Life Begins at the Moment of Conception for the Purposes of W. Va. Code 55-7-5: The Supreme Court of Appeals of West Virginia Rewrites Our Wrongful Death Statute

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LIFE BEGINS AT THE MOMENT OF CONCEPTION
FOR THE PURPOSES OF W. VA. CODE § 55-7-5:
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
"REWrites" OUR WRONGFUL DEATH STATUTE

Jason Cuomo *

I. INTRODUCTION ............................................. 238

II. HISTORY OF WRONGFUL DEATH STATUTES, AS APPLIED
TO UNBORN CHILDREN ........................................ 240
A. The Rise and Fall of the "Single Entity" Theory ........ 240
B. Current Status of Wrongful Death Actions on
Behalf of Unborn Children ............................... 242
   1. Majority of Jurisdictions Recognize
      Wrongful Death Actions on Behalf of
      Unborn Children ..................................... 243
   2. Minority of Jurisdictions Do Not
      Recognize Wrongful Death Actions on
      Behalf of Unborn Children ...................... 246

III. WRONGFUL DEATH ACTIONS ON BEHALF OF UNBORN
CHILDREN IN WEST VIRGINIA ............................. 248
A. West Virginia Adopts Majority Position in
   Baldwin v. Butcher .................................. 248
B. Criticism of Baldwin v. Butcher ...................... 249

IV. WEST VIRGINIA EXPANDS BALDWIN V. BUTCHER AND
MOVES INTO THE MINORITY OF JURISDICTIONS WITH
FARLEY V. SARTIN ......................................... 251

V. FARLEY COMPOUNDS THE PROBLEMS THAT BALDWIN CREATED .... 255
A. West Virginia's Legislature Never Intended for
   Our Wrongful Death Statute To Encompass
   Unborns, Viable or Not .............................. 255

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Virginia University College of Law, 1996.

237
B. **South Dakota’s Legislature Did Intend for Its Wrongful Death Statute To Encompass Unborns, Viable and Non-viable**

VI. **CONCLUSION**

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I. **INTRODUCTION**

[Although our wrongful death statute is remedial in nature and must be liberally construed, we may not rewrite the statute in the guise of construing it.]

Prior to 1969, West Virginia had not addressed the issue of whether an unborn child could maintain a cause of action under our wrongful death statute. West Virginia’s first attempt at addressing the issue came in the case of *Panagopoulous v. Martin*, where the District Court for the Southern District of West Virginia determined that a viable unborn child is a “person” within the context of our wrongful death statute. Two years later, in *Baldwin v. Butcher*, the Supreme Court of Appeals of West Virginia adopted the holding in *Panagopoulous* and allowed a wrongful death action to be maintained on behalf of a viable unborn child.

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2. Throughout this Note, the terms “fetus” and “unborn child” will be used interchangeably. My use of either phrase is not meant to offend anyone. The use of either phrase is simply meant to encompass all stages of development after conception. See Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995). I would also like to add that this Note is limited to unborn children who are “en ventre sa mere.” “En ventre sa mere” is defined as “[i]n its mother’s womb.” *BLACK’S LAW DICTIONARY* 534 (6th ed. 1990). This Note will not address the issues that may arise with conception outside the womb, nor the area of preconception torts.

3. W. VA. CODE § 55-7-5 (1966) (current version at W. VA. CODE § 55-7-5 (1994)). For the full text of West Virginia’s wrongful death statute, see infra part V.A.

of a viable fetus. By allowing wrongful death actions to be maintained on behalf of a viable fetus, Baldwin pushed West Virginia into alignment with the majority of courts on this issue.

In late 1995, however, in the case of Farley v. Sartin, the Supreme Court of Appeals of West Virginia decided to re-align our position on the issue of whether wrongful death actions could be maintained by unborn children. In Farley, the issue was whether a nonviable fetus could maintain such an action. In a unanimous opinion, West Virginia became only the third jurisdiction in the country to hold that a wrongful death action may be maintained on behalf of a nonviable unborn child.

Part II of this Note involves an exploration of the history of wrongful death statutes, as applied to fetuses. In Part III, wrongful death actions on behalf of unborn children in West Virginia will be discussed. In Part IV, the holding and reasoning behind the decision in Farley will be presented. Part V criticizes the Farley decision as being nothing more than a judicial "rewriting" of West Virginia's wrongful death statute. Finally, in Part VI, this Note will be concluded.

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5 184 S.E.2d 428 (W. Va. 1971).

6 See infra note 28 for a list of the jurisdictions which allow a wrongful death action to be maintained on behalf of a viable fetus.

7 466 S.E.2d 522 (W. Va. 1995).

8 The phrase "nonviable fetus," as used throughout this Note, refers to a fetus that is not capable of sustaining independent life outside the mother's womb, either by natural or artificial systems.


10 Id. at 534. Prior to Farley, two jurisdictions allowed a cause of action to be maintained on behalf of a nonviable fetus. See Shirley v. Bacon, 267 S.E.2d 809 (Ga. Ct. App. 1980) (permitting recovery if an unborn child is "quick," meaning capable of moving, in its mother's womb); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995) (en banc) (permitting wrongful death action for unborn child prior to viability). Furthermore, subsequent to Farley, South Dakota extended the protection of its wrongful death statute to encompass a nonviable fetus. See, e.g., Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996). Thus, as of this writing, only four jurisdictions exist which allow a wrongful death action to be maintained on behalf of a nonviable fetus.
II. HISTORY OF WRONGFUL DEATH STATUTES, AS APPLIED TO UNBORN CHILDREN

A. The Rise and Fall of the "Single Entity" Theory

At common law, recovery for prenatal torts was generally not permitted, and courts were even less willing to allow wrongful death actions for unborns. Courts routinely held that no duty could be owed to a person not yet in existence at the time of the injury, and that any injury to the fetus was compensable through the mother. The courts' rationale being that the mother and the fetus were but one person (i.e., a "single entity"). As the Supreme Court of Illinois stated at the turn of the twentieth century in Allaire v. St. Luke's Hospital, "an unborn child was but a part of the mother, and had no existence or being which could be the subject-matter of injury distinct from the mother, and that an injury to it was but an injury to the mother." Thus, at common law, wrongful death actions could not be maintained on behalf of unborns because they were not deemed "independent entities" until birth.

However, after years of medical and scientific advancements which

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14 See Peterfy, supra note 11.

15 Barbara E. Lingle, comment, Allowing Fetal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?, 44 ARK. L. REV. 465, 468-69 (1991). Justice Oliver Wendell Holmes expressed the opinion that "the unborn infant was 'a part of the mother at the time of the injury' and any damage to the infant 'which was not too remote' to deny recovery altogether was recoverable by the mother." Farley, 466 S.E.2d at 526 (citing Deitrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884), overruled by Torigan v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967)).

16 56 N.E. 638 (Ill. 1900), overruled by Amann v. Faidy, 114 N.E.2d 412 (1953).

17 Id. at 641 (Boggs, J., dissenting); see also Farley, 466 S.E.2d at 527.
enabled a fetus to exist independently of its mother prior to birth, the “single entity” view eroded away. The start of this erosion occurred in 1946, when the United States District Court for the District of Columbia, in Bonbrest v. Kotz, became the first American court to depart from the “single entity” view. While Bonbrest did not involve the wrongful death of an unborn, it was the first case to acknowledge that viable unborns should be considered separate from the mother for the purposes of tort recovery. The district court held that an unborn child, who suffers injuries wrongfully committed upon it while in a viable state, should be allowed to maintain an action for such injuries if it is subsequently born alive. The court reasoned that once a child is born alive, it should not be considered part of the mother. Rather, a child should be considered a “person” with standing to maintain an action for injuries inflicted upon it while in the womb.

Since Bonbrest, there has been all but universal change in the “single entity” theory. “Indeed, today, every jurisdiction permits recovery for prenatal injuries if a child is born alive.”

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18 The point prior to birth at which the fetus is able to exist independently from its mother is known as “viability.” A “viable child” refers to an unborn child who is capable of independent existence outside his or her mother’s womb, either by natural or artificial life-supportive systems. *BLACK'S LAW DICTIONARY* 1566 (6th ed. 1990). Medical technology has advanced tremendously since the times of the “single entity” view. As of mid-1995, the point of viability was placed at nearly 23 weeks of fetal development. *See* Darcy Frey, *On the Border of Life*, *N.Y. TIMES MAG.*, July 9, 1995, at 29.


20 *Id.*

21 *Id.* at 142.

22 *Id.* at 140.

23 *See RESTATEMENT (SECOND) OF TORTS, supra* note 13, § 869 cmt. a. In fact, the Restatement has codified this change in section 869(1), which states, “One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.” (emphasis added).

injury occurred prior to or after the point of viability. 25

B. Current Status of Wrongful Death Actions on Behalf of Unborn Children

Although nearly every jurisdiction now permits recovery for prenatal injuries where a child is born alive, 26 courts have been less willing to extend recovery for injuries that cause the death of unborn children. In 1949, Minnesota became the first state to recognize a cause of action for wrongful death brought on behalf of an unborn child. 27 Since then, the majority of jurisdictions, thirty-nine in all, have recognized such a cause of action. Of these thirty-nine jurisdictions, thirty-five recognize wrongful death actions on behalf of viable unborn children. 28 Within these thirty-nine jurisdictions exists the minority of four jurisdictions which have gone the final step and recognized a wrongful death

25 Farley v. Sartin, 466 S.E.2d 522, 527 (W. Va. 1995); see also RESTATEMENT (SECOND) OF TORTS, supra note 12, § 869 cmt. d (“If the tortious conduct and the legal causation of the harm can be satisfactorily established, there may be recovery for any injury occurring at any time after conception”)

26 See supra note 23.

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

cause of action on behalf of nonviable unborn children — West Virginia now being one of them with the Farley decision. Outside of the majority of thirty-nine jurisdictions which permit wrongful death recovery for the unborn, a minority of ten jurisdictions refuse to recognize that a wrongful death action may be brought on behalf of an unborn child.

Since the right to recover for the wrongful death of a person is a statutory right, a plaintiff's ability to recover in a given state depends upon how the courts in that state interpret their own wrongful death statute. The absence of a fifty-state consensus on this issue stems from the courts' varying interpretations of their own states' wrongful death statutes. In particular, the courts have struggled to determine whether their legislature intended their wrongful death statutes to include an unborn; and if so, whether the line should be drawn at viability.

1. Majority of Jurisdictions Recognize Wrongful Death Actions on Behalf of Unborn Children

In order to justify holding that a wrongful death action may be maintained on behalf of an unborn child, courts have had to search beyond the often nonexistent legislative intent by focusing upon the language of the statutes and the goals and purposes behind their enactments. For example, in DiDonato v.

29 See, e.g., supra note 10.

30 For a more detailed discussion on West Virginia's recognition of a wrongful death action on behalf of nonviable children, see infra part IV.


32 See infra part IV.

33 See Murphy S. Klasing, The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases, 22 Pepp. L. Rev. 933 (1995) [hereinafter Klasing]; see also Restatement (Second) of Torts, supra note 13, § 869 cmt. f.

Wortman, the Supreme Court of North Carolina was asked to determine whether its wrongful death statute allowed recovery for the death of a viable unborn child. Before addressing this issue, the court noted that there was no evidence that its legislature had ever considered this problem. With this in mind, the court focused its inquiry on "the words of the statute itself, the public policies underlying North Carolina's Wrongful Death Act, and common law principles governing its application."

The words of the North Carolina Wrongful Death Act read, in pertinent part, "[w]hen the death of a person is caused by wrongful act . . . such as would, if the injured person had lived, have entitled him to an action for damages therefore, the person . . . that would have been so liable . . . shall be held liable to an action for damages." Thus, in order to answer the issue before it, the DiDonato court had to determine whether the word "person" included a viable fetus. After noting that the statute itself did not provide a clear-cut answer, the court looked to case law from other jurisdictions.

After examining the case law of other jurisdictions, the DiDonato court found that a viable fetus is generally considered to be among the class of "persons" contemplated by the statutes' authors. In addition, the DiDonato court decided that the legislative preamble to the most recent revision of the North Carolina Wrongful Death Act was instructive on the definition of the word "person." The preamble states that

WHEREAS, human life is inherently valuable; and
WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused the death by

35 358 S.E.2d 489 (N.C. 1987).
36 Id. at 490.
37 Id.
38 Id.
40 DiDonato, 358 S.E.2d at 491.
41 Id. (citing Amadio v. Levin, 501 A.2d 1085, 1097-98 n.4 (Pa. 1985) (Zappala, J., concurring)).
42 Id., 358 S.E.2d at 491.
a wrongful act are effectively limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life.\textsuperscript{43}

After determining that a viable fetus is undeniably human because it is capable of life independent from its mother,\textsuperscript{44} the DiDonato court had no trouble in holding that "although the face of the wrongful death statute does not conclusively answer this question before us, case law concerning recovery for fetal injuries and the amending legislation quoted above both point toward acknowledging fetal personhood."\textsuperscript{45} Finally the DiDonato court used the statute’s broad remedial objectives (i.e., to deter dangerous conduct and provide compensation to beneficiaries of the decedent’s estate for their loss) to conclude that "any uncertainty in the meaning of the word ‘person’ should be resolved in favor of permitting an action to recover for the destruction of a viable fetus en ventre sa mere."\textsuperscript{46}

The DiDonato court’s use of its statute’s broad remedial objectives, and the court’s use of one of the statute’s main goals — to deter dangerous conduct — is representative of the reasoning used by the majority of courts in this country who have decided in favor of including a viable fetus within the meaning of their wrongful death statutes.\textsuperscript{47} However, the reasoning used and the conclusions reached by these courts have been criticized.

One of the main criticisms of the majority’s interpretation of the word “person” to include unborn children is that the courts are “judicially legislating” by rewriting these statutes.\textsuperscript{48} The minority of courts have refused to “judicially legislate” by including an unborn child within the definition of the word “person.”

\textsuperscript{43} Id. (citing 1969 N.C. Sess. Laws 194) (preamble) (emphasis added).

\textsuperscript{44} Id. at 491.

\textsuperscript{45} DiDonato, 358 S.E.2d at 491-92.

\textsuperscript{46} Id. at 493. “En ventre sa mere” describes an unborn child “[i]n its mother’s womb.” BLACK’S LAW DICTIONARY, supra note 2, at 534.

\textsuperscript{47} See supra note 28; see also Farley v. Sartin, 466 S.E.2d 522, 530 (W. Va. 1995).

These courts have steadfastly required that a fetus be "born alive" before it is entitled to recover.

2. Minority of Jurisdictions Do Not Recognize Wrongful Death Actions on Behalf of Unborn Children

Generally, the minority has refused to recognize wrongful death actions on behalf of unborn children for two reasons. The first argument that has been made is that wrongful death statutes were meant to transmit a cause of action for personal injuries, which the decedent would have enjoyed had he not died, to his personal representative. As applied to unborns, the argument goes that: Had the unborn not died, he would not have had a right to a cause of action for personal injuries. This being the case, the unborn can have no personal injury cause of action to transmit; thus, the unborn cannot maintain an action in wrongful death. For example, in Lawrence v. Craven Tire Co.,\(^4\) the Supreme Court of Appeals of Virginia was asked to determine whether its wrongful death statute, which is nearly identical to West Virginia's wrongful death statute, encompassed an action for the wrongful death of a stillborn child.\(^5\) Virginia's wrongful death statute reads, in pertinent part, that:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person . . . and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then . . . the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages.\(^5\)^\(^1\)

The Lawrence court held that their statute simply takes the right which the decedent would have had to bring a personal injury suit, if death had not ensued, and transmits that right to his personal representative.\(^5\)^\(^2\) "Thus, if the unborn child had no right, at the time of death, to maintain an action for personal injuries, the right to maintain the present action could not be transmitted to her


\(^{5}\) W. VA. CODE § 55-7-5 (1994); for the full text of this statute, see infra part V.A.

\(^{5\,1}\) VA. CODE ANN. § 8.01-50 (Michie 1992) (emphasis added).

\(^{5\,2}\) Lawrence, 169 S.E.2d at 441 (citing Anderson v. Hygeia Hotel Co., 24 S.E. 269 (Va. 1896); Virginia Elec. & Power Co. v. Decatur, 3 S.E.2d 172 (Va. 1939) (dissenting opinion)).
personal representative."53 The Lawrence court was unwilling to hold that a child, when it dies from injuries sustained while in its mother's womb, has a right to maintain an action for those injuries.54 This being the case, the Lawrence court held that an unborn could not maintain an action in wrongful death because it has no cause of action for personal injury to transmit to its personal representative.55 The court stated that if it were to hold otherwise, then "if such child were injured and subsequently stillborn for reason wholly unrelated to the injuries, a right of action would survive."56

The second argument relied upon by the minority of jurisdictions to explain their refusal to allow a wrongful death action on behalf of an unborn child is that their legislatures never intended for the word "person" or "individual," as used in their statute, to encompass an unborn child.57 For example, in Witty v. American General Capital Distributors, Inc., the Supreme Court of Texas was asked to determine whether its wrongful death statute provided a cause of action for the death of a fetus.58 Prior to Witty, the Texas Wrongful Death Act was codified to provide for "damages arising from an injury that causes an individual's death."59 The Witty court held that the legislature did not intend the word "individual" to be construed as including an unborn child.60

53 Lawrence, 169 S.E.2d at 441; see also Witty v. American Gen. Capital Distrbs., Inc., 727 S.W.2d 503, 504-05 (Tex. 1987).

54 Lawrence, 169 S.E.2d at 441.

55 Id.

56 Id.

57 E.g., Hogan v. McDaniel, 319 S.W.2d 221 (Tenn. 1958) (holding that to construe that an unborn child is a "person" within the Tennessee wrongful death statute would be to create an additional right under the guise of interpretation); Lawrence, 169 S.E.2d at 441 (stating that the word "person," when given its common, ordinary meaning, simply does not include an unborn child); Farley v. Sartin, 466 S.E.2d 522, 530 (W.Va. 1995) ("the Legislature should determine this issue and the courts should not expand the scope of liability beyond what was contemplated when the [wrongful death] statute was enacted.").

58 727 S.W.2d 503 (Tex. 1987). Witty was later upheld. Blackman v. Langford, 795 S.W.2d 742 (Tex. 1990).

59 Witty, 727 S.W.2d at 504 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(b) (West 1984) (emphasis added)).

60 Id. at 504.
In arriving at its conclusion, the Texas Supreme Court stated that:

although our wrongful death statute is remedial in nature and must be liberally construed, we may not rewrite the statute in the guise of construing it. We find nothing in the legislative history to demonstrate an intent that an unborn fetus be embraced within the scope of the statute. As the dissent so aptly stated in Presley v. Newport Hospital, [d]espite the fact that “we have made great strides in the field of the sciences and we have read with great respect the writings of learned philosophers and theologians, we must remember that such individuals cannot create a right of action at law, for this is the job of the Legislature."61

Thus, on the one hand, the majority of jurisdictions is willing to look past the often non-existent legislative history of their statutes, and seek guidance from medical and biological principles of when life begins in order to conclude that the word “person” within their wrongful death statutes was intended to include unborns. On the other hand, the minority of jurisdictions is unwilling to look to scientific principles. Instead, the minority maintains that an action in wrongful death must exist, if at all, from the wording of the statute itself, and until and unless their legislature more clearly defines the word “person,” unborn children may not maintain an action for wrongful death.

III. WRONGFUL DEATH ACTIONS ON BEHALF OF UNBORN CHILDREN IN WEST VIRGINIA

A. West Virginia Adopts the Majority Position in Baldwin v. Butcher

Prior to 1971, the Supreme Court of Appeals of West Virginia had not addressed the issue of whether a cause of action under our wrongful death statute62 could be maintained on behalf of an unborn child. However, in 1969, in the case of Panagopoulous v. Martin, 63 the District Court for the Southern District of West Virginia held that a viable unborn child was a “person” within

61 Id. at 504-05 (quoting Presley v. Newport Hosp., 365 A.2d 748, 756 (R.I. 1976) (Kelleher, J., dissenting)).

62 W. VA. CODE § 55-7-5. For the full text of this statute, see infra part V.A.

West Virginia’s wrongful death statute.\textsuperscript{64}

Two years later, in \textit{Baldwin v. Butcher},\textsuperscript{65} the Supreme Court of Appeals of West Virginia first addressed the issue of whether the wrongful death statute encompassed the unborn. West Virginia’s wrongful death statute allows a “person” to recover damages when he has been tortiously killed by a wrongful act.\textsuperscript{66} Because the right to maintain a wrongful death action is a statutory right,\textsuperscript{67} the Baldwin court acknowledged that it had to determine whether a viable unborn child was a “person” within the meaning of chapter 55, article 7, section 5 of the West Virginia Code.\textsuperscript{68} However, the court, rather than looking to the legislative history of chapter 55, article 7, section 5 of the West Virginia Code, chose to examine biological principles of when life begins and the decisions by the various jurisdictions that have already been confronted with this issue.\textsuperscript{69}

The Baldwin court found convincing the conclusion that a viable unborn child is, biologically speaking, a presently existing person, a living human being, capable of independent life apart from its mother.\textsuperscript{70} Having recognized a viable fetus as a living human being, capable of independent life apart from its mother, the court “found no difficulty in holding that such a child is a ‘person’ within the intendment of West Virginia’s Wrongful Death Statute.”\textsuperscript{71}

\textbf{B. Criticism of Baldwin v. Butcher}

How the Baldwin court was able to ascertain our legislature’s intendment of the use of the word “person” by looking to “biological principles” of when life begins was left unexplained; and the court’s lack of explanation did not go unnoticed, nor without criticism. In his dissenting opinion in Baldwin, Justice

\textsuperscript{64} Id. at 225.

\textsuperscript{65} 184 S.E.2d 428 (W. Va. 1971).

\textsuperscript{66} W. VA. CODE § 55-7-5 (1994) (emphasis added). For the full text of this statute, see \textit{infra} part V.A.

\textsuperscript{67} See Baldwin, 184 S.E.2d at 429; see also Klasing, \textit{supra} note 33.

\textsuperscript{68} Baldwin, 184 S.E.2d at 432.

\textsuperscript{69} Id. at 435.

\textsuperscript{70} Id. at 428.

\textsuperscript{71} Id.
Calhoun accused the majority of encroaching upon the legislative branch of our government. After citing our state’s constitutional provision dealing with the separation of powers, Justice Calhoun stated that:

Our judicial function in this case is to determine what was the intention of the legislative branches of government, in this State and in Virginia, when our wrongful death statutes were enacted so many years ago. More recent biological or medical concepts of “viability” and comparatively recent court decisions authorizing wrongful death actions to be predicated upon the “wrongful death” of a fetus as a “person” cannot properly be considered in determining the legislative intent involved in the original enactment of statutes in this category.

Justice Calhoun was not persuaded that “biology” had a place in the court’s legal determination of what the legislature intended when it placed the word “person” in the wrongful death statute back in the nineteenth century. He states that:

It makes no appeal to me to assert that, “biologically speaking” or from a medical viewpoint, the fetus in question was a “person.” We are not concerned with the question from a medical or biological viewpoint. The case presents a question of law and not one of medical concept or of biology. From a legal standpoint, it does not satisfy me to assert that the fetus was a “child” merely because it had advanced to the state of “viability” that would have permitted it . . . to leave the womb of the mother and to live apart from her. The fact is that, when the accident occurred, the fetus had no life apart from that of its mother.

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72 Id. at 436-39 (Calhoun, J., dissenting).
73 W. VA. CONST. art. III, § 20.
74 Baldwin, 184 S.E.2d at 438-39 (Calhoun, J., dissenting).
75 Id. at 438.
76 Id.
Notwithstanding Justice Calhoun's criticism, the Baldwin decision placed West Virginia in the majority of jurisdictions which recognized that a wrongful death action may be maintained on behalf of a viable unborn child.\(^7\)

IV. WEST VIRGINIA EXPANDS BALDWIN V. BUTCHER AND MOVES INTO THE MINORITY OF JURISDICTIONS WITH FARLEY V. SARTIN

Baldwin remained the law of West Virginia until December of 1995, when a unanimous Supreme Court of Appeals of West Virginia, in Farley v. Sartin,\(^8\) held that our wrongful death statute not only encompasses a viable fetus, it also encompasses a nonviable fetus.\(^9\) The Farley decision made our State only one of three jurisdictions in the country to recognize such a cause of action.\(^\text{80}\)

In Farley, the issue presented was whether "the plaintiff [could] maintain a cause of action under West Virginia's wrongful death statute, W. Va. Code, section 55-7-5, for the death of Baby Farley, who was eighteen to twenty-two weeks of gestation and, at best, of questionable viability."\(^\text{81}\) Although viability was "questionable," the court chose to focus on whether a nonviable unborn child is a "person" within chapter 55, article 7, section 5 of the West Virginia Code. The court addressed only this issue.\(^\text{82}\)

The Farley court began its analysis by discussing the history of wrongful death statutes.\(^\text{83}\) The court recognized that a cause of action for wrongful death did not exist at common law, with the harsh result being that "tortfeasors, who otherwise would have been liable for their victims' injuries, escaped all liability when the injuries were severe enough to kill the victims."\(^\text{84}\) Thus, in order to deal with this harsh result, the English Parliament passed the first wrongful death

\(^{7}\) See supra note 28.

\(^{8}\) 466 S.E.2d 522 (W. Va. 1995).

\(^{9}\) Id. at 534.

\(^{10}\) See supra note 10.

\(^{11}\) Farley, 466 S.E.2d at 523 (citation omitted).

\(^{12}\) Id. at 524.

\(^{13}\) Id. at 525-26.

\(^{14}\) Id. at 525.
statute in 1846, commonly referred to as Lord Campbell’s Act. The Farley court then observed that although West Virginia’s wrongful death statute was first passed in 1863, it “[is] the same in general purpose and effect as Lord Campbell’s Act.

The court then proceeded to discuss the history of prenatal torts and wrongful death of the unborn. Within this discussion, the court traced wrongful death jurisprudence from the origins of the “single entity” view, to the near complete destruction of the “single entity” doctrine.

Before delving into the case at hand, the Farley court analyzed the reasons cited by those jurisdictions which still deny recovery for the wrongful death of an unborn child, and the reasons cited by those jurisdictions who permit a wrongful death action to be maintained on behalf of a viable unborn child. By analyzing the reasons cited on both sides of the issue, the Farley court was in a better position to accept or reject those various reasons in reaching its conclusion.

After citing the general reasons given by the courts which denied a wrongful death cause of action to be maintained on behalf of an unborn child, the Farley court proceeded to reject each one -- which was no surprise, considering the fact that the court had already done this twenty-five years previously in Baldwin. On the other side of the issue, the Farley court proceeded to cite and

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85 Fatal Accidents ACT OF 1846, 9 & 10 Vict. c. 93 (1846).
86 Farley, 466 S.E.2d at 526 (quoting Swope v. Keystone Coal & Coke Co. 89 S.E. 284, 286 (W. Va. 1916) (citations omitted)).
87 Id. at 526-29.
88 Id. at 526-28 (explaining that the single entity view denied recovery to unborns who were tortiously injured because they were not considered capable of separate, independent existence apart from the mother); see also supra part II.A.
89 Farley, 466 S.E.2d at 528-29 (stating that the single entity doctrine was virtually destroyed as a majority of jurisdictions began to recognize wrongful death actions on behalf of unborn children who had already reached the point of viability); see also supra part II.B.
90 Farley, 466 S.E.2d at 529-30.
91 Id. at 530-31.
92 The four reasons cited by those jurisdictions who deny a wrongful death action on behalf of an unborn child are: (1) a lack of precedent; (2) the single entity theory; (3) recognizing a wrongful death action on behalf of the unborn would lead to fraudulent claims; and (4) the legislature should
validate the reasons given by Baldwin for recognizing a cause of action on behalf of viable unborns.93

After discussing the reasons cited by courts on both sides of the issue, the Farley court finally turned to the issue of whether West Virginia would extend Baldwin and recognize a cause of action for the tortious death of a nonviable unborn child. The court began its analysis by stating that, although only two jurisdictions permitted wrongful death recovery on behalf of a nonviable fetus,94 "a lack of precedent -- standing alone -- is an insufficient reason to deny a cause of action."95

Once the court made the decision not to be bound by the majority position, the court felt itself free to develop and "construe"96 Chapter 55, article 7, section 5 of the West Virginia Code, which it did as liberally as possible. The Farley court rejected the viability distinction and held that the term "person," within chapter 55, article 7, section 5 of the West Virginia Code, encompasses a nonviable unborn child.97 One of the main reasons used by the Farley court to extend Baldwin from fetuses to conception, was that

The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life--old, young, and

93 Id. at 530-31.

94 See supra note 9.

95 Farley, 466 S.E.2d at 533.

96 The word "construe" is placed in quotes because Part V of this Note criticizes the Farley court for judicially legislating and rewriting chapter 55, article 7, section 5 of the West Virginia Code in the guise of "construing" it. See infra part V.

97 Farley, 466 S.E.2d at 534.
prospective—should not be wrongfully taken away. In the absence of legislative direction, the overriding importance of the interest that we have identified merits judicial recognition and protection by imposing the most liberal means of recovery that our law permits.\textsuperscript{98}

Given that there was a complete absence of legislative direction on the definition of “person,” the Farley court anticipated that it would be criticized for its extension. In response to such anticipated criticism, the court stated that it was its duty to “reach that decision which is most consistent with the purpose of the wrongful death law and which best comports with our sense of justice. We believe our holding meets that duty.”\textsuperscript{99}

The Farley court sought to forestall two other criticisms: (1) the potential for fraudulent claims with the increased difficulty in proving causation; and (2) the risk of interference with a woman’s constitutional right to an abortion.\textsuperscript{100} In response to the former line of criticism, the court reasoned that while its decision may increase the potential for fraudulent claims and difficulty in proving causation, “our holding in this case eliminates the need for trial courts to decide . . . whether the fetus was ‘viable.’”\textsuperscript{101}

The court quickly dispelled the second possible criticism by stating that “[w]hile a fetus may not be a ‘person’ for the purposes of the fourteenth amendment, it may be a ‘person’ for the purposes of a state’s wrongful death statute.”\textsuperscript{102} In clarification, the court stated that:

By definition, if a woman has a constitutional right to decide whether to carry an unborn child to term or abort it, then the act of aborting it is not tortious. In such cases, the reasons for invoking the wrongful death statute do not apply as there is no

\textsuperscript{98} Id. at 533 (emphasis added).

\textsuperscript{99} Id. at 534.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Farley, 466 S.E.2d at 534.
tortious conduct to deter.\textsuperscript{103}

Thus, with Farley, West Virginia moved from the Baldwin-majority position of recognizing a wrongful death action on behalf of a viable fetus, and into a minority position of recognizing a wrongful death action on behalf of a fetus from conception until birth. This landmark decision has many implications and will not go without criticism.

V. FARLEY COMPOUNDS THE PROBLEMS THAT BALDWIN CREATED

A. West Virginia's Legislature Never Intended for Our Wrongful Death Statute To Encompass Unborns, Viable or Not

As stated previously in this Note, wrongful death actions never existed at common law.\textsuperscript{104} The right to an action for wrongful death has always been a statutory right.\textsuperscript{105} Wrongful death became a statutory right in West Virginia in 1863,\textsuperscript{106} and, aside from periodic amendments "with respect to damages recoverable,"\textsuperscript{107} the statute has remained essentially the same to this day.\textsuperscript{108} Thus, as acknowledged by both the Baldwin court in 1971 and the Farley court in 1995, in order for a cause of action to exist for wrongful death, attention must be paid to the language of the wrongful death statute itself and the goals and purposes

\textsuperscript{103} Id. at 535. Other courts, such as the Supreme Court of South Dakota, have similarly distinguished abortion and wrongful death, stating:

[The use of abortion rights analysis, simply has no applicability here. A choice to abort sanctions a mother's decision, not someone else's. . . . Clearly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaul ts a pregnant woman, causing the death of her fetus, are not similarly situated. A woman consents to the abortion and has the absolute right, at least during the first trimester of the pregnancy, to choose to terminate the pregnancy. A woman has a privacy interest in terminating her pregnancy; however, defendant has no such interest.


\textsuperscript{104} See supra Part III.B.

\textsuperscript{105} Id.

\textsuperscript{106} Id.


\textsuperscript{108} See supra part III.
behind its enactment.  

The West Virginia Code provides, in pertinent part, that:

Whenever the death of a **person** shall be caused by wrongful act, . . . and the act . . . is such as would *(if death had not ensued)* have entitled the party injured to maintain an action to recover damages in respect thereof, then . . . the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances *as amount in law to murder in the first or second degree, or manslaughter.*

*Farley* held that our legislature has not defined nor addressed the issue of whether the word "**person**," within chapter 55, article 7, section 5 of the West Virginia Code, includes unborn children.  
However, according to the language of the wrongful death statute itself, there are two reasons why the word "**person**" was not intended to encompass unborn children.  
The first reason is that our legislature intended the word "**person**" to include anyone who could be the victim of "murder in the first or second degree, or manslaughter."  
The *Farley* court did not address the issue of whether an unborn could be the victim of murder or manslaughter in West Virginia.

In *State ex rel. Atkinson v. Wilson,* the Supreme Court of Appeals of West Virginia did address the issue of whether West Virginia’s murder statute

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109. See Baldwin, 184 S.E.2d at 432; *Farley v. Sartin,* 466 S.E.2d 522, 530 (W. Va. 1995).


111. *Farley,* 466 S.E.2d at 534.

112. W. VA. CODE § 55-7-5.

113. *Id.*


115. W. VA. CODE § 61-2-1 (1994). West Virginia’s murder statute does not define the substantive elements of murder; it merely categorizes the common law crimes of murder in order to set degrees of punishment. *State ex rel. Atkinson,* 332 S.E.2d at 808 (quoting State v. Sims, 248 S.E.2d 834 (W. Va. 1978)). The West Virginia Code provides that:
encompassed a thirty-seven week-old viable unborn child. In *State ex rel. Atkinson*, the court first noted that West Virginia’s murder statute is not specific on this point. Thus, the *State ex rel. Atkinson* court had to rely on common law principles to reach its conclusion. The common law rule, of which the vast majority of courts are in agreement, provides that “in the absence of legislation to the contrary, the killing of an unborn child cannot be the basis for a charge of murder.” Because chapter 61, article 2, section 1 of the West Virginia Code did not provide to the contrary, the issue before the court was whether it had the authority to alter the common law rule. The *State ex rel. Atkinson* court, finding that the legislature had the sole right to define crimes and their punishments, held that “neither our murder statute . . . nor its attendant common law principles authorize prosecution of an individual for the killing of a viable unborn child. This matter must be left to the good judgment of the legislature, which has the primary authority to create crimes.” Thus, in *State ex rel. Atkinson*, the Supreme Court of Appeals of West Virginia determined that the legislature did not intend for our murder statute to encompass a viable unborn child.

*State ex rel. Atkinson* demonstrates that the legislature could not have intended the word “person,” within the wrongful death statute, to include an unborn child because the legislature never intended the murder statute to encompass an unborn child. While the *Baldwin* court could not have anticipated that the *State ex rel. Atkinson* court would hold that chapter 61, article 2, section

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Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnaping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this Code, is murder of the first degree. All other murder is murder of the second degree.


116 *State ex rel. Atkinson*, 332 S.E.2d at 807.

117 Id.

118 Id. at 809 n. 3 (citations omitted).

119 Id. at 809.

120 Id. at 808-11.

121 Id. at 812.
1 of the West Virginia Code does not encompass the murder of an unborn child, the Farley court failed to address State ex rel. Atkinson and carried Baldwin another step further.122

The second reason why the legislature did not intend the word “person,” within chapter 55, article 7, section 5 of the West Virginia Code to include unborn children is that the unborn cannot maintain an action for personal injuries “if death does not ensue.”123 The Farley court interprets chapter 55, article 7, section 5 of the West Virginia Code, as most jurisdictions interpret their wrongful death statutes, by asking whether the unborn child would have been able to maintain a cause of action if it had been born alive.124 Asking the question in these terms makes the Farley court’s interpretation a little easier to swallow, because once a fetus is born alive, then the fetus becomes a “person” by anyone’s definition. However, taking the statute at face value, the correct question to ask is whether a nonviable fetus, or even a viable fetus, could have maintained a cause of action for personal injuries if it had not died as a result of the tortious act committed upon it. The answer is doubtful.125 A related question is whether

122 What is interesting about the Farley court’s disregard of State ex rel. Atkinson is that such disregard was directly in the face of the court’s use of the fact that our legislature provides protection to the unborn in other areas of the law. The Farley court stated that it observed in Baldwin that the “law confers significance on the unborn’s existence in other contexts: ‘An unborn child possesses certain rights at common law,’ including having a legacy, guardian, and estate.” Farley v. Sartin, 466 S.E.2d 522, 532 (W. Va. 1995) (quoting Baldwin v. Butcher, 184 S.E.2d 428, 435 (W. Va. 1971)).

Thus, while the Farley court partly justified its decision based upon the reasoning that our legislature provides protection to the unborn in other areas of the law, such as property, the Farley court completely ignored the fact that the legislature does not provide protection to the unborn in the context of criminal law. One would think that an examination of West Virginia’s criminal law, as applied to the unborn, would be of significance to the Farley court. If West Virginia does not criminally punish third parties for intentionally killing a viable fetus, it appears illogical to punish third parties for unintentionally killing a nonviable fetus in a civil proceeding.

123 W. VA. CODE, § 55-7-5.

124 Farley, 466 S.E.2d at 530-31.

125 Justice Calhoun, in his dissent in Baldwin, states that:

Assume that the “viable unborn child” involved in this case had not died until a month after he sustained the personal injuries which are alleged to have been wrongfully caused by the defendants. Could it be asserted with any semblance of justification that, during the one-month interval of time, the ‘viable unborn child’ was a ‘person’ who had a cause of action against the defendants for the personal injuries he had sustained? The obvious, unassailable answer is in the negative. It inevitably follows, therefore, that an action for wrongful death,
a fetus, who survived a tortious injury received at ten weeks, only to be stillborn six months later from a wholly unrelated cause, would be able to maintain an action for the first injury? Again, it is doubtful. However, the Farley decision would make recovery plausible in such a situation.

Thus, if the word "person," within chapter 55, article 7, section 5 of the West Virginia Code, is going to be construed by the judiciary, that word should be construed consistent with its meaning in other statutes, which is to say that it was not intended to encompass the unborn, viable or not. Any ambiguity in chapter 55, article 7, section 5 of the West Virginia Code, should be resolved, not by "rewriting" the statute, but by looking at what little guidance the legislature has given. The Baldwin court did not examine the language of chapter 55, article 7, section 5 of the West Virginia Code in reaching its conclusion, and the Farley court merely compounded that error by not only refusing to reverse Baldwin, but by taking Baldwin a step further and allowing a wrongful death action to be maintained on behalf of nonviable fetuses.

B. South Dakota's Legislature Did Intend for Its Wrongful Death Statute to Encompass Unborns, Viable and Nonviable

The recent decision by the Supreme Court of South Dakota, in Wiersma v. Maple Leaf Farms, illustrates the proper role that the judiciary should play in interpreting wrongful death statutes. As in Farley, the issue in Wiersma was whether its legislature intended its wrongful death statute to include a nonviable fetus. Like Farley, the Wiersma court held that its wrongful death statute was based wholly on the pertinent statute, cannot be maintained in this case. Baldwin v. Butcher, 184 S.E.2d 428, 438 (W. Va. 1971) (Calhoun, J., dissenting).

Cf. Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969). The Supreme Court of Appeals of Virginia, after interpreting its wrongful death statute, which is nearly identical to West Virginia's, rejected a wrongful death action on behalf of unborns because it believed that to hold otherwise would mean that "if such child were injured and subsequently stillborn for reason [sic] wholly unrelated to the injuries, a right of action would survive." Id. at 441.

See supra part III.A.

See supra part IV.

543 N.W.2d 787 (S.D. 1996).

Id.
intended to encompass a nonviable fetus. However, unlike in Farley, the Supreme Court of South Dakota reached its conclusion by interpreting a wrongful death statute which specifically included the unborn. South Dakota's wrongful death statute states that:

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

In 1984, the South Dakota legislature amended the above statute by replacing the word "person" with the phrase "including an unborn child." Before the amendment, the Supreme Court of South Dakota interpreted the word "person" to include a viable fetus. Thus, the Wiersma court correctly determined that "to now interpret 'unborn child' to mean only a viable fetus would result in the amendment adding nothing to the term 'person,' and would negate the legislative purpose of expanding the class of persons covered by the statute.

While the Supreme Court of South Dakota may have done a little "rewriting" of its wrongful death statute prior to the 1984 amendment, like the Supreme Court of Appeals of West Virginia had done in Baldwin in 1971, the Wiersma court did not overstep its bounds after the 1984 amendment. Had the South Dakota legislature not replaced the word "person" with "unborn children" in its wrongful death statute, it is unlikely the Wiersma court would have reached the same conclusion as the Farley court. The Wiersma court stated, "We acknowledge a majority of jurisdictions decline to recognize wrongful death actions for children in utero before viability. Yet none of these authorities

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131 Id. at 791.
132 Id.
134 Wiersma, 543 N.W.2d at 790.
135 See In re Certification of Question of Law from U.S. Dist. Court, Dist. of South Dakota, Southern Division (Wiersma), 387 N.W.2d 42 (S.D. 1986).
136 Wiersma, 543 N.W.2d at 790.
interpret a term similar to 'unborn child,' but instead consider whether a nonviable child in utero falls within the definition of 'person,' 'minor child,' 'natural person,' or 'one.' Thus, the Wiersma court did not judicially "rewrite" South Dakota's wrongful death statute.

VI. CONCLUSION

Should West Virginia define the word "person," within chapter 55, article 7, section 5 of the West Virginia Code to include a fetus from conception until birth? Maybe. Should the Supreme Court of Appeals of West Virginia be the governmental branch to make that decision? Absolutely not. Assuming, like the Farley court did, that our society has made a "fundamental value determination . . . that life--old, young, and prospective--should not be wrongfully taken away," then it must also be assumed that our legislators should be the ones who turn that "value determination" into law, not our judicial officers.

Judicial officers are elected for the purpose of construing the laws that our legislators make and not for writing legislation. The Farley court advocated just the opposite. After it had already "rewritten" chapter 55, article 7, section 5 of the West Virginia Code to impose liability upon a tortfeasor for a wrong which our legislature never contemplated, the Farley court asked our legislators to help construe the statute, by stating: "Although we have answered the question presented to this court given the current language in our wrongful death statute, we strongly encourage the Legislature to define the word 'person' to deal with future problems that may arise . . . ." With this statement, the Farley court appears to realize that it "rewrote" chapter 55, article 7, section 5 of the West Virginia Code. Also with this statement, the Farley court seems to be indicating that it had to "rewrite" chapter 55, article 7, section 5 of the West Virginia Code in order to force our legislature's hand; to force our legislature into doing what

137 Id. at 790 (citations omitted).

128 Farley v. Sartin, 466 S.E.2d 522, 533 (W. Va. 1995); see also supra part IV.

139 Farley, 466 S.E.2d at 534 ("[I]t is clear from the statute that the Legislature has not confronted the issue we must decide here . . . ."). It should also be noted that the criticisms expressed in this part of the Note, dealing with "judicial legislation," are meant to be aimed at the Supreme Court of Appeals of West Virginia's decision in Baldwin, because that case marked the first step that West Virginia took in "rewriting" chapter 55, article 7, section 5 of the West Virginia Code. Farley simply adds the finishing touches to the "new" chapter 55, article 7, section 5 of the West Virginia Code.

140 Id. at 535 (emphasis added).
it should have done after the Baldwin decision in 1971 (i.e., define the word “person.”)

However, “rewriting” statutes in order to force our legislature’s hand is not within our judiciary’s power. The Farley court has overstepped its bounds and has “rewritten” chapter 55, article 7, section 5 of the West Virginia Code, “in the guise of construing it.” As Justice Calhoun stated in his dissent in Baldwin when he sought to defeat West Virginia’s acceptance of wrongful death actions on behalf of viable unborn, “[b]y a labored judicial pronouncement, in a shocking disregard of judicial functions and prerogatives, this court has now amended and added to a clear statute which has been in existence since the formation of our state.”

The concerns that Justice Calhoun had back in 1971 about the Baldwin court “rewriting” our wrongful death statute are just as applicable to the Farley court’s decision to “rewrite” that statute even further in 1995. Until and unless our legislature more clearly defines the word “person,” within chapter 55, article 7, section 5 of the West Virginia Code, there should be no cause of action in West Virginia for the wrongful death of an unborn child, viable or otherwise.

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