiffs normally went uncompensated for the loss caused by the acts of tortfeasors.²⁷

In response to the harshness of the common law rule, Lord Campbell's Act²⁸ was enacted in 1846 allowing recovery by personal representatives suing for the wrongful death of another. In the United States, statutes modeled after Lord Campbell's Act were adopted by legislatures in the late 1840's.²⁹ One of the first such statutes was enacted in New York in 1847.³⁰ The statute contained substantially the same provisions as Lord Campbell's Act and created a cause of action for losses sustained by named beneficiaries by reason of death.

All jurisdictions now allow actions for wrongful death.³¹ The statutes of the different jurisdictions assume several forms but fall generally into three classes: (1) statutes allowing recovery for damages sustained by named beneficiaries, (2) statutes allowing recovery for damages sustained by the decedent's estate, and (3) statutes allowing recovery against the estate of the deceased person.³² The North Carolina wrongful death statute falls within the first class.

B. *Wrongful Death Recovery in North Carolina*

Eight years after the enactment of Lord Campbell's Act,³³ the North Carolina Legislature enacted a statute modeled after the English statute.³⁴ The statute then enacted is now incorporated into section 28A-18-

27. Both rules were later modified in that they suspended the right of an action in tort until prosecution but did not destroy it. Thus, the modification was the first suggestion of dissatisfaction with the rules. HOLDWORTH, *supra* note 23, at 334.

28. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93. The Act provided: That whenever the Death of a Person shall be caused by wrongful Act, Neglect or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the part injured to maintain an Action or recover Damages in respect thereof, then and not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured...every such Action shall be brought by and in the Name of the Executor or Administrator of the Person deceased....

29. See Comment, *Torts—The Right of Recovery For the Tortious Death of the Unborn*, 27 HOW. L.J. 1649 (1984).

30. N.Y. EXECUTORS LAW § 450 (McKinney 1847).

31. S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2D at 29 (2d ed. 1975).

32. 3 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 337 (4th ed. 1974).

33. Lord Campbell's Act, ch. 93.

34. The statute provided:

Whenever the death of a person shall be caused by the wrongful act of another person, and the wrongful act is such as would have entitled the party injured to maintain an action, and recover damages in respect thereof, if death had not ensued, then and in every such case, the person who would have been liable, if death had not ensued, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount to felony law.

Be it further enacted, That every such action shall be brought by and in the name of the personal representative of the deceased, and the amount recovered in every such action, shall be disposed of according to the statute for the distribution of personal property in case the jury

2 of the North Carolina General Statutes.³⁵

The statute, by express language, limits recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death."³⁶ It does not provide for the assessment of punitive damages, nor does the statute provide for the allowance of nominal damages in the absence of pecuniary loss.³⁷

The North Carolina wrongful death statute has from its passage been interpreted to accord with the interpretation given by the English courts to Lord Campbell's Act: "If they bring an action and prove no loss, actual or prospective, the defendant is entitled to the verdict."³⁸ In 1867, the North Carolina Supreme Court stated:

The reason why, at common law, an action against a trespasser died with the person was, that it was not so much an action for pecuniary loss, as it was for a *solatium*³⁹ for the wounded feelings of the plaintiff, and for the punishment of the defendant. But the plaintiff could not be solaced, nor the defendant punished after death. But our statute, which gives an action to the representative of a deceased party, who was injured or slain by a trespasser, confines the recovery to the amount of *pecuniary injury*. It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being, how much has the plaintiff lost by the death of the person injured.⁴⁰

Any recovery for wrongful death must be based on actionable negligence or misconduct, under the general rules of tort liability, and the action must be asserted in strict conformity with the statute.⁴¹

In 1969, the North Carolina Legislature completely rewrote the wrongful death statute, making extensive changes;⁴² the most considera-

may give such damages as they deem fair and just, with reference to the pecuniary injury resulting from such death: within one year from the death of such deceased person.

Be it further enacted, That the amount recovered in every such action shall be for the exclusive and sole benefit of the widow and issue of deceased, in all cases where they are surviving. N.C. GEN. STAT. § 39 (1855).

35. N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1985).

36. *Id.*

37. *Id.*; see also *Reeves v. Hill*, 272 N.C. 352, 360, 158 S.E.2d 529, 535 (1968).

38. *Armentrout v. Hughes*, 247 N.C. 631, 632, 101 S.E.2d 793, 794 (1958).

39. Defined as: "Damages allowed for injury to the feelings." BLACK'S, *supra* note 4, at 1248.

40. *Armentrout*, 247 N.C. at 633, 101 S.E.2d at 795 (quoting *Collier v. Arrington*, 61 N.C. 356, 358 (1867)) (emphasis in original).

41. 5 STRONG'S NORTH CAROLINA INDEX 3d at 3.

42. The current wrongful death statute reads:

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representatives or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including

ble of which allowed recovery of punitive as well as nominal damages. Aside from a 1984 amendment, the current statute remains unchanged.⁴³

C. History of a Cause of Action for the Wrongful Death of a Fetus

At common law, a fetus was not recognized apart from its mother as a "person" having standing to bring suit.⁴⁴ Four major cases have established the history of a cause of action for the wrongful death of a fetus.⁴⁵ The first recorded case in which the issue of the rights of an unborn arose was *Dietrich v. Inhabitants of Northhampton*.⁴⁶ The case involved a wrongful death action by a woman, who, during her fourth or fifth month of pregnancy, slipped upon a defect in a highway of the defendant town. The fall resulted in the miscarriage of her child who died a few

attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars (\$1,500) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1.

N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1985).

43. The 1984 amendment raised the burial expenses exclusion from \$500 to \$1,500.

44. Note, *A Wrongful Death Action Can Be Maintained for Prenatal Injuries Causing the Stillborn of a Fetus*: *Witty v. American General Capital Distributors*, 697 S.W.2d 636 (Tex. App. 1985), 17 TEX. TECH. L. REV. 983, 985 (1986).

45. *Verkennes v. Corniea*, 229 Minn. 365, 58 N.W.2d 838 (1949); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900); *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14 (1884).

46. 138 Mass. 14 (1884).

minutes after birth. An action was brought to recover damages "for the further benefit of the mother."⁴⁷ Justice Holmes, speaking for the Massachusetts Supreme Court, stated the opinion that was followed for the next sixty years—an unborn child incapable of surviving a premature birth is not a separate entity and therefore is not a person in its own right.⁴⁸

In another early decision in this area, the Illinois Supreme Court in *Allaire v. St. Luke's Hospital*,⁴⁹ denied recovery to a child for prenatal injuries received within ten days of his delivery date.⁵⁰ The court, relying on *Dietrich*, held that as the unborn child was a part of the mother at the time of the injury, the child could not be allowed to maintain an action for injuries occasioned before its birth.⁵¹ The *Dietrich-Allaire* rationale was followed in the United States until 1946, when the two cases were eventually reversed due to the criticism surrounding their outcome.⁵²

In *Bonbrest v. Kotz*,⁵³ the court broke the ground for allowing recovery for prenatal injuries where the child is born alive. In *Bonbrest*, a viable fetus was injured in the process of removal from its mother's womb and only survived for a short time thereafter due to the defendants' alleged professional malpractice.⁵⁴ The Federal District Court for the District of Columbia distinguished *Dietrich* by stating that *Dietrich* involved an injury transmitted to a fetus through its mother whereas the *Bonbrest* court was considering a direct injury to a viable fetus.⁵⁵ The court rejected the "single entity" view and held that a child, if born alive and *viable*, should be allowed to maintain an action for injuries wrongfully committed upon its person in the womb of its mother.⁵⁶

All American jurisdictions now allow recovery by a surviving child for prenatal injuries.⁵⁷ After a court has recognized that a cause of action for prenatal injuries will lie in cases where the child survives birth, it would be reasonable for courts to take the next step and recognize a cause of action for prenatal injuries resulting in death when the child was

47. *Id.* at 15.

48. *Dietrich*, 138 Mass. at 16.

49. 184 Ill. 359, 56 N.E. 638 (1900).

50. *Id.* at 360, 56 N.E. at 638.

51. *Id.* at 366, 56 N.E. at 640.

52. Justice Boggs' dissent in *Allaire* argued for recovery based on the viability of the fetus. He stated:

If at that period a child so advanced is so injured in its limbs or members and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

Allaire, 184 Ill. at 370, 56 N.E.2d at 641.

53. 65 F. Supp. 138 (D.D.C. 1946).

54. *Id.* at 139.

55. *Id.* at 140.

56. *Id.* at 142.

57. Note, *supra* note 1, at 696.

born alive.⁵⁸ Many courts, however, limit recoveries to injuries sustained after viability.⁵⁹ Criticism of this viability requirement has led some jurisdictions to allow recovery for injuries sustained at any time after conception.⁶⁰

The Minnesota Supreme Court in *Verkennes v. Corniea*⁶¹ was the first to allow a wrongful death recovery for the death of a viable, but stillborn fetus. In *Verkennes*, the father of the unborn alleged that a negligently supervised delivery resulted in the death of a viable fetus and its mother.⁶² The court relied on the rationale of Justice Boggs' dissent in *Allaire* and on the *Bonbrest* opinion, and held that "where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises"⁶³ The court deemed the viable fetus an independent entity that was owed a duty of care separate and apart from that owed to the expectant mother.⁶⁴

State courts are currently divided on whether to allow an action for the wrongful death of a viable fetus. Today, an overwhelming majority of jurisdictions addressing the issue allow recovery. As of 1985, thirty-three jurisdictions allow an action to be maintained for the wrongful death of a viable fetus.⁶⁵ These courts recognize that a viable fetus is biologically independent. They support their decisions with two basic arguments: "(1) that such a cause of action is a natural extension of the rule that recovery is allowed for prenatal injuries when the child is born alive, and (2) that the purpose of a wrongful death act is to provide a remedy whenever an action could have been brought; provided death had not ensued, and allowing recovery for the wrongful death of a viable fetus is consistent with that purpose."⁶⁶ Nine jurisdictions, including North Carolina, deny recovery for the wrongful death of a viable fetus.⁶⁷ These jurisdictions have denied recovery on one of two different bases, either that a fetus is not a person within the meaning of the statute or that the losses are too speculative in nature.⁶⁸ The jurisdictions remaining have not had the opportunity to rule on the issue.⁶⁹

58. *Id.* at 696-97.

59. *Id.* at 697; see also *supra* note 9 (defining "viable").

60. Note, *supra* note 1, at 697.

61. 229 Minn. 365, 38 N.W.2d 838 (1949).

62. *Id.* The issue was whether the special administrator of the estate of an unborn infant, which dies prior to birth as the result of another's negligence, has a cause of action on behalf of the next of kin of said unborn infant under the wrongful death statute. *Id.* at 367, 38 N.W.2d at 839.

63. *Id.* at 370-71, 38 N.W.2d at 841.

64. *Id.*

65. Note, *supra* note 46, at 998.

66. Note, *supra* note 1, at 697-98.

67. *Id.* at 698. The other states include: Arizona, California, Florida, Nebraska, New Jersey, New York, Pennsylvania and Virginia.

68. *Id.*

69. *Id.*

The landmark decision of *Roe v. Wade*,⁷⁰ contains one of the few references by the United States Supreme Court concerning whether a right of action for prenatal death exists under applicable tort law.⁷¹ In *Roe*, Justice Blackmun, writing for the majority, stated that the word "person," as used in the fourteenth amendment of the United States Constitution, does not include the unborn.⁷² Yet, in dictum, Justice Blackmun acknowledged that "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn *except in narrowly defined situations* and except when the rights are contingent upon live birth."⁷³

D. *Treatment of Wrongful Death Actions for the Unborn Fetus in North Carolina*

Although the North Carolina Wrongful Death Act was originally enacted in 1854, it was not until 1966 that the court was confronted with the issue of whether there can be a right of action under the Wrongful Death Act for the prenatal death of a viable child *en ventre sa mere*. In *Gay v. Thompson*,⁷⁴ Barbara Gay, on August 23, 1962, was eight months pregnant, in good health, and the child's condition and growth were normal. The child was capable of a separate existence outside of the mother's womb. Mrs. Gay had no symptoms of being in labor, and no complications existed requiring labor to be induced prematurely.⁷⁵ However, upon recommendation of her physician, defendant Dr. Thompson, she was admitted to the hospital so that Thompson could cause a premature delivery. In an effort to induce the premature delivery, her amniotic membranes were ruptured and labor-inducing drugs were administered for 41 hours without success.⁷⁶ On the night of August 25, Gay became ill from an acute infection of the uterus which resulted in her death; her baby was delivered dead the following afternoon. The complaint alleged that Thompson's negligence proximately caused Baby Gay's death; that prior to defendant's negligence Baby Gay was a healthy, normal boy.⁷⁷

The North Carolina Supreme Court cited the particular language of the Wrongful Death Act limiting recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death."⁷⁸ The court said that a right of action to recover damages for

70. 410 U.S. 113 (1973).

71. *Id.* at 161.

72. *Id.* at 158.

73. *Id.* at 161 (emphasis added).

74. 266 N.C. 394, 146 S.E.2d 425 (1966).

75. *Id.* at 394-95, 146 S.E.2d at 425-26.

76. *Id.* at 395, 146 S.E.2d at 426.

77. *Id.*

78. *Id.* at 396, 146 S.E.2d at 426-27.

wrongful death is purely statutory.⁷⁹ The court further recognized that although damages in any wrongful death action are to some extent uncertain and speculative, there are no competent means of measuring the probable future earnings of the fetus: "It is virtually impossible to predict whether an unborn child, but for its death, would have been capable of giving pecuniary benefit to anyone."⁸⁰ Since there was "pecuniary injury resulting from" the wrongful prenatal death of a viable child *en ventre sa mere*, the court concluded that there could be no right of action.⁸¹

Two years later, the North Carolina Supreme Court decided *Stetson v. Easterling*,⁸² in which an infant died, after living only a few months, from prenatal brain injuries allegedly proximately caused by the negligence of the attending physicians. The issue in *Stetson* was whether the administrator could maintain an action under the Wrongful Death Act to recover for the death of his intestate who, after living only a few months, died as the result of prenatal injuries allegedly caused by the negligence of the defendants.⁸³ The court examined the statutory language which limits the right of action to "such as would, if the injured person had lived, have entitled him to an action for damages therefor."⁸⁴ The court first addressed the issue of whether the infant, if he had lived, could have maintained an action to recover damages on account of injuries he sustained while *en ventre sa mere*.⁸⁵ The *Stetson* court relied on dictum in *Gay* and held that the *Stetson* baby, if he had lived, could have maintained an action to recover damages.⁸⁶ The court then turned to the main issue: whether the administrator could recover damages for the wrongful death of his intestate. Using the *Gay* rationale, the court held that negligence alone, without "pecuniary injury resulting from such death," does not create a cause of action; "it would be sheer speculation to attempt to assess damages as of the time of the alleged negligently inflicted fatal injuries."⁸⁷

In 1975, the North Carolina Court of Appeals changed the emphasis from the speculative nature of damages to the statutory meaning of "person" in *Cardwell v. Welch*.⁸⁸ In *Cardwell*, the parents of a viable unborn

79. *Id.* at 396, 146 S.E.2d at 427.

80. *Id.* at 398, 146 S.E.2d at 428.

81. *Id.* at 400, 146 S.E.2d at 429.

82. 274 N.C. 152, 161 S.E.2d 531 (1968).

83. *Id.* at 154-55, 161 S.E.2d at 533.

84. N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1985).

85. The court relied on *Gay v. Thompson*, which said that "[s]ince the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence." 274 N.C. at 156, 161 S.E.2d at 534.

86. *Id.*

87. *Id.* at 156-57, 161 S.E.2d at 534.

88. 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975). The North Carolina Supreme Court denied certiorari on this issue, holding in *Gay v. Thompson* that it

child brought an action to recover damages alleging that the child's death was caused by placental separation resulting from trauma to the mother sustained in an automobile collision caused by defendant's negligence.⁸⁹ The issue was whether a viable unborn child whose death is caused while still in its mother's womb is properly to be considered a "person" within the meaning of the North Carolina Wrongful Death Act such that an action may be maintained by an administrator to recover damages for its wrongful death.⁹⁰ The court, in affirming the lower court's decision, denied recovery. Looking at the legislative intent, the court construed the word "person" to mean one who has become recognized as a person by having been born alive — one who has "attained a recognized individual identity so as to have become a 'person' as that word is commonly understood."⁹¹ A year later, in *Yow v. Nance*,⁹² the North Carolina Court of Appeals followed *Cardwell* and held that a viable unborn child whose death was caused while still in its mother's womb is not to be considered a "person" within the meaning of the Wrongful Death Act.⁹³

In *Stam v. State*,⁹⁴ a North Carolina citizen and taxpayer brought a declaratory judgment action against the State of North Carolina and Wake County seeking judgment declaring unlawful appropriation of state funds by the 1977 session of the General Assembly and use of supplemental county funds to pay for elective, medically unnecessary abortions for indigent women.⁹⁵ The court of appeals held that a live human fetus is not a legal "person" within the meaning of article 1, sections 1 and 19 of the North Carolina Constitution which govern equality of rights of persons and equal protection of laws,⁹⁶ and thus the state may provide funds for performance of elective, medically unnecessary abortions for indigent women.⁹⁷ The court reasoned that although an unborn child may be a "person" for some purposes,⁹⁸ that view is qualified in one significant respect: live birth is a condition precedent to the exercise of

was not necessary to decide whether a viable child *en ventre sa mere*, who is born dead, is a person within the meaning of the wrongful death statute. *Gay*, 266 N.C. at 402, 146 S.E.2d at 431.

89. *Id.*

90. *Id.* at 392, 213 S.E.2d at 383.

91. *Id.*

92. 29 N.C. App. 419, 224 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976).

93. *Id.* at 419-20, 224 S.E.2d at 292.

94. 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd in relevant part*, 302 N.C. 357, 275 S.E.2d 439 (1981).

95. *Id.* at 210, 267 S.E.2d at 338.

96. *Id.* at 214, 267 S.E.2d at 340.

97. *Id.* at 218, 267 S.E.2d at 342.

98. For example, "[b]y a legal fiction or indulgence, a legal personality is *imputed* to an unborn child as a rule of property for all purposes working to his detriment." *Id.* at 216, 267 S.E.2d at 341 (quoting *Mackie v. Mackie*, 230 N.C. 152, 154-55, 52 S.E.2d 352, 354 (1949)) (emphasis added by the *Stam* court).

the property rights of the child *en ventre sa mere*.⁹⁹ In further support of its conclusion, the court cited the decision of *Roe v. Wade*¹⁰⁰ in which the United States Supreme Court held that the word "person," as used in the fourteenth amendment due process clause, does not include the unborn.¹⁰¹ The Supreme Court's reasoning persuaded the North Carolina Court of Appeals that the word "person" should not have broader meaning in the state constitution than it has in the United States Constitution.

In the 1984 decision of *Azzolino v. Dingfelder*,¹⁰² the appellate court was faced with two questions of first impression, namely, whether a cause of action for "wrongful life" may be maintained and whether a cause of action for "wrongful birth" may be maintained.¹⁰³ In *Azzolino*, the parents and siblings of a child born with Down's Syndrome, along with the child, brought an action against the health service, the physician and the nurse who provided prenatal care to the mother, for wrongful birth, wrongful life, and injuries suffered by the minor siblings as a result of the wrongful birth.¹⁰⁴

Although the North Carolina Court of Appeals held that both the wrongful life and the wrongful birth claims could be maintained,¹⁰⁵ the North Carolina Supreme Court reversed the wrongful life claim because "such claims for relief are not cognizable at law in this jurisdiction," and reversed the wrongful birth claims "absent a clear mandate by the legislature."¹⁰⁶ Even though the court assumed *arguendo* that the defendants owed a duty to the infant *in utero* as well as to his parents and that the defendants breached that duty and thereby proximately caused his birth,¹⁰⁷ the court failed to find that life, even with severe defects, was an injury in the legal sense.¹⁰⁸

II. ANALYSIS

After the decision in *DiDonato v. Wortman*,¹⁰⁹ North Carolina remains in the minority of jurisdictions which prohibit wrongful death actions on behalf of fetuses.¹¹⁰ The North Carolina Court of Appeals in *DiDonato* held that the word "fetus" does not mean "person" within the meaning

99. *Stam*, 47 N.C. App. at 216, 267 S.E.2d at 341.

100. 410 U.S. 113 (1976).

101. *Id.* at 158.

102. 71 N.C. App. 289, 322 S.E.2d 567 (1984), *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985).

103. *Id.* at 294, 322 S.E.2d at 572-73.

104. *Id.* at 292-93, 322 S.E.2d at 571.

105. *Id.* at 303, 322 S.E.2d at 577-78.

106. *Azzolino v. Dingfelder*, 315 N.C. 103, 110, 337 S.E.2d 528, 533 (1985).

107. *Id.* at 108, 337 S.E.2d at 532.

108. *Id.* at 109, 337 S.E.2d at 532.

109. 80 N.C. App. 117, 341 S.E.2d 58 (1986).

110. *See Note, supra* note 1, at 698.

of the wrongful death statute. The majority gave three reasons for its holding. First, the court found it was bound by a previous North Carolina Supreme Court decision¹¹¹ which contained similar facts, and according to the doctrine of *stare decisis* should also follow prior North Carolina Court of Appeals decisions¹¹² expressly addressing the same issue.¹¹³ Second, the court did not want to conflict with the United States Supreme Court decision of *Roe v. Wade*.¹¹⁴ Third, the legislature, rather than the judiciary, is the branch to expand the meaning of the word "person" to include "fetus" within the meaning of the wrongful death statute.¹¹⁵

Based on the authority of *Gay v. Thompson*,¹¹⁶ the *DiDonato* court held that no cause of action exists on behalf of a fetus for wrongful death.¹¹⁷ In *Gay*, the defendant physician's actions caused a pregnant woman's amniotic membranes to burst and infect the uterus, and as a result, she died and her baby was stillborn.¹¹⁸ The court held that no evidence existed from which to infer pecuniary damages as a result of the "wrongful prenatal death of a viable child *en ventre sa mere*; it is all sheer speculation."¹¹⁹

Since *Gay* did not expressly answer the question of whether a "fetus" is a "person" within the meaning of the wrongful death statute, the majority of the *DiDonato* court appears to give misplaced reliance on *Gay*. The issue in *Gay* arose under North Carolina's former wrongful death statute, which allowed recovery only for "such damages as are a fair and just compensation for the pecuniary injury."¹²⁰ According to *Gay*, the usual measurement of pecuniary damages, or the probable future earnings of a decedent, such as "mental and physical capabilities, personality traits, aptitudes and training," were missing when dealing with an unborn child.¹²¹ Since the pecuniary worth of a fetus could not be measured, the court in *Gay* dismissed the action. However, as the dissent in *DiDonato* points out, since the amended wrongful death statute excludes pecuniary worth as the sole basis of recovery, the *Gay* holding, when

111. See *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966).

112. See *Stam v. State*, 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd in relevant part*, 302 N.C. 357, 275 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976); *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

113. *DiDonato*, 80 N.C. App. at 119, 341 S.E.2d at 59-60.

114. *Id.* at 119, 341 S.E.2d at 60.

115. *Id.*

116. 266 N.C. 394, 146 S.E.2d 425 (1966).

117. *Id.* at 119, 341 S.E.2d at 60.

118. *Gay*, 266 N.C. at 395, 146 S.E.2d at 426.

119. *Id.* at 402, 146 S.E.2d at 431.

120. N.C. GEN. STAT. § 28-174 (repealed in 1973 and now replaced by N.C. GEN. STAT. § 28A-18-2(b) (1984)).

121. *Gay*, 266 N.C. at 398, 146 S.E.2d at 428 (quoting Comment, *Developments in the Law of Prenatal Wrongful Death*, 69 DICK. L. REV. 258, 267 (1965)).

applied to the facts in *DiDonato*, provides little justification for the majority's decision.¹²² Not only may a beneficiary now recover pecuniary damages but he may recover punitive and nominal damages as well. Since punitive damages are based on the heinousness of the conduct and the financial status of the defendant,¹²³ damages recoverable do not take on a speculative nature. Indeed, other jurisdictions, in the absence of specific proof of earning power, have allowed recovery for the destruction of an unborn child's power to earn money when it can be inferred that a child would have had such power.¹²⁴

DiDonato also recognized the United States Supreme Court decision of *Roe v. Wade* in holding that a "fetus" is not a "person" within the meaning of the wrongful death statute.¹²⁵ However, in giving advertence to *Roe*, *DiDonato* appears to unnecessarily restrict the meaning of "fetus" to prohibit a wrongful death action from arising on behalf of a stillborn. In *Roe*, a pregnant woman claimed that she had a constitutional right to terminate her pregnancy.¹²⁶ The state asserted that it had a compelling state interest to protect unborn children.¹²⁷ The Court disagreed with the state's argument that its compelling state interest, even before viability, was to protect the fetus as a "person," as that word is used in the fourteenth amendment.¹²⁸

DiDonato, along with other courts,¹²⁹ does not appear to examine the real differences between the wrongful death statute and the fourteenth amendment and the dissimilar analyses that the provisions warrant. In *Roe*, the claim centered around the rights and liberties guaranteed by the fourteenth amendment, thus warranting the Court to balance a fundamental right against a compelling state interest. The Court came to its conclusion after balancing the interests of a pregnant woman's right to privacy in her decision to terminate her pregnancy against the state's interest in protecting prenatal life and the health of the mother. At the state level however, the courts in construing the language of the wrongful death statute are not to be concerned with such a balancing test but are interested in effectuating the purpose of the statute. Based on the history of the North Carolina statute and the enactment of its amendment, the current statute has a remedial nature,¹³⁰ to compensate beneficiaries for

122. *DiDonato*, 80 N.C. App. at 121-22, 341 S.E.2d at 61.

123. See generally K. REDDEN & L. SCHLUETER, PUNITIVE DAMAGES § 2.4, at 34 (1980).

124. *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970).

125. *DiDonato*, 80 N.C. App. at 119, 341 S.E.2d at 60.

126. *Roe*, 410 U.S. at 129.

127. *Id.* at 156.

128. *Id.* at 156-57.

129. See, e.g., *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977).

130. *Christenbury v. Hedrick*, 32 N.C. App. 708, 713, 234 S.E.2d 3, 5-6 (1977).

the loss of their loved one and to punish the tortfeasor. Excluding "fetus" from the meaning of the word "person" contained in the fourteenth amendment advances a woman's constitutional right to privacy, while excluding "fetus" from the meaning of the word "person" in the North Carolina wrongful death statute leaves the beneficiaries uncompensated for their losses and the tortfeasors unpunished for their wrongs.¹³¹ Does an injustice occur if the limited holding in *Roe* is expanded to apply to the word "person" as contained in the North Carolina Wrongful Death Act? In the *DiDonato* decision, it would appear so. In *Roe*, Justice Blackmun seems to suggest an injustice would occur, and states in *dicta* that the state may protect an unborn in other areas.¹³²

Again, problems similar to those found in *DiDonato's* reliance on *Roe* appear when the court cites *Stam v. State*¹³³ as controlling. *Stam* involved an abortion question arising under two state constitutional provisions guaranteeing rights similar to those guaranteed by the fourteenth amendment. The North Carolina Court of Appeals in *Stam* based its holding that a "fetus" is not a "person" within the meaning of the North Carolina Constitution article I, sections 1 and 19 on both the probable intent of the framers of the constitution, as well as the United States Supreme Court's interpretation of the similar wording in the United States Constitution.¹³⁴ After examining such intent, the court concluded that the framers of the North Carolina Constitution did not intend to include "fetus" within the meaning of the word "person" in the constitutional provisions.¹³⁵ In addition, the *Stam* court noted that the current state of medical knowledge involving fetal development is far more advanced than it was at the time the state constitution was adopted in the eighteenth century.¹³⁶ However, according to *Stam*, if these medical advancements controlled the court's decision, "fetus" would take on a new meaning which would indirectly conflict with the holding in *Roe v. Wade*.¹³⁷ Likewise, the change in the legal status of the fetus which such advancements would create should be recognized by the courts. Recognizing a fetus as a "person" within the meaning of the Wrongful Death Act would further the remedial purpose of the statute without conflicting with the decision in the factually dissimilar *Roe v. Wade*. Moreover, the North Carolina General Assembly has already recognized the rights of the unborn in provisions other than the Wrongful Death Act and has

131. Comment, *supra* note 29, at 1674.

132. *Roe*, 410 U.S. at 163-65.

133. 47 N.C. App. 209, 267 S.E.2d 335 (1980).

134. *Id.* at 214, 267 S.E.2d at 340.

135. *Id.* at 217-18, 267 S.E.2d at 342.

136. *Id.* at 217, 267 S.E.2d at 341.

137. *Id.*

intimated a desire to protect those rights.¹³⁸ Courts should not hesitate to protect these important rights.

Finally, the majority in *DiDonato* holds that the legislature, not the judiciary should expand "person" to include the word "fetus" within the meaning of the wrongful death statute.¹³⁹ Again, the problems surface under this rationale. As courts in other jurisdictions have stated, denying recovery where a fetus is stillborn prevents effectuation of the legislative intent, sanctions the tortfeasor's wrongful act and negates the primary objective of the statute.¹⁴⁰ An Alabama court faced with the argument that the legislature is the appropriate forum for deciding whether recovery for the wrongful death of a fetus exclaimed that it is "often necessary for [the judiciary] to breathe life into existing laws less they become stale and shelfworn."¹⁴¹

CONCLUSION

Now that over two-thirds of the American jurisdictions allow recovery for the wrongful death of unborn fetuses (some requiring viability), the trend will eventually reflect itself in the laws of North Carolina. Although it is up to the legislature to make the laws, it is for the courts to interpret them. With no explicit exclusion of the viable unborn fetus in the statutory use of "person" in § 28A-18-2, it would appear that the North Carolina Supreme Court's grant of certiorari to hear plaintiff-appellant's appeal in *DiDonato v. Wortman*, the reversal of the lower court's decision, and the broadening of the statutory definition of "person" to include a viable unborn fetus, would be an appropriate forum in which to begin that trend.

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138. See N.C. GEN. STAT. § 41-5 (1984). An unborn infant may take an estate by deed or writing.

139. *DiDonato*, 80 N.C. App. at 119, 267 S.E.2d at 60.

140. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974) (plaintiff sued defendant for the wrongful death of an 8.5 month-old fetus caused by defendant's negligence in an automobile accident).

141. *Id.* at 99, 300 So. 2d 357.