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**Wrongful Death Action--Death of Viable Unborn Child from Prenatal Injury**

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The defendant relied upon the rule, recognized in West Virginia, that a general contractor is not liable for the negligence of an independent contractor that it has employed. *Chenoweth v. Settle Engineers, Inc.*, 151 W. Va. 830, 156 S.E.2d 297 (1967); *Law v. Phillips*, 136 W. Va. 761, 68 S.E.2d 452 (1952). However, an exception to this rule exists where a general contractor retains control over any part of the work and fails to exercise reasonable care for the protection of others or to stop dangerous activity of which it acquires knowledge. W. Prosser, *Law of Torts* 481 (3d ed. 1964). Although the Supreme Court of Appeals of West Virginia has not had opportunity to apply this exception, the Fourth Circuit held that the district judge "was fully justified in believing that the Court [the West Virginia Court] approved it." Civil No. 71-1463 at 5.

In *Chenoweth* the general contractor had retained no contractual right "to enforce or require any safety precautions." 151 W. Va. at 839, 156 S.E.2d at 302. The court in *Summers* reasoned that by inference, had there been a retention of control in *Chenoweth* over the safety practices by the general contractor, it would have been liable due to its own negligence in failing to enforce those safety practices. Although there was no written contract between Crown and Kent, the retention of the right to prohibit Kent from continuing to do its work in a dangerous manner was amply established by the testimony of Crown's senior employees. Thus *Summers* was held to fall clearly within the inference created in *Chenoweth*. See Brown, *Liability for the Tort of Independent Contractors in West Virginia*, 55 W. Va. L. Rev. 216 (1953) in which the author discussed the exceptions recognized by West Virginia to the rule that a general contractor is not liable for the negligence of its independent contractors.

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Plaintiff's decedent, a viable infant *en ventre sa mere*, was stillborn two days after his mother, a guest passenger, was seriously injured in an automobile accident. The official cause of the infant's
death was trauma resulting from the accident. Defendant's motion to dismiss plaintiff's wrongful death action for failure to state a claim upon which relief could be granted was sustained by the circuit court. Plaintiff appealed. Held, reversed. In an opinion by Judge Haymond, the West Virginia Supreme Court of Appeals ruled that under West Virginia's Wrongful Death Statute [W. Va. Code ch. 55, art. 7, §§5, 6 (Michie 1966)], an action could be maintained by the personal representative of a viable unborn child for the wrongful death of that child caused by injuries sustained while in the womb of its mother. Baldwin v. Butcher, 184 S.E.2d 428 (W. Va. 1971).

Although this was a case of first impression for the West Virginia court, the Federal District Court for the Southern District of West Virginia, in an Erie-educated guess, had previously determined that the West Virginia Supreme Court would hold that a cause of action was stated. Panagopoulous v. Martin, 295 F. Supp. 220 (S.D. W. Va. 1969). The majority agreed with the Panagopoulous decision that an unborn viable child was an existing person and that the possibility of fraudulent claims had no bearing upon the validity of the cause of action. They also believed that it was fallacious to conclude that the legislature never intended that a viable unborn fetus recover under the statute, especially in view of the fact that such an individual could own an estate, have a legal guardian appointed, and have a legacy.