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Farley v. Sartin: Viability of a Fetus No Longer Required for Wrongful Death Liability

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I. INTRODUCTION

[Justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development.]

-Justice Cleckley

The recent unanimous decision by the Supreme Court of Appeals of West Virginia in Farley v. Sartin leads the state into the territory of fetal nonviability. Farley permits a cause of action for the tortious death of a fetus from conception until birth. Justice Cleckley’s opinion expands the law of Baldwin v. Butcher from the right of recovery

2. 466 S.E.2d 522 (W. Va. 1995).
3. Id. at Syl. Pt. 2.
4. 184 S.E.2d 428 (W. Va. 1971). Viability is defined as “[t]hat stage of fetal develop-

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for the wrongful death of a viable fetus to the right of recovery for the wrongful death of an unborn child in any stage of development. With the Farley decision, West Virginia joins the absolute minority of states that do not require viability for civil liability.

With Farley's expansive interpretation of the definition of a "person" within the context of West Virginia's wrongful death statute, controversy will arise within the arena of tort law, and inconsistencies will widen among civil liability, criminal liability, and the constitutional right of a woman to have an abortion. Although the Farley court stresses that the opinion will not bear on a woman's ability to exercise her constitutional right to have an abortion, nor crossover into the criminal context, much speculation and controversy will follow this case.

This Case Comment reviews the jurisprudence of wrongful death statutes, focusing on a personal representative's right to recover for the death of a fetus. It examines the facts of Farley and the court's basis

opment when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." BLACK'S LAW DICTIONARY 1565-66 (6th ed. 1990).

5. The Supreme Court of Appeals of West Virginia uses the phrase "unborn child" to encompass all stages of fetal development including conception. The court chose not to use fetus because it limits the "developmental time frame." Farley, 466 S.E.2d at 523 n.3. This Case Comment interchanges the use of unborn child and fetus with no explicit difference in the use of such terms.


7. "[A] wrongful death action will not lie against a woman who chooses to exercise her constitutional right to have an abortion." Farley, 466 S.E.2d at 535.

The ramifications of this decision on a woman's constitutional right to an abortion, fetal rights, and criminal liability exceed the scope of this Case Comment. For an exploration into these issues see Klasing, supra note 6 (expounding judicial inconsistencies among criminal law, constitutional law, and tort law).
for discarding the fetal viability requirement in wrongful death actions. Furthermore, this Comment evaluates the inconsistencies of various fetal causes of action within West Virginia and provides guidance to practicing lawyers as to the future impact of the *Farley* decision in wrongful death suits.

II. STATEMENT OF THE CASE

On November 6, 1991, the plaintiff's wife, Cynthia Farley, was killed when her car collided with a tractor trailer. The driver and the owner of the tractor trailer were named as defendants in a wrongful death action filed by Cynthia Farley's husband, Kenneth Farley. The plaintiff's unborn child was also killed in the accident.

The plaintiff filed the wrongful death action as the Administrator of the Estate of Baby Farley in accordance with West Virginia Code Section 55-7-5 which allows for an action for death by wrongful act. The defendants filed a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure arguing that Baby Farley was not viable at the time of death and could not be considered a "person" under the wrongful death statute. The Circuit Court of Wayne County granted the summary judgment in favor of the defendants based on the court's assumption that a fetus between the age of eighteen and twenty-two weeks of gestation is not viable, and therefore could not be considered a person. According to the late wife's treating obstetrician, Baby Farley was approximately eighteen to

8. *Farley*, 466 S.E.2d at 523.
9. *Id.*
10. *Id.*
11. W. VA. CODE § 55-7-5 (1994) (providing: [w]henever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would . . . have entitled the party injured to maintain an action to recover damages, . . . then . . . the person . . . who would have been liable if death had not ensued shall be liable to an action for damages).
12. *Farley*, 466 S.E.2d at 524.
twenty-two weeks in fetal development. The doctor "indicated that the gestational age of Baby Farley was an estimate because more accurate testing is not performed on a normal pregnant woman until her twentieth week of pregnancy and Mrs. Farley had not reached that point when calculated from her last menses." However, the doctor determined that Baby Farley was neither large enough nor developed enough to survive outside the mother's womb. Since the fetus was not viable, the circuit court dismissed the plaintiff's case with prejudice.

Mr. Farley appealed to the Supreme Court of Appeals of West Virginia asking it to allow a plaintiff to maintain a cause of action under the wrongful death statute for a nonviable unborn child. The court found that an unborn child, viable or nonviable, is a "person" within the context of West Virginia Code Section 55-7-5, and that "viability is not the appropriate criterion to determine whether an unborn child is a 'person'" for purposes of the Wrongful Death Statute.

### III. Legal Background of Wrongful Death Actions

At common law, no cause of action existed for the wrongful death of a person. If a person died from injuries negligently inflicted upon him, then the action for such injuries died with him; the action also died with the tortfeasor. Therefore, under the common law, "it was cheaper for the defendant to kill the plaintiff than to injure him, and

15. *Id.* at 523 n.2.
16. *Id.* at 523.
17. *Id.* at 524. See also *Baldwin*, 184 S.E.2d at 436 (allowing a fetal wrongful death action to be maintained by the personal representative of a viable unborn child).
18. *Farley*, 466 S.E.2d at 524.
19. *Id.*
that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy.\textsuperscript{22}

The English Parliament rectified this wrong when it passed the Fatal Accidents Act of 1846, also known as Lord Campbell’s Act. The Act created a cause of action for wrongful death.\textsuperscript{23} Lord Campbell’s Act allowed for “close relatives to recover damages incurred as a result of the tortious death of the victim.”\textsuperscript{24} Subsequently, every American state has enacted a statutory remedy for wrongful death.\textsuperscript{25} West Virginia adopted a wrongful death action in 1863 patterning it after Lord Campbell’s Act.\textsuperscript{26} The right to bring such a suit is codified in the West Virginia Code.\textsuperscript{27} Wrongful death actions are to be brought by the victim’s personal representative for certain designated beneficiaries.\textsuperscript{28}

A. History of Recovery for Prenatal Torts

Similar to wrongful death, the common law did not recognize a cause of action for prenatal torts.\textsuperscript{29} In 1884, Justice Holmes’ opinion

\textsuperscript{22} Keeton et al., supra note 20, § 127, at 945. See also Barbara E. Lingle, Allowing Fatal Wrongful Death Actions in Arkansas: A Death Whose Time Has Come?, 44 Ark. L. Rev. 465, 467 (1991) (explaining the historical background of common law wrongful death actions).

\textsuperscript{23} Farley, 466 S.E.2d at 525.

\textsuperscript{24} Gary A. Meadows, Wrongful Death and the Lost Society of the Unborn, 13 J. LEGAL MED. 99, 100 n.9 (1992).

\textsuperscript{25} Keeton et al., supra note 20, § 127, at 945.

\textsuperscript{26} Farley, 466 S.E.2d at 526 (citing Swope v. Keystone Coal & Coke Co., 89 S.E. 284, 286 (W. Va. 1916)).


\textsuperscript{28} W. Va. Code § 55-7-6 (1994). “Every such action shall be brought by and in the name of the personal representative of such deceased person . . . .” W. Va. Code § 55-7-6 (a) (1994).

\textsuperscript{29} Michael P. McCready, Recovery for the Wrongful Death of a Fetus, 25 U. RICH. L. Rev. 391 (1991). Two reasons were normally given for denying recovery for prenatal torts: “first, that the defendant could owe no duty of conduct to a person who was not in existence at the time of his action; and second, that the difficulty of proving any causal connection between negligence was too great, such that there was too much danger of fictitious claims.” Keeton et al., supra note 20, §55, at 367 (footnotes omitted).
in *Dietrich v. Inhabitants of Northampton,*\(^3^0\) the landmark Massachusetts case, captured the essence and beliefs of traditional common law by holding that a fetus is not a "person" for whom suit could be brought.\(^3^1\) In *Dietrich,* a woman who was four to five months pregnant slipped and fell on a defective highway.\(^3^2\) The fall resulted in the premature birth of the child who died shortly thereafter.\(^3^3\) In denying recovery, Justice Holmes reasoned that an unborn child was part of the mother and that any injury to the child that was not too remote from the tortfeasor's action was recoverable by the mother herself.\(^3^4\) Justice Holmes' approach, that a fetus is part of its mother and not "an independent biological entity" is also known as the "single entity" view.\(^3^5\)

For fifty years, American courts followed the single entity view of *Dietrich.* However, this view did not come without criticism, mainly focusing on the medical aspect that a viable fetus could maintain life outside its mother's womb.\(^3^6\) In 1946, the voice of criticism prevailed and the District Court for the District of Columbia was the first court to depart from the *Dietrich* approach.\(^3^7\)

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31. *Id.* at 17.
32. *Id.* at 14-15.
33. *Id.*
34. *Id.* at 17.
35. Lingle, *supra* note 22, at 468-69. *See also* Farley, 466 S.E.2d at 526 (discussing the "single entity" approach).

A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but, if, while in the womb, it reaches that pre-natal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue that there is but one life, and that the life of the mother.

*Allaire,* 56 N.E. at 641 (Boggs, J., dissenting).
In *Bonbrest v. Kotz*, a father sued on behalf of his infant who had sustained injuries during delivery. The district court allowed the infant to maintain an action and distinguished *Bonbrest* from *Dietrich*. The court reasoned that the infant had survived despite the tortfeasor’s actions; this survival proved that the viable child was a separate being from its mother. The *Bonbrest* court concluded that a viable infant could recover for prenatal injuries if the child is subsequently born alive. Other courts rapidly incorporated the *Bonbrest* holding into the common law and “brought a rather spectacular reversal of the no-duty rule.” As a result of *Bonbrest*, “every jurisdiction [now] follows the Restatement (Second) of Torts in allowing a child to recover for prenatal injuries as long as the child is born alive.”

After the *Bonbrest* decision, courts began to expand liability from the prenatal injury of a fetus who subsequently was born alive to the wrongful death of an unborn child. The first court to exceed *Bonbrest’s* scope was the Supreme Court of Minnesota. In the landmark case, *Verkennes v. Corniea*, the court allowed a father to maintain a wrongful death suit as the personal representative of his viable unborn child. In *Verkennes*, the plaintiff father alleged that the defendants had failed to properly aid and treat his wife and child in labor, resulting in the death of both wife and child. The court concluded that an action for wrongful death could be maintained when a life capable of extra-uterine existence was tortiously killed.

39. *Id.* at 140-41.
42. Klasing, *supra* note 6, at 935.
43. *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949).
44. 38 N.W.2d 838 (Minn. 1949).
45. *Id.* at 839.
46. *Id.* at 841. *See also* Meadows, *supra* note 24, at 102-103 (discussing the reasoning behind the *Verkennes* court’s holding).
In 1971, West Virginia joined the majority of states by allowing recovery for the wrongful death of an unborn child.\textsuperscript{47} In Baldwin v. Butcher,\textsuperscript{48} the Supreme Court of Appeals of West Virginia held that a wrongful death action could be maintained by the personal representative of a viable unborn child for fatal injuries sustained by it while "en ventre sa mere."\textsuperscript{49} In Baldwin, the unborn child was injured when his mother, a passenger in the defendant's vehicle, collided with another motor vehicle.\textsuperscript{50} The child was stillborn, and the plaintiff filed a wrongful death action as the administrator of his estate.\textsuperscript{51} The Circuit Court of Cabell County dismissed the action concluding that the child was not a "person" and thus a wrongful death action could not be maintained.\textsuperscript{52} The Baldwin court determined that a viable unborn child who dies from a defendant's negligence should be considered a person within the meaning of the wrongful death statute.\textsuperscript{53} The Baldwin court reasoned that the nature of the wrongful death act was remedial and should be liberally construed thereby allowing a wrongful death claim to be filed on behalf of a viable fetus.\textsuperscript{54}

\textbf{B. Standards for Liability in Fetal Wrongful Death Actions}

Despite the liberalization of fetal wrongful death suits, American courts began to diverge on when wrongful death actions involving a fetus arose.\textsuperscript{55} In terms of civil liability, various state courts have adopted different standards ranging from the live birth requirement,\textsuperscript{56}

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\item \textsuperscript{47} Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971).
\item \textsuperscript{48} 184 S.E.2d 428 (W. Va. 1971).
\item \textsuperscript{49} Id. at 436. \textit{En ventre sa mere} is defined as "[i]n its mothers womb" and is "descriptive of an unborn child." \textsc{black's law dictionary} 534 (6th ed. 1990).
\item \textsuperscript{50} Baldwin, 184 S.E.2d at 428-29.
\item \textsuperscript{51} Id. at 428.
\item \textsuperscript{52} Id. at 429.
\item \textsuperscript{53} Id. at 432.
\item \textsuperscript{54} Id. at 431.
\item \textsuperscript{55} Klasing, \textit{supra} note 6, at 935.
\item \textsuperscript{56} See, e.g., Chatelain v. Kelley, 910 S.W.2d 215, 217 (Ark. 1995) (holding that the live birth requirement shall distinguish liability in wrongful death actions); Kalafut v. Gruver, 389 S.E.2d 681, 684 (Va. 1990) (holding that "a tortfeasor who causes harm to an unborn child is subject to liability to the child, or the child's estate, for the harm to the child, if the child is born alive"); Pietila v. Crites, 851 S.W.2d 185, 187 (Tex. 1993) (holding that
\end{itemize}
to the viability threshold,\textsuperscript{57} to the nonviability standard.\textsuperscript{58} In \textit{Farley},\textsuperscript{69} West Virginia moved from the majority, recognizing the viability threshold,\textsuperscript{60} to an absolute minority, recognizing and accepting the standard of nonviability.

1. Live Birth

In a minority of states, the “live birth” requirement permits a suit to be maintained only for a child who survived a tortfeasor’s negligence during or prior to birth.\textsuperscript{61} This test has been called the most stringent test for purposes of liability.\textsuperscript{62} The jurisdictions that have adopted this threshold have several justifications for the live birth requirement. First, a mother may recover for the death of her unborn child through damages for her physical injury and mental suffering associated with the stillbirth; if she also recovered damages as the administrator of her stillborn child, she would be receiving double recovery.\textsuperscript{63} Furthermore, the live birth creates a bright line test of liability. Allowing recovery for the unborn may be difficult because “proof of causation and damages become tenuous . . . .”\textsuperscript{64} In live

\textsuperscript{57} See, e.g., Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1993) (recognizing a cause of action for a viable unborn child); Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985) (en banc) (holding that the word “person” in the wrongful death statute encompasses a viable fetus); DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987) (holding wrongful death statute to include recovery for the death of a viable but unborn child); Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1983) (recognizing a wrongful death cause of action for a viable fetus negligently injured en ventre sa mere and subsequently stillborn). \textit{See also} McCready, \textit{supra} note 29, at 395 (explaining the concept of the viability threshold); Klasing, \textit{supra} note 6, at 941-49 (discussing those jurisdictions that adopted viability).

\textsuperscript{58} Klasing, \textit{supra} note 6, at 949-51; McCready, \textit{supra} note 29, at 394-95.

\textsuperscript{59} 466 S.E.2d 522 (W. Va. 1995).

\textsuperscript{60} Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971).


\textsuperscript{62} Klasing, \textit{supra} note 6, at 935-36.

\textsuperscript{63} McCready, \textit{supra} note 29, at 398, 402.

\textsuperscript{64} \textit{Id.} at 402.
birth jurisdictions, even if the child dies shortly after birth an action can be maintained because the requirement of life has been met.\textsuperscript{65}

Despite these justifications, the live birth requirement has been criticized for embodying a lack of understanding about fetal development.\textsuperscript{66} The rule assumes that a fetus cannot be considered a person, able to survive outside the womb, at any point prior to birth.\textsuperscript{67} The live birth rule is also criticized for being unjust because it "protects the tortfeasor rather than the victim since it rewards lethal tortious conduct by allowing recovery only if the child in the womb survives."\textsuperscript{68} Such harshness can be illustrated by the following often used twin analogy. Suppose a woman pregnant with twins and due to a tortfeasor's negligence one was stillborn and one was born alive dying shortly after the birth. In a live birth jurisdiction, the mother could not maintain an action for the stillbirth's death, but she could file a wrongful death suit for the death of the child born alive.\textsuperscript{69} Due to the strictness of this rule, a majority of jurisdictions have rejected or abolished the live birth requirement in wrongful death actions and adopted the rule of "viability."\textsuperscript{70}

2. Viability

Although a majority of jurisdictions permit fetal wrongful death actions, most require a viable fetus to fulfill the definition of a "person" in wrongful death statutes.\textsuperscript{71} The fetus is considered viable when it can live indefinitely outside the mother's womb.\textsuperscript{72} The viability concept was first suggested by Justice Boggs of the Illinois Supreme Court in his dissent to \textit{Allaire v. St. Luke's Hospital}.\textsuperscript{73} Justice Boggs

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\textbf{Notes:}
\begin{itemize}
\item \textsuperscript{65} \textit{Id.} at 395 n.44.
\item \textsuperscript{66} Lingle, \textit{supra} note 22, at 468 nn.19 to 20.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} Klasing, \textit{supra} note 6, at 940.
\item \textsuperscript{69} See McCready, \textit{supra} note 29, at 403. \textit{See also Baldwin}, 184 S.E.2d at 435 (analyzing the twin analogy).
\item \textsuperscript{70} Lingle, \textit{supra} note 22, at 468.
\item \textsuperscript{71} Meadows, \textit{supra} note 24, at 106.
\item \textsuperscript{72} \textsc{Black's Law Dictionary} 1565-66 (6th ed. 1990).
\item \textsuperscript{73} 56 N.E. 638 (Ill. 1900) (Boggs, J., dissenting).
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argued that when an unborn child is viable it must be considered an independent and separate life and not merely part of the mother’s body.\textsuperscript{74} The once progressive reasoning of the Allaire dissent is now the cornerstone of many states’ viability standard.\textsuperscript{75} A second reason for adopting the viability rule is that it allows for consistent results between those children born dead and those children born alive who die a short time afterward.\textsuperscript{76}

Although less stringent than the live birth requirement, the viability threshold also has not come without criticism. The main criticism surrounds the difficulty in proving at what point in the pregnancy a child is viable.\textsuperscript{77} The point of viability varies with each child, as well as advances in modern medicine which can accelerate viability.\textsuperscript{78} The viability standard also has been criticized as an arbitrary cutoff for deciding when to allow recovery in a fetal wrongful death suit.\textsuperscript{79}

3. Nonviability

With the realization that viability has no bright line of demarcation, some courts have embarked upon the idea that a fetus is a person in terms of wrongful death statutes at the time of conception.\textsuperscript{80} In the jurisdictions that have adopted a nonviability standard, a tortfeasor will be held liable for the wrongful death of an unborn child from the time of its conception until birth.\textsuperscript{81} Arguments for adopting a nonviability standard range from legislative construction of a “person” within the

\textsuperscript{74} Id. at 641.
\textsuperscript{75} See, e.g., Summerfield v. Superior Court, 698 P.2d 712, 722 (Ariz. 1985) (en banc) (recognizing that the “ability of the fetus to sustain life independently of the mother’s body that should determine when tort law should recognize it as a ‘person’ whose loss is compensable to survivors”); Baldwin, 184 S.E.2d at 432 (W. Va. 1971) (holding that a viable fetus is an individual capable of independent life and capable of sustaining a legal wrong, thereby holding it to be a “person” within the wrongful death statute).
\textsuperscript{76} McCready, supra note 29, at 403.
\textsuperscript{78} Meadows, supra note 24, at 107.
\textsuperscript{79} Symonds, supra note 40, at 115.
\textsuperscript{80} See Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995); Porter v. Lassiter, 87 S.E.2d 100, 103 (Ga. 1955) (holding that a fetus is a person at the time of “quickness” which is after the time of conception but prior to the point of viability).
\textsuperscript{81} Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).
wrongful death statute\textsuperscript{82} to the remedial nature of the act.\textsuperscript{83} Furthermore, valid arguments have been set forth stating that the nonviability standard would cure the arbitrariness of the viability and live birth requirements.\textsuperscript{84} However, most states faced with the decision of adopting nonviability for fetal wrongful death actions have rejected the requirement.\textsuperscript{85}

A 1995 decision by the Court of Appeals of Maryland that rejected nonviability is representative of other courts that have ruled similarly.\textsuperscript{86} In \textit{Kandel v. White},\textsuperscript{87} the court held that a nonviable fetus was not capable of maintaining a claim for wrongful death.\textsuperscript{88} Despite the plaintiffs' argument that liability should not depend on the arbitrary distinction of viability, the court found that viability was a "condition precedent" to maintaining a cause of action on behalf of a stillborn fetus.\textsuperscript{89} There could be no liability because the fetus could not maintain a separate and independent existence from its mother.\textsuperscript{90} Furthermore, the court reasoned that a line had to be drawn at viability because of the need to have "boundaries to the zone of liability."\textsuperscript{91} The

\begin{footnotesize}
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\item Conner v. Monkem Co., 898 S.W.2d 89 (Mo. 1995) (holding that a nonviable unborn child was a "person" for purposes of the wrongful death act).
\item Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995); Porter v. Lassiter 87 S.E.2d 100 (Ga. 1955).
\item Symonds, supra note 40, at 115. Generally, most jurisdictions have abandoned the viability and live birth "line-drawings" and have opted for the conception threshold for recovery for "children who are injured prenatally, but born alive." \textit{Id.}
\item Kandel v. White, 663 A.2d 1264 (Md. 1995).
\item 663 A.2d 1264 (Md. 1995).
\item \textit{Id.} at 1266-67.
\item \textit{Id.} at 1267.
\item \textit{Id.}
\item \textit{Id.} at 1269 (quoting \textit{Wallace}, 421 A.2d at 136).
\end{enumerate}
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court declined to go beyond the "zone of liability" established by precedent unless the legislature expressly directed the court to include a nonviable aborted fetus within the scope of the wrongful death statutes.92 Finally, the Kandel court noted that the adoption of the nonviability concept would cause an inherent conflict between a woman's constitutional right to terminate her pregnancy and her right to recover wrongful death damages on behalf of a nonviable fetus.93

IV. THE DECISION

In Farley, the Supreme Court of Appeals of West Virginia's unanimous landmark decision permitted the personal representative of a nonviable fetus to maintain a wrongful death suit.94 The Farley opinion reviewed the history of fetal wrongful death actions and modified the West Virginia wrongful death statute to include a nonviable fetus as a "person."95 This expansive interpretation of the statute places West Virginia in the minority of states willing to define a fetus as a person from conception until birth.96

After a thorough explanation of the facts and procedural history of the case,97 the Farley court addressed the standard of review for the question presented.98 The court reviewed the entry of summary judg-

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92. Kandel, 663 A.2d at 1269. In Wallace, the Supreme Court of New Hampshire succinctly expressed its refusal to maintain an action for a nonviable fetus:

The real question is not when life begins but rather, whether our death of a fetus that has not drawn a breath of air, seen the light of day, or possessed the capacity to survive in the world outside its mother, despite all the medical and other care that could be mustered for it. To deny nonviable fetus a cause of action is not deny that life begins with conception. It is simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive. In other words, life may begin with conception but causes of action do not.

Wallace, 421 A.2d at 136-37 (emphasis added).

93. Kandel, 663 A.2d at 1267-68.


95. Id. at 522-32.

96. Id. at 532-33.

97. See supra text accompanying notes 8-19.

98. Farley, 466 S.E.2d at 524.
ment de novo and recognized the issue of viability as the appropriate standard within the wrongful death context as a question of law. As part of its review, the Farley court devoted substantial discourse to the progression from the traditional common law rule, that no cause of action could survive the tortfeasor or the victim, to the criticism of the single entity view, to the modern courts' acceptance of fetal wrongful death suits. In particular, the court focused on the growth and development of prenatal torts and fetal wrongful death actions. Furthermore, the Farley court analyzed the standards of liability for those jurisdictions which allow recovery for the wrongful death of an unborn child.

After reviewing the history, the court preceded its analysis of the issue presented with a sua sponte discussion of a living child’s right to sue for previable injuries suffered by him en ventre sa mere. The Farley court decided that viability at the time of injury was a “mere


100. See Allaire v. St. Luke’s Hosp., 56 N.E. 638 (Ill. 1900) (Boggs, J., dissenting). Justice Boggs is “credited with starting the movement to abolish the theory that a tortfeasor owes no duty to an unborn child because the child ‘was not in existence at the time of [the] action . . . ‘” Farley, 466 S.E.2d at 526 (citations omitted).

Justice Boggs also argued that precedents were used in common law to “illustrate principles, and to give them a fixed certainty.” It would be absurd not to change precedent when time and education have proved the common law incorrect. Id. (quoting Allaire, 56 N.E. at 640 (Boggs, J., dissenting)).

101. See Verkennes v. Cornia, 38 N.W.2d 838 (Minn. 1949) (allowing a father to maintain a wrongful death suit as the personal representative of his viable unborn child). See supra text accompanying notes 29-54.


103. Farley, 466 S.E.2d at 526-32. Even though some jurisdictions do not allow a fetal wrongful death action to be maintained, most states do allow for some recovery depending on the status of the child when it died. See supra text accompanying notes 55-93.

Jurisdictions that denied recovery for tortious death of a viable unborn child claimed various reasons: (1) The lack of precedents and strict adherence to stare decisis; (2) the common law belief of the mother and child as a single entity; (3) belief that allowing fetal wrongful death actions would lead to fraudulent claims and difficulties in proof of causation and damages; and (4) the argument that the legislature should determine such issues. Farley, 466 S.E.2d at 531-32. The Farley court diffused each of these arguments in their own right. Id.

104. Farley, 466 S.E.2d at 532-33.
The court concluded that a tortiously injured nonviable child who subsequently is born alive has the same right to compensation that a viable fetus with tortious injuries would receive if subsequently born alive. The court then turned to the issue of whether a cause of action should lie for the tortious death of a nonviable unborn child.

The court began its analysis of this key issue by reviewing the "dearth of precedent" which denied a fetal wrongful death action to a nonviable child, and determined that the reasons for denial were not persuasive enough to "infuse the [viability] distinction into West Virginia statute." The court reasoned that stare decisis was insufficient to deny a wrongful death suit for a nonviable fetus, noting that "landmark decisions become landmark because they establish new, groundbreaking precedent." Furthermore, the court concluded that forsaking the majority position for the lesser known rule of nonviability, would not cause harm to any West Virginia interest. Rather, this rule would only broaden the class of litigants allowed to file suits under the West Virginia wrongful death enactment. Moreover, the Farley court reasoned that viability jurisdictions allow the tortfeasor to avoid liability for the full extent of damages caused by his negligence, thereby denying justice. The court reasoned that the societal and parental loss of an unborn child at any stage is deplorable, and parents should be compensated for their loss.

In making its decision, the Farley court relied heavily on the dissent of Justice Maddox in the Alabama case of Gentry v. Gilmore. Justice Maddox believed that the phrase "minor child" in Alabama's
wrongful death statute should include a nonviable unborn child. Inclusion of this standard would:

(1) promote the purpose of the wrongful death statute, which is to prevent the wrongful termination of life, even potential life; (2) facilitate the legislature's intent to protect nonviable fetal life, as expressed in other statutes concerning abortion and fetal deaths; and (3) be logically consistent with prior decisions of this Court that have . . . rejected . . . artificial distinctions based on viability and live births as conditions for recovery.

The Farley court believed that the "artificial" distinction of viability focuses on the status of life that’s been wrongfully terminated, rather than upon the tortfeasor’s conduct. Furthermore, the Farley court contended that the loss of a potential family member to tortious conduct should equal the loss of an existing member. The West Virginia Supreme Court of Appeals reasoned that these "common-sense principles" set forth in Justice Maddox’s dissent serve the purpose and goals of the wrongful death statute: to provide economic compensation for bereaved families of the victim.

The court further justified its holding by reasoning that West Virginia’s Wrongful Death Act should be interpreted liberally to meet the remedial goals and purposes of the enactment. Defining the term "person" to include a nonviable child for wrongful death purposes would not be inconsistent with past interpretation because West Virginia courts have always construed the statute liberally.

Anticipating criticism to this expansive interpretation of a "person," the court responded to the argument that the nonviability rule created

115. *Id.* at 1245 (Maddox, J., dissenting).
116. *Id.*
117. *Farley,* 466 S.E.2d at 534.
118. *Id.* The court concedes the "degree of bonding and love toward an unborn child may not be as great that which would extend toward the deceased in the more typical wrongful death case." *Id.* at 534 n.25. However, this fact does not go to the actionability but rather to the question of damages. *Id.*
119. *Id.*
120. *Id.* at 534. *See Baldwin,* 184 S.E.2d at 431 (explaining that the policy of the statute is remedial and not punitive).
121. *Farley,* 466 S.E.2d at 534.
the potential for fraudulent claims and increased difficulties in proof of causation and damages.\textsuperscript{122} The court rebutted this contention arguing that even if the rule increased those risks, this reason alone should not bar claims.\textsuperscript{123} By denying recovery for all nonviable fetuses, the courts would be rejecting valid as well as fraudulent claims.\textsuperscript{124} The court rationalized that the nonviability standard removed the trial court's difficult task of determining viability.\textsuperscript{125} The \textit{Farley} court also conceded that interpretation of the statute should fall within the realm of the legislature's duties, and invited the legislature to focus attention on this matter.\textsuperscript{126} However, in the legislature's failure to act, the court reasoned that it had a duty to reach decisions which are most consistent with the nature and goals of the wrongful death statute.\textsuperscript{127}

Throughout the decision the court stressed that the definition of a "person" within the gamut of the wrongful death statute would not extend into issues of abortion or the area of criminal law.\textsuperscript{128} The \textit{Farley} court dismissed the issue of abortion when it stated "[t]he abortion question simply is not relevant to wrongful death."\textsuperscript{129} Moreover, "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 is not tortious."\textsuperscript{130} The court also concluded that the nonviability standard in the wrongful death context would not extend into criminal law.\textsuperscript{131}

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Farley}, 466 S.E.2d at 534.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 535 n.29. \textit{See also} State ex \textit{rel.} Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984) (recognizing no criminal liability for the killing of a viable unborn child).
\item \textsuperscript{129} \textit{Farley}, 466 S.E.2d at 534. In making this determination, the court relied heavily on law review articles which concluded that the different policies governing abortion and wrongful death decisions would lead to inconsistencies when defining a "person." \textit{Id.} \textit{See also} Symonds, \textit{supra} note 40, at 113 (explaining that defining a "person" consistently throughout all areas of the law would not serve the purposes and goals underlying each jurisprudential area).
\item \textsuperscript{130} \textit{Farley}, 466 S.E.2d at 535.
\item \textsuperscript{131} \textit{Id.} at 535 n.29.
\end{itemize}
In summary, the court held that if a nonviable fetus dies as a result of a person's tortious conduct, the personal representative of the deceased may file a wrongful death suit.\textsuperscript{132} Furthermore, the court, in dictum, reasoned that a nonviable unborn child who is tortiously injured, but is subsequently born alive will be able to maintain an action for damages against the tortfeasor.\textsuperscript{133}

\section*{V. The Implications of Farley}

In West Virginia, the \textit{Farley} decision has simplified the fetal cause of action for wrongful death by erasing the arbitrary distinctions between viability and nonviability. Thus, a person may be liable for all tortious conduct toward any unborn child. The adoption of the nonviability rule will not come without cost or controversy. Speculation and debate are almost certain to arise concerning: the various definitions of when a fetus is a person; the ever-widening zone of liability for tortfeasors; the evidentiary difficulties which will arise from the \textit{Farley} holding; and the Supreme Court of Appeal's seeming disregard for the doctrine of stare decisis.

In West Virginia, the definition of a "person" vary according to the area of the law. The definition for purposes of criminal liability was defined in \textit{State ex rel. Atkinson}.\textsuperscript{134} The Supreme Court of Appeals of West Virginia denied the state the right to prosecute for the murder of an unborn, viable child.\textsuperscript{135} The \textit{Atkinson} court reasoned that the legislature had the primary right to define crimes and their punishments.\textsuperscript{136} Thus, if the court decided that a person could be convicted for the killing of an unborn viable fetus, then it would exceed its power and encroach upon the right of the legislature to create new crimes.\textsuperscript{137} Instead of adopting the proposed new rule of viability, the

\begin{itemize}
\item \textsuperscript{132} \textit{Id.} at 535.
\item \textsuperscript{133} \textit{Id.} at 532-33.
\item \textsuperscript{134} 332 S.E.2d 807 (W. Va. 1984).
\item \textsuperscript{135} \textit{Id.} at 808.
\item \textsuperscript{136} \textit{Id.} at 810.
\item \textsuperscript{137} \textit{Id.} In his dissent, Justice McGraw criticized the majority's reliance on a distinction of the court's role in tort law versus criminal law. \textit{Id.} at 812 (McGraw, J., dissenting). The majority hinged its ruling on the fact that wrongful death decisions have been creatures of
\end{itemize}
court decided to adhere to the archaic common law rule of live birth.\textsuperscript{138} When the \textit{Atkinson} court did not expand the criminal law definition of a "person" to include a viable unborn child, an inconsistency in state jurisprudence was created between the definition of a person under the wrongful death statute\textsuperscript{139} and the criminal law definition of a person. As Justice McGraw pointed out in his dissent in \textit{Atkinson}, by adhering to the live birth rule it has become easier "to collect but not convict" for the killing of an unborn child.\textsuperscript{140}

Concerning the issue of criminal liability, the \textit{Farley} court explained that the definition of a "person" for purposes of criminal liability would be unaffected by its decision.\textsuperscript{141} Under the \textit{Farley} rule, a nonviable or a viable fetus is a "person" within the tort context, however the individual who killed that same fetus runs no risk of criminal conviction.\textsuperscript{142} This rule further exacerbates the conflicting standards which depend upon the context in which the suit is filed.

Adding to this complexity is a woman's constitutional right to have an abortion. In \textit{Roe v. Wade},\textsuperscript{143} the United States Supreme Court legalized abortion. At issue in \textit{Roe} was whether or not the fetus is a "person" in terms of the Fourteenth Amendment.\textsuperscript{144} The \textit{Roe} holding established a trimester framework to help determine when the state can regulate abortion.\textsuperscript{145} \textit{Roe} suggests that "once a fetus reaches viability" the life of a person begins.\textsuperscript{146} In 1992, the \textit{Roe} ruling was

\textsuperscript{138} See supra text accompanying notes 61-70.
\textsuperscript{139} Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971).
\textsuperscript{140} Atkinson, 332 S.E.2d at 812 (McGraw, J., dissenting).
\textsuperscript{141} Farley, 466 S.E.2d at 535 n.29.
\textsuperscript{142} Id. See also Klasing, supra note 6, at 959-62 (discussing the different interpretations of a "person" in terms of wrongful death and the criminal liability).
\textsuperscript{143} 410 U.S. 113 (1973).
\textsuperscript{144} Klasing, supra note 6, at 966.
\textsuperscript{145} Id. at 966-67. Note that "after viability the state may regulate abortion only as it 'reasonably relates to the preservation and protection of maternal health.'" Id. at 967-68 (footnotes omitted).
\textsuperscript{146} Id. at 967.
modified when the Supreme Court in Planned Parenthood v. Casey\(^{147}\) rejected the rigid trimester framework of Roe and concluded that “the line should be drawn at viability” for purposes of abortion.\(^{148}\) Therefore, before the date of viability a woman has the right to choose to terminate her pregnancy which has been interpreted as the point when a fetus becomes a person for purposes of the Fourteenth Amendment.\(^{149}\)

Although the Farley court has explained that a woman who aborts her nonviable child will not be held liable under the wrongful death statute because the “act of aborting is not tortious,”\(^{150}\) there is an “inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.”\(^{151}\) Furthermore, the president of West Virginians For Life, a pro-life activist group, has heralded this decision as “a recognition of the court that unborn children have civil rights.”\(^{152}\)

After the Farley court’s adoption of nonviability in the wrongful death context, West Virginia is left with three separate definitions of a "person." Under the wrongful death statute, a “person” is defined to include a fetus from conception until birth.\(^{153}\) Under the criminal homicide statute, a “person” does not include any type of fetus, rather when a child is born it is considered a “person” for purposes of criminal liability.\(^{154}\) Finally, according to the Fourteenth Amendment which governs the constitutional right to have an abortion, a fetus becomes a “person” at the point of viability.\(^{155}\)

\(^{148}\) Id. at 2816.
\(^{149}\) Id.
\(^{150}\) Farley, 466 S.E.2d at 534-35.
\(^{151}\) Klasing, supra note 6, at 966 (citations omitted).
\(^{152}\) Nancy Nussbaum, Father Can Sue for Death of Wife’s Fetus in Crash, High Court Rules, CHARLESTON GAZETTE & DAILY MAIL, Dec. 14, 1995, at P1A.
\(^{153}\) Farley, 466 S.E.2d at 535.
\(^{154}\) State ex rel. Atkinson, 332 S.E.2d at 812.
With the court’s decision to make conception the threshold of liability in the wrongful death context, efforts may soon begin to "widen more and more the circle of liability which surrounds us."\(^{156}\) In *Wallace v. Wallace*,\(^{157}\) the Supreme Court of New Hampshire denied a wrongful death action for a nonviable fetus recognizing that with every enlargement of the "zone of liability," tenacity builds a new and wider zone.\(^{158}\) The *Wallace* court stated that "[i]f life is not to become intolerable, there must be some boundaries to the zone of liability. Neither logic nor science is the determining factor. It is the policy of the law which must establish a reasonable limitation on liability."\(^{159}\) The *Wallace* court avoided determining when life begins, reasoning that although life may begin at conception, the cause of action does not necessarily begin at that time.\(^{160}\)

Eradicating the viability distinction for purposes of liability may send the court on a "slippery slope" toward extending the zone of liability beyond the range of nonviable fetuses into the stage of preconception.\(^{161}\) Although the *Farley* court argues that the wrongful death act is remedial in nature and needs to be liberally interpreted,\(^{162}\) the court seems to cast aside arguments that "viability is not an illogical condition precedent . . . . A nonviable fetus is not capable of living outside its mother’s womb; it cannot maintain a separate and distinct existence. Thus, a nonviable fetus which dies before birth has never become an independent living person."\(^{163}\) The court argued that the societal and parental loss is no less egregious for an eighteen week old fetus than a fetus of nine months.\(^{164}\) Yet, the emotional loss of a nonviable unborn child does not negate its physical inability to live an independent and distinct existence outside of its mother womb.

\(^{157}\) 421 A.2d 134.
\(^{158}\) Id. at 136.
\(^{159}\) Id.
\(^{160}\) Id. at 137.
\(^{162}\) Farley, 466 S.E.2d at 531 (citing City of Wheeling ex *rel.* Carter v. American Casualty Co., 48 S.E.2d 404, 408 (W. Va. 1948)).
\(^{164}\) Farley, 466 S.E.2d at 533.
In the Farley opinion, the court averred that the nonviability standard eliminated the "need for the trial court to decide what often could be an extremely difficult factual question, i.e. whether the fetus was 'viable.'" With the adoption of a nonviability standard, the court recognized that increased difficulties would arise when determining factual issues such as the "moment of conception" and calculation of damages. However, it reasoned that such issues were not justification to bar a nonviable fetal wrongful death claim. Furthermore, the court did not offer any guidance on how to resolve such factual questions. In essence, the Farley court eradicated the difficult evidentiary issue of the point of viability and created potentially difficult questions of when conception occurred and how to calculate damages.

Finally, there may be criticism of the court’s seeming disregard of the doctrine of stare decisis. The court justified its departure from precedent stating that often precedent must change to accommodate modern technology, skill and experience not known beforehand. However, even with modern technology and medicine, a fetus within the first twenty-two weeks cannot survive outside the womb of its mother. Capability to live a separate and distinct existence is the character and quality that the majority of courts have used to distinguish a fetus from a person.

VI. CONCLUSION

With the Farley decision, tort victims can claim victory, but like all victories, it comes with a price. The Farley court rejected the viability standard in the fetal wrongful death context and adopted one of

165. Farley, 466 S.E.2d at 534.
166. Id.
167. Id.
168. Stare decisis is defined as the "[p]olicy of courts to stand by precedent and not to disturb settled point." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).
169. Farley, 466 S.E.2d at 527.
170. Id. at 524. The plaintiff's doctor testified that "[t]he earliest surviving infant that [he] knew of was right at 500 grams, which would have been about 22 weeks." Id.
171. See supra text accompanying notes 71-79.
nonviability. As a result of the *Farley* decision, a person’s life and his wrongful death causes of actions begin at conception.172

With the adoption of this rule, an inconsistency now exists between the realms of constitutional law and civil liability. Moreover, the *Farley* decision only widens the conflict between criminal law and wrongful death liability. Whether the decision will have a problematic effect among these three areas of the law remains to be seen, but, in terms of civil liability, the *Farley* court purports to have answered the question so many courts consider unanswerable of when life begins.

The unanimous decision also indicates how far the Supreme Court of Appeals of West Virginia is willing to interpret the wrongful death statute for tort victims; this holding can only encourage victims to appeal undesirable results to the Supreme Court of Appeals in hopes of changing the wrongful death law for a more favorable outcome. The *Farley* decision most likely will not end questions concerning the duty for tortfeasors, but rather more difficult questions are sure to arise as to the foreseeability of the tortfeasor’s conduct toward a nonviable fetus which may be far more difficult to answer than the viability issue.

Robin C. Hewitt

172. *See supra* text accompanying notes 94-133.