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# Examining DiDonato's Damage Limitations and Mandatory Joinder Requirements - Greer v. Parsons

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# EXAMINING *DiDONATO'S* DAMAGE LIMITATIONS AND MANDATORY JOINDER REQUIREMENTS — *Greer v. Parsons*

## INTRODUCTION

In the landmark decision *DiDonato v. Wortman*,<sup>1</sup> the North Carolina Supreme Court held that a viable<sup>2</sup> fetus is a "person" within the purview of the state's wrongful death statute.<sup>3</sup> As a result of this decision, a plaintiff can successfully maintain a cause of action for the wrongful death of a stillborn child.<sup>4</sup> However, the court barred recovery for pecuniary loss<sup>5</sup> and loss of society and companionship, damages which are expressly available under the wrongful death statute.<sup>6</sup> The court reasoned that since a fetus' in-

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1. 320 N.C. 423, 358 S.E.2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E.2d 73 (1987).

2. Viability is normally defined as the ability of the fetus to maintain life outside of the mother's body. T. KIELY, *MODERN TORT LIABILITY: RECOVERY IN THE 90s* 302 (1990).

3. N.C. GEN. STAT. § 28A-18-2 (1991). The *DiDonato* court stated, "A viable fetus . . . is by definition capable of life independent of its mother. [It] is genetically complete and can be taxonomically distinguished from non-human life forms." *DiDonato* at 427, 358 S.E.2d at 491-92.

4. Jim Hutcherson, Note, *North Carolina Recognizes Cause of Action for the Wrongful Death of a Viable Fetus: DiDonato v. Wortman*, 23 WAKE FOREST L. REV. 849 (1988).

5. For the purposes of this Note, pecuniary losses will refer only to lost income.

6. N.C. GEN. STAT. § 28A-18-2(b) (1991). North Carolina's Wrongful Death Act provides in pertinent part:

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

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

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

(3) The reasonable funeral expenses of the decedent;

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

(a) Net income of the decedent,

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

(c) Society, companionship, comfort, guidance, kindly offices and advice of

telligence, personality, and abilities cannot be determined, recovery for such damages would be based on "sheer speculation."<sup>7</sup>

*DiDonato* also adopted a mandatory joinder requirement.<sup>8</sup> Under this requirement, an action for the wrongful death of a viable fetus must be joined with any action based on the same facts brought by the decedent's parents.<sup>9</sup> The court adopted the joinder requirement to protect a defendant from possibly paying punitive damages to the parents in both actions.<sup>10</sup> In most instances, since the parents, in addition to having their own claim, are the real parents of interest in the wrongful death action, the court feared parents might possibly receive a double recovery of punitive damages.<sup>11</sup> The court reasoned that allowing such a result would in effect punish a defendant twice for a single act of negligence.<sup>12</sup>

*Greer v. Parsons*<sup>13</sup> is the first North Carolina Supreme Court application of *DiDonato*. In *Greer*, the court again faced the question of whether damages for pecuniary loss and loss of society and companionship could be recovered in an action for the wrongful death of a viable fetus. In upholding *DiDonato*'s damage limitations, the court again noted that "an award of damages covering these kinds of losses would necessarily be based on speculation rather than reason."<sup>14</sup> Thus, *Greer* "declined plaintiff's invitation to revisit [*DiDonato*]."<sup>15</sup>

However, the *Greer* court bypassed *DiDonato*'s joinder requirement, and allowed the claim for punitive damages to be brought even though it was not joined with the parents' personal injury claims.<sup>16</sup> The court noted that the parents settled their

the decedent to the persons entitled to the damages recovered;

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

(6) Nominal damages when the jury so finds.

7. *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 492 (1987) (quoting *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 489 (1966)).

8. *Id.* at 434, 358 S.E.2d at 495.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 331 N.C. 368, 416 S.E.2d 174 (1992).

14. *Id.* at 374, 416 S.E.2d at 177 (quoting *DiDonato v. Wortman*, 320 N.C. 423, 432, 358 S.E.2d 489, 494).

15. *Id.*

16. *Id.* at 373, 416 S.E.2d at 176.

claims prior to the filing of the *DiDonato* decision.<sup>17</sup> As a result, the court held that "it was impossible for plaintiff to anticipate and comply with the mandatory joinder requirement."<sup>18</sup> Hence, the court, noting that other methods could be used to prevent double recovery, declined to apply the joinder requirement.<sup>19</sup>

This Note will outline the evolution of wrongful death actions, with particular attention being given to the inclusion of unborn children under the providing statutes. It also traces North Carolina's legislative and judicial treatment of wrongful death actions. Next, the Note will discuss the inconsistencies created by ruling that pecuniary loss and loss of society and companionship cannot be recovered as a matter of law in a wrongful death action brought on behalf of viable fetus. It will argue that instead of limiting recovery as a matter of law, such damages should be addressed on a case-by-case basis and the question of whether damages are too speculative should be answered by the trial court. The Note concludes by addressing the consequences of *Greer's* decision to disregard *DiDonato's* mandatory joinder requirement. It suggests that although *Greer* provides an exception to the joinder requirement, it is unclear exactly how broad (or narrow) that exception is.

### THE CASE

On October 19, 1986, Brenda and Danny Greer were seriously injured in an automobile accident involving their car and one operated by defendant Bynum Parsons.<sup>20</sup> At the time of the accident, Mrs. Greer was eight-and-a-half months pregnant, and the accident resulted in the death of her unborn child, Kandy Greer.<sup>21</sup>

On April 8, 1987, two months prior to the filing of *DiDonato*, the Greers settled their claims against the defendants.<sup>22</sup> On July

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* In her complaint, the plaintiff alleges that the defendant: (1) drove across the centerline and into the path of plaintiff's automobile, (2) was careless and reckless in operating his vehicle, (3) drove at an excessive speed, (4) failed to keep a proper lookout, and (5) was under the influence of an impairing substance. See Complaint at 4, *Greer v. Parsons*, 331 N.C. 368, 416 S.E.2d 174 (1992) (No. 334PA91).

21. *Greer*, 331 N.C. at 370, 416 S.E.2d at 175.

22. *Id.* As part of the settlement, the Greers signed a release "[for themselves, their] heirs, personal representatives, and assigns." The release discharged defendants "from any and all claims, demands, damages, costs, expenses, loss of

28, 1988, Mrs. Greer qualified as administratrix of Kandy Greer's estate, and subsequently filed a wrongful death claim, seeking compensatory and punitive damages on behalf of the deceased.<sup>23</sup> The plaintiff's claim for compensatory damages included claims for pecuniary loss and loss of companionship.<sup>24</sup> Relying on *DiDonato*, the trial court granted the defendant's motion for summary judgment with respect to the plaintiff's claim for these damages.<sup>25</sup> In addition, the trial court, noting plaintiff's failure to comply with *DiDonato's* mandatory joinder requirement, granted defendant's motion for summary judgment with respect to the punitive damages claim.<sup>26</sup>

The North Carolina Court of Appeals reversed the trial court's grant of summary judgment with respect to the punitive damages claim.<sup>27</sup> The court held that it would be a "pointless absurdity" to require the parents to join their defunct claim with the wrongful death claim.<sup>28</sup> In addition, the court stated that the only purpose of *DiDonato's* joinder requirement was "to facilitate the fair litigation of two claims for punitive damages that are based upon the same act or event."<sup>29</sup> The court continued by noting that "when

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services, actions and causes of actions" for any injuries, present or future, stemming from the accident. *Id.* The effect of this release was an issue raised in *Greer*, however it is an issue beyond the scope of this note. Briefly, however, the court ruled that the release did not bar the wrongful death action since the plaintiff "had no authority to settle the wrongful death claim of the fetus prior to qualifying as administratrix, and the release operated only to discharge defendant's liability to the signers thereof." *Id.* at 372, 416 S.E.2d at 176.

23. *Id.* Note that Mrs. Greer was named administratrix almost two year after the date of loss. Since North Carolina did not allow recovery for the wrongful death of a viable fetus until the *DiDonato* decision in 1987, there was no estate (i.e., tort claim) to oversee at the time of the loss. Note also that according to *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 89 N.C. App. 154, 365 S.E.2d 909 (1988), *aff'd*, 327 N.C. 283, 395 S.E.2d 85 (1990), an action to recover for the destruction of a viable fetus *en ventre sa mere* could be applied retroactively to an action commenced before *DiDonato* was decided. Finally note that Mrs. Greer brought this action just prior to the running of the two-year statute of limitation for wrongful death actions. See *High v. Broadnax*, 271 N.C. 313, 156 S.E.2d 282 (1967), *overruled on other grounds*, *Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Greer v. Parson*, 103 N.C. App. 463, 467, 405 S.E.2d 921, 924 (1991), *aff'd*, 331 N.C. 368, 416 S.E.2d 174 (1992).

28. *Id.* at 468, 405 S.E.2d at 924.

29. *Id.* at 467, 405 S.E.2d at 924.

only one claim is being or can be litigated, there is nothing to join."<sup>30</sup> The court concluded that a defendant's right not to be assessed punitive damages twice could be protected simply by allowing the defendant to introduce evidence showing that part of the parents' settlement included punitive damages.<sup>31</sup> Thus, the court disregarded *DiDonato's* joinder requirement and allowed the plaintiff to present a claim for punitive damages.<sup>32</sup> However, noting its deference to the state's Supreme Court, the Court of Appeals reluctantly affirmed the trial court's grant of summary judgment with respect to damages for pecuniary loss and loss of companionship.<sup>33</sup>

On discretionary review, the North Carolina Supreme Court affirmed the Court of Appeals' decision.<sup>34</sup> With respect to plaintiff's claim for punitive damages, the supreme court disregarded the mandatory joinder requirement because of the impossibility of joining the claims.<sup>35</sup> However, with respect to the claim for pecuniary damages and damages for loss of companionship, the court reiterated that "an award of damages covering these kinds of losses would necessarily be based on speculation rather than reason."<sup>36</sup> Hence, the *Greer* court "decline[d] plaintiff's invitation to revise [*DiDonato's*] holding."<sup>37</sup>

## BACKGROUND

In *Baker v. Bolton*,<sup>38</sup> Lord Ellenborough established the common law rule barring recovery for the negligently-caused death of another. In that decision, the court prohibited recovery because "the death of a human being could not be complained of as an injury."<sup>39</sup> It was not until the passage of Lord Campbell's Act in

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30. *Id.*

31. *Id.* at 468, 405 S.E.2d at 924.

32. *Id.*

33. *Id.*

34. *Greer v. Parsons*, 331 N.C. 368, 374, 416 S.E.2d 174, 175 (1992).

35. *Id.* at 373, 416 S.E.2d 176.

36. *Id.*

37. *Id.* at 374, 416 S.E.2d at 175.

38. 1 Camp. 493, 170 Eng. Rep. 1033 (1808) (denying a husband's claim for the wrongful death of his wife which occurred when defendants' stagecoach overturned). See also *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216 (1912) (recognizing no right of action for wrongful death at common law).

39. *Id.*

1846<sup>40</sup> that a cause of action for wrongful death was finally recognized.<sup>41</sup> In 1855, North Carolina passed its first wrongful death statute,<sup>42</sup> which, like most other jurisdiction, modeled Lord Campbell's Act.<sup>43</sup>

Despite the enactment of wrongful death statutes, all states continued to treat an unborn child as an entity inseparable from its mother.<sup>44</sup> As a result, a child could not maintain an action for injuries occurring before its birth.<sup>45</sup> This "single entity" view was exemplified in *Dietrich v. Inhabitants of Northampton*.<sup>46</sup> In *Dietrich*, the court held that an unborn child was still considered part of the mother and, therefore, was not a separate being in its own right.<sup>47</sup> As a result, the court concluded the defendant could not owe a duty of conduct to a person who was not in existence at the time of the action.<sup>48</sup>

However, in what Prosser deemed "the most spectacular ab-

40. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict. ch. 93.

41. 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:2, at 5-7 (2d ed. 1975). Lord Campbell's Act provided that "whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action may be maintained if brought within twelve (12) months after his death in the name of his executor or administrator for the benefit of certain relatives."

42. N.C. GEN STAT. § 39 (1855).

43. See *Killian v. Southern Ry. Co.*, 128 N.C. 261, 38 S.E. 873 (1901).

44. S. SPEISER, *supra* note 41, at 29. Note, the North Carolina Supreme Court did not address the issue until *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968).

45. See, e.g., *Stanford v. St. Louis-San Francisco Ry. Co.*, 214 Ala. 611, 108 So. 566 (1926); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E.2d 638 (1900) (denying recovery where a full-term unborn child was seriously and permanently disabled by a malfunctioning elevator in the hospital just prior to its delivery); *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937); *Buel v. United Ry. Co.*, 248 Mo. 126, 154 S.W. 71 (1913); *Stemmer v. Kline*, 128 N.J. 455, 26 A.2d 489 (1942); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Berlin v. J.C. Penny Co.*, 339 Pa. 547, 16 A.2d 28 (1940); *Gorman v. Budlong*, 23 R.I. 169, 49 A. 704 (1901); *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916).

46. 138 Mass. 14, 52 Am. Rep. 242 (1884) (denying recovery for infant who died within 15 minutes of birth from injuries sustained when its mother slipped on a negligently maintained highway during between the fourth and fifth months of her pregnancy). See generally William T. Muse & Nicholas A. Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611 (1950).

47. *Id.*

48. *Id.*

rupt reversal of a well-settled rule in the whole history of the law of torts,"<sup>49</sup> the United States District Court for the District of Columbia in *Bonbrest v. Ketz*<sup>50</sup> became the first court to allow recovery for prenatal injuries. In *Bonbrest*, the court rejected the "single entity" view and conditioned recovery on the child's being born alive.<sup>51</sup> The court held that because the fetus was viable at the time it sustained injury, its rights deserved legal protection.<sup>52</sup> Today, all American jurisdictions allow a surviving child to recover damages for prenatal injuries.<sup>53</sup>

49. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 336 (4th ed. 1971).

50. *Bonbrest v. Ketz*, 65 F. Supp. 138 (D.D.C. 1946) (recovery allowed when a viable fetus survived for only a brief period because of injuries sustained during removal from its mother's womb).

51. *Id.*

52. *Id.*

53. S. SPEISER, *supra* note 41, § 4:33, at 180-82. Today, in an action to recover for prenatal injuries, a majority of jurisdictions have rejected the viability standard, and have held that when a child is born alive, he/she is considered a legal person to whom a duty of care could be owed from the moment of conception. See, e.g., *Wolfe v. Isbell*, 291 Ala. 327, 280 So. 758 (1973); *Simon v. Mullin*, 34 Conn. Supp. 139, 380 A.2d 1353 (1977); *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560 (Fla. Dist. Ct. App. 1976); *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *Danos v. St. Pierre*, 383 So. 2d 1019 (La. Ct. App. (1980); *Torigian v. Watertown News Co.*, 352 Mass. 466, 225 N.E.2d 926 (1967); *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 2189 (1971); *Bergsteser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978) (Missouri); *Bennett v. Hymers*, 101 N.H. 438, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696 (1953); *Jorgensen v. Meade Johnson Laboratories*, 483 F.2d 237 (10th Cir. 1973) (Oklahoma); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Ct. App. 1971), *aff'd per curiam*, 471 S.W.2d 569 (1971); *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959). However, many jurisdictions have retained the viability standard for determining whether a child may recover for injuries sustained *en ventre sa mere*. See *Bonbrest v. Ketz*, 65 F. Supp. 138 (D.C. 1945); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939), *aff'd per curiam*, 33 Cal. 2d 629, 93 P.2d 562 (1939); *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Salazar v. St. Vincent Hospital*, 95 N.M. 105, 619 P.2d 826 (1980); *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968); *Williams v. Marion Rapid Transit*, 152 Ohio St. 144, 87 N.E.2d 334 (1949); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636 (1974), *aff'd*, 269 Or. 543, 525 P.2d



Three years later in *Verkennes v. Corneia*,<sup>54</sup> Minnesota became the first state to recognize an action for the death of a viable, but unborn child. Relying on *Bonbrest*, the Minnesota Supreme Court emphasized "that where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises."<sup>55</sup> Thus, the court held the fetus was entitled to protection under the state's wrongful death statute.<sup>56</sup>

In *Gay v. Thompson*,<sup>57</sup> North Carolina first confronted the issue of whether the state's wrongful death statute allowed recovery for the death of a viable child *en ventre sa mere*.<sup>58</sup> At the time of the *Gay* decision, North Carolina's wrongful death statute allowed recovery of "such damages as are a fair and just compensation for the pecuniary losses resulting from the death."<sup>59</sup> In light of this statute, the North Carolina Supreme Court ruled that "negligence

1296 (1974); *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960); *Shousha v. Matthews Drivurself Serv.*, 210 Tenn. 384, 358 S.W.2d 471 (1962); *Vaillancourt v. Medical Center Hosp.*, 139 Vt. 217, 425 A.2d 92 (1980); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971).

54. 229 Minn. 365, 38 N.W.2d 838 (1949) (father of the unborn alleged that a negligently-supervised delivery resulted in the death of viable fetus and its mother).

55. *Id.* at 370-71, 38 N.W.2d at 841. In condemning the no duty rule, the *Verkennes* court seemingly adopted the view that "an unborn child in the path of an automobile is as much a person in the street as the mother, and should be equally protected under the law." Winfield, *The Unborn Child*, 4 U. TORONTO L.J. 278 (1942).

56. *Id.* Today, in jurisdictions which recognize an action for the wrongful death of a fetus, viability is a "prerequisite in determining whether a fetus acquires a legal identity which warrants the protections and remedies of the legal system." Comment, *The Right of Recovery for the Tortious Death of the Unborn*, 27 How. L.J. 1649, 1660 (1984).

57. 266 N.C. 394, 146 S.E.2d 425 (1966) (eight-month-old fetus and its mother died when doctor negligently attempted to induce premature delivery).

58. *Id. En ventre sa mere* is defined as "in its mother's womb." BLACK'S LAW DICTIONARY, 534 (6th ed. 1990).

59. N.C. GEN. STAT. §§ 28-173, 28-174 (1966). Pecuniary injury was determined by deducting the probable cost of the decedent's living expenses from his probably gross income during the years he would have been expected to live had it not been for the wrongful act of the defendant. *Purnell v. Rockingham R.R. Co.*, 190 N.C. 573, 130 S.E.2d 313 (1925). See also *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958) (recovery under state's wrongful death statute is limited to pecuniary injury; it does not provide for punitive damages or nominal damages in the absence of pecuniary loss); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965) (state's wrongful death statute leave no room for sentiment, it confers a right to compensation only for pecuniary loss).

alone, 'without pecuniary injury resulting from such death,' does not create a cause of action."<sup>60</sup> Thus, the court declined to recognize an action for the wrongful death of a fetus, stating that it was "virtually impossible to predict whether an unborn child, but for its death, would have been capable of giving pecuniary benefit to anyone."<sup>61</sup>

Two years later, in *Stetson v. Easterling*,<sup>62</sup> the North Carolina Supreme Court held that a child who lived for only a few months could recover for prenatal injuries. However, the *Stetson* court, relying on *Gay*, refused to allow damages for the child's wrongful death.<sup>63</sup> The court noted that since the state's wrongful death statute confined recovery to pecuniary losses, "it would be 'sheer speculation' to assess damages as of the time of the negligently inflicted injuries."<sup>64</sup> Thus, under *Gay* and *Stetson*, North Carolina refused to recognize an action against one who inflicts fatal injuries on a fetus, regardless of whether the fetus was born dead or alive.

In 1969, the General Assembly rewrote the damages section of the state's Wrongful Death Act.<sup>65</sup> The revised damage section provided compensation for the following:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for loss of the reasonably expected:
  - (a) Net income of the decedent;
  - (b) Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered;

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60. *Gay*, 266 N.C. at 398, 146 S.E.2d at 428 (quoting *Hoke v. Atlantic Greyhound Corp.*, 266 N.C. 332, 38 S.E.2d 105 (1946)).

61. *Id.*

62. 274 N.C. 152, 161 S.E.2d 531 (1968) (denying wrongful death action, but allowing recovery for prenatal injuries when the child lived for only a few months before dying from brain damages negligently inflicted while *en ventre sa mere*). See also *Stam v. State*, 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd*, 302 N.C. 357, 275 S.E.2d 439 (1981) (live birth requirement is a condition precedent to exercise property rights acquired by unborn child).

63. *Id.*

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

65. Act approved April 14, 1969, ch. 215, 1969 N.C. Sess. Laws 194 (codified at N.C. GEN. STAT. § 28A-18-2 (supp. 1987)).

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

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

(6) Nominal damages when the jury so finds.<sup>66</sup>

Since damages were no longer limited to "speculative" pecuniary losses, the revisions effectively removed the primary obstacle which had previously blocked recovery for a viable fetus.

Prior to *DiDonato*, the North Carolina Court of Appeals twice addressed whether an unborn child fell within the purview of the state's revised wrongful death statute. In *Cardwell v. Welch*,<sup>67</sup> the court held that the wrongful death statute applied only to "one who by live birth had attained a recognized individual identity."<sup>68</sup> One year later, the Court of Appeals addressed the same issue in *Yow v. Nance*.<sup>69</sup> In affirming its decision in *Cardwell*, the court again denied recovery for the wrongful death of a fetus stating that a child still in its mother's womb was not a "person" under the Wrongful Death Act.<sup>70</sup>

Almost twenty-one years after *Gay*, the North Carolina Supreme Court in *DiDonato v. Wortman*<sup>71</sup> finally readdressed the issue of whether a viable fetus could maintain a wrongful death action. In overruling *Cardwell* and *Yow*, Chief Justice Exum noted that almost every state, including North Carolina, allowed children to recover for fetal injuries.<sup>72</sup> The court stated that as a matter of consistency and logic, the wrongful death statute should be extended to protect viable, unborn children.<sup>73</sup> Chief Justice Exum

66. N.C. GEN. STAT. § 28A-18-2(b).

67. 25 N.C. App. 390, 213 S.E.2d 382 (1975).

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

69. 29 N.C. App. 419, 224 S.E.2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E.2d 833 (1976).

70. *Id.*

71. 320 N.C. 423, 358 S.E.2d 489 (1987).

72. *DiDonato v. Wortman*, 320 N.C. 423, 427, 358 S.E.2d 489, 491 (1987). *See also, Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) (a child can recover for injuries negligently inflicted upon him while within the womb).

73. *DiDonato*, 320 N.C. at 427, 358 S.E.2d at 491. A commonly-used hypothetical illustrating the potential inconsistencies supposes that twins are negligently injured while in their mother's womb. The injuries result in the death of one child, but the other survives. Commentators have argued that it would be

reasoned that denying this action would allow a tortfeasor to escape liability for the death of a fetus, but would hold a tortfeasor liable when he only injures a fetus.<sup>74</sup> As one court noted, failing to include a viable fetus within the protections of a state's wrongful death statute "would only serve the tortfeasor by rewarding him for his severity in inflicting the injury."<sup>75</sup> Noting the possibility of such unjust results, the *DiDonato* court concluded that a viable fetus is within the class of "persons" contemplated by the wrongful death statute.<sup>76</sup>

In reconciling *DiDonato* with its prior holding in *Gay*, the North Carolina Supreme Court focused on the 1969 amendments to the wrongful death statute.<sup>77</sup> The *DiDonato* court held that since damages were no longer limited to "speculative" pecuniary losses, a fetus is entitled to compensation for damages which can be "precisely calculated."<sup>78</sup> These damages included medical and funeral expenses, as well as, nominal and punitive damages.<sup>79</sup>

With respect to punitive damages claims, the court held, "The plaintiff's claim for the wrongful death of a viable fetus must be joined with any claims based on the same acts of alleged negligence brought by the parents in their own right."<sup>80</sup> The court noted that "wrongful death actions are permitted not for the benefit of the decedent, but to compensate the decedent's survivors."<sup>81</sup> Thus, since the parents are the real party of interest in the wrongful

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inequitable to allow only the surviving child to recover. *See, e.g., Espadero v. Feld*, 649 F. Supp. 1480 (D.C. 1986); *Endresz v. Friedberg*, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 248 N.E.2d 901 (1969) ("It would be arbitrary and illogical to hold the distributees of an injured fetus which survives birth by a few minutes may have a recovery while those of a stillborn fetus may not.").

74. *Id.*

75. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974) (action for the death of an eight-and-a-half month old fetus may be maintained under the wrongful death statute regardless of whether death from fetal injury occurred before or after live birth).

76. *Id.*

77. *Id.* at 429-30, 358 S.E.2d at 492-93. Recall that the 1969 amendments allowed recovery for the following: lost income; compensation for the decedent's medical and funeral expenses; decedent's pain and suffering; and loss of the decedent's services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices, and advice. N.C. GEN. STAT. § 28A-18-2(b) (1991).

78. *DiDonato*, 320 N.C. at 428, 358 S.E.2d at 492-93.

79. *Id.* at 432, 358 S.E.2d at 494.

80. *Id.* at 434, 358 S.E.2d at 495.

81. *Id.* at 433, 358 S.E.2d at 495 (citing *In re Ives Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958)).

death action, the joinder requirement was adopted to protect a defendant from having to pay punitive damages to the parents in both actions.<sup>82</sup>

However, despite recognizing that damages in a wrongful death are to some extent uncertain and speculative, the court prohibited recovery for pecuniary loss, as well as loss of society and companionship.<sup>83</sup> The court, stating that it needed to draw a line between *relatively* speculative and *unreasonably* speculative damages, held that since a stillborn's intelligence, abilities, and interests cannot be determined, a jury attempting to calculate such damages would be reduced to "sheer speculation."<sup>84</sup> Hence, *DiDonato* in effect held that although a viable fetus is a "person" under the Wrongful Death Act, a plaintiff is precluded as a matter of law from recovering some of the damages specifically provided under the Act.<sup>85</sup>

#### ANALYSIS

##### A. Greer's Upholding of DiDonato's Damage Limitations

###### 1. The basic inconsistencies created by precluding damages as a matter of law

*Greer v. Parsons*<sup>86</sup> is the first case to challenge *DiDonato's* damage limitations. In that case, the North Carolina Supreme Court reiterated that in an action for a fetus' wrongful death, pecuniary damages and damages for loss of companionship would necessarily be based on "sheer speculation" since the child's abilities and personality could not be determined at the time of its death.<sup>87</sup> Thus, the court upheld its ruling in *DiDonato* that an award of such losses would be based on speculation and not reason.<sup>88</sup>

*Greer's* upholding of limited damages in wrongful death action

82. *Id.* at 432, 358 S.E.2d at 494.

83. *Id.*

84. *Id.* at 431-32, 358 S.E.2d at 492.

85. *Id.* In *DiDonato*, the court was not convinced that a fetus' pain and suffering could ever be satisfactorily proven. The court, however, did not want to preclude such recovery as a matter of law. As a result, pain and suffering damages were held to be recoverable if they could be established with reasonable certainty.

86. 331 N.C. 368, 416 S.E.2d 174.

87. *Id.* at 374, 416 S.E.2d at 177 (quoting *DiDonato v. Wortman*, 320 N.C. 423, 432, 358 S.E.2d 489, 494 (1987)).

88. *Id.*

brought on behalf of a viable fetus preserves the inconsistencies created by *DiDonato*. *DiDonato* expressly states that a viable fetus is a "person" under the Wrongful Death Act.<sup>89</sup> The Wrongful Death Act, in turn, explicitly allows "persons" coming under its purview to recover certain enumerated damages.<sup>90</sup> These damages include compensation for the expected net income of the decedent; services, protection, care and assistance of the decedent; and society, companionship, and advice.<sup>91</sup> Yet, despite this clear allowance of damages, the *DiDonato* and *Greer* courts held that such losses are not recoverable. As Judge Phillips noted in writing the Court of Appeals opinion in *Greer*, precluding these damages creates an inconsistency because it "prevents parents from trying to prove damages that the act expressly authorizes in all cases under it."<sup>92</sup>

In essence, *DiDonato* and *Greer* have "legislated" an outcome contrary to the intent of the General Assembly.<sup>93</sup> In *Beck v. Carolina Power & Light Co.*,<sup>94</sup> the North Carolina Supreme Court recognized that the "legislative intent of the wrongful death statute was to compensate persons as fully as possible for the loss of the decedent."<sup>95</sup> Further, the specific listing of these damages clearly indicates the legislature's intent to allow for broad recoveries.<sup>96</sup> Yet, by an act of "judicial fiat," the Court has barred plaintiffs as a matter of law from being fully compensated.<sup>97</sup> As Justice Martin noted in his dissent in *DiDonato*, "It is not the prerogative of this Court to usurp a legislative function by rewriting the statute to change the rule of damages."<sup>98</sup> Justice Webb expounded on this notion by stating, "If there are to be wrongful death claims for unborn persons, the plaintiffs should have whatever damages they may prove under the Wrongful Death Act."<sup>99</sup>

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89. *DiDonato*, 320 N.C. at 430, 358 S.E.2d at 495.

90. N.C. GEN. STAT. § 28A-18-2(b) (1991).

91. *Id.*

92. *Greer*, 103 N.C. App. 463, 468, 405 S.E.2d 931, 924 (1991), *aff'd*, 331 N.C. 368 (1992).

93. Brief for Plaintiff Appellant at 5, *Greer v. Parsons*, 331 N.C. 368, 416 S.E.2d 174 (1991) (No. 334PA91).

94. 57 N.C. App. 373, 291 S.E.2d 897, *aff'd*, 307 N.C. 267, 297 S.E.2d 397 (1982).

95. *Id.*

96. *DiDonato v. Wortman*, 320 N.C. 423, 436-37, 358 S.E.2d 489, 496-97 (Martin, J., concurring in part and dissenting in part).

97. *Id.* at 438, 358 S.E.2d at 497 (Webb, J., dissenting).

98. *Id.* at 437, 358 S.E.2d at 497.

99. *Id.* at 438, 358 S.E.2d at 497.

In attempting to justify the damage limitations, *DiDonato* and *Greer* contend that jurors would be reduced to using "sheer speculation" in awarding damages for lost income and loss of companionship in cases involving a viable fetus.<sup>100</sup> However, as one court noted, "the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it."<sup>101</sup> By stating as a matter of law that the plaintiff cannot attempt to prove these types of damages, *DiDonato* and *Greer* not only deny plaintiffs the full benefit of the statute, but also yield unjust results. In order to fully understand how *DiDonato* and *Greer* deprive plaintiffs of the full benefits of the statute, it is necessary to individually consider the preclusion of (1) loss of income damages and (2) loss of society and companionship.

## 2. *The preclusion of lost income damages*

*DiDonato* creates a basic inconsistency with the state's wrongful death statute by ruling that pecuniary damages were speculative as a matter of law in cases involving a viable fetus. Admittedly, determining a fetus' intelligence, industry, and ability is a most difficult challenge. However, by holding that such damages could be determined only by sheer speculation, the court failed to note that other jurisdictions have awarded lost income damages in wrongful death action brought on behalf of a viable fetus.<sup>102</sup> For example, in *Pehrson v. Kistner*,<sup>103</sup> the Minnesota Supreme Court awarded pecuniary losses based on testimony suggesting that the decedent would have been expected to assist in the operations of its family's dairy farm. In *O'Neil v. Morse*,<sup>104</sup> the Michigan Su-

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100. *Greer v. Parsons*, 331 N.C. 368, 374, 416 S.E.2d 174, 177 (1992); *DiDonato v. Wortman*, 320 N.C. 423, 432, 358 S.E.2d 489, 494 (1987).

101. *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960).

102. The following cases have allowed recovery of pecuniary loss in a wrongful death action brought on behalf of a viable fetus: *Espadero v. Feld*, 649 F. Supp. 1480 (D.C. 1986) (granting recovery for the wrongful death of a nine-month-old fetus under statute interpreted as limiting recovery to net pecuniary loss); *Jones v. Karraker*, 109 Ill. App. 3d 363, 188 N.W.2d 785 (1982); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. App. 1970); *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974).

103. 301 Minn. 299, 222 N.W.2d 334 (1974). Under Minnesota statute, recovery for wrongful death is "the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death." MINN. STAT. § 573.02(1) (1973).

104. 385 Mich. 130, 188 N.W.2d 785 (1971). In discussing whether a viable fetus was a "person" under Michigan's wrongful death statute, the court posed the following question: "Widely reported was the March 20, 1971, birth of one

preme Court allowed recovery for loss of services despite acknowledging that such damages are difficult to prove in the case of an infant or stillborn child.<sup>105</sup> The *O'Neil* court ruled that the parents were entitled to these damages because the statute expressly provided for such compensation.<sup>106</sup> The awarding of these damages indicates pecuniary damages are not necessarily based on speculation. In addition, these decisions show the feasibility of calculating pecuniary loss. As noted in *Rice v. Rizk*,<sup>107</sup> lack of proof does not preclude recovery because "there is an inference that the child would have had some earning power."<sup>108</sup>

Further, as one court noted, "It is difficult to visualize a case where a human being does not have some monetary value."<sup>109</sup> Common sense indicates that in the majority of cases, a child will eventually have some earning capacity.<sup>110</sup> Such potential should be recognized and compensated accordingly when it is wrongfully preempted. However, the *Greer* and *DiDonato* decisions bar consideration of these damages as a matter of law. As a result, plaintiffs in North Carolina cannot even attempt to present a claim for pecuniary loss. In order to remain consistent with the statute's expressed

Kimberly Sue Bange, found alive and in good condition some distance from the body of her mother, killed in a fatal automobile accident. Termed 'a Cesarean section by violence,' the event . . . establishes a useful hypothetical case; suppose Kimberly Sue had also been found dead. How many 'persons' would have died in the crash? How many wrongful deaths?" *Id.* at 137, 188 N.W.2d at 787.

105. *Id.* at 138, 188 N.W.2d at 788.

106. *Id.* In pertinent part, the Michigan wrongful death statute provides:

(2) Every such action shall be brought by . . . the personal representatives of such deceased person, and every such action the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. MICH. STAT. ANN. § 27A.2922 (West 1965).

107. 453 S.W.2d 732 (1970).

108. *Id.* at 735.

109. *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974).

110. *Rice v. Rizk*, 453 S.W.2d 732 (Ky. App. 1970). See also National Ass'n of Educ. Progress, *Earning and Learning* (1990) (54% of eleventh grade students held part-time jobs); Amy Callahan, *Teens Begin Quest for Summer Work; Improved Prospects Reported, But Youths Won't Take Just Any Job*, THE BOSTON GLOBE, June 4, 1989, at 1 (normal teen-age unemployment rate is 11.7% in Massachusetts).



provisions and the legislature's intent, pecuniary losses should be addressed on a case-by-case basis.<sup>111</sup>

### 3. *The preclusion of damages for loss of society and companionship*

Perhaps more troublesome than the preclusion of pecuniary damages is the denial of damages for loss of society and companionship. In both *DiDonato* and *Greer*, the North Carolina Supreme Court states, "When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been."<sup>112</sup> In writing the Court of Appeals opinion in *Greer*, Judge Phillips noted that *DiDonato* was too broad in holding a child's loss of companionship is based entirely on personality.<sup>113</sup> Although the child's personality may affect the parent-child relationship in the later years of childhood, companionship will surely occur during the early years.<sup>114</sup> As Judge Phillips noted, a "unique and treasured companionship" exists between parents and their younger children.<sup>115</sup>

Further, in holding that damages for loss of companionship could only be calculated by sheer speculation, the court pessimistically inferred that it assumes a negative parent-child relationship will develop.<sup>116</sup> However, this is contrary to the average household.<sup>117</sup> Although there will certainly be rough times in the rearing of a child, most parents establish fulfilling relationships with their children.<sup>118</sup> Even if the rough times outnumber the easy times,

111. *DiDonato* at 436, 358 S.E.2d 489 (Martin, J., concurring in part and dissenting in part) (citing *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986)).

112. *Greer v. Parsons*, 331 N.C. 368, 373-74, 416 S.E.2d 174, 177 (1992); *DiDonato v. Wortman*, 320 N.C. 423, 432, 358 S.E.2d 489, 496. (1987).

113. *Greer v. Parsons*, 103 N.C. App. 463, 468, 405 S.E.2d 921, 924 (1991), *aff'd*, 331 N.C. 368 (1992).

114. *Id.*

115. *Id.*

116. *Greer v. Parsons*, 331 N.C. 368, 374, 416 S.E.2d 174, 177 (1992).

117. In a recent study by the National Commission on Children, the following statistics were cited as indicating a strong sense of family togetherness: (1) 70% of parents play a game or sport with their children at least once a week; and (2) 70% of parents report eating dinner together as a family five or more nights a week. National Comm'n on Children, *Speaking of Kids: A National Survey of Children and Parents* (1992).

118. According to the same study, 65% of parents rate their relationship with their children age 17 and younger as "excellent;" and 32% rate their relationship

"kinship in enduring and a parent's bond with its offspring does not vanish when the child's personality becomes displeasing or its character disappointing."<sup>119</sup>

Besides failing to consider companionship in the early stages of childhood and the enduring companionship maintained throughout life, the *DiDonato* and *Greer* courts also failed to acknowledge that jurors' life experiences will assist them in assessing the loss of a child's society and companionship. As Judge Phillips concluded:

[F]or a jury to conclude that any normal parent would have enjoyed cuddling, looking after, playing with and training his or her child *regardless* of its characteristics would *not* be "sheer speculation;" instead it would be a rational determination based upon [the jury's] knowledge of human experience and the law of probabilities.<sup>120</sup>

The purpose of damages in a wrongful death case is to restore the beneficiaries to the position they would have occupied had there been no death.<sup>121</sup> When there has been a wrongful death of a viable fetus, the parents are deprived of the expected benefits of having that child. These benefits surely include loss of companionship and loss income. However, *DiDonato* and *Greer*, have precluded this damages as a matter of law. As one commentator noted, the limited damages are "vastly inadequate to the estate of a child who had a right to life and to pursue a full life."<sup>122</sup> Justice Webb expounded upon this notion by stating, "If there are to be wrongful death claims for unborn persons, the plaintiffs should have whatever damages they may prove under the wrongful act."<sup>123</sup> Even if such damages may initially appear speculative, plaintiffs should at least have the opportunity to prove otherwise. However, under *Greer* and *DiDonato*, a plaintiff cannot even have his day in court with respect to these damages.

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as "good." National Comm'n on Children, *supra* note 117.

119. *Greer v. Parsons*, 103 N.C. App. 463, 468, 405 S.E.2d 921, 924 (1991).

120. *Id.*

121. *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *cert. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982).

122. Christopher P. Edwards, Note, *DiDonato v. Wortman and Wrongful Death of a Viable Fetus in North Carolina: The Case Against Unreasonably Restricting Damages*, 66 N.C.L. REV. 1291 (1988).

123. *DiDonato v. Wortman*, 320 N.C. 423, 438, 358 S.E.2d 489, 491 (1987).

B. Greer's *Bypassing of DiDonato's Mandatory Joinder Requirement*

With respect to punitive damages claims, the *DiDonato* court held, "The plaintiff's claim for the wrongful death of a viable fetus must be joined with any claims based on the same acts of alleged negligence brought by the parents in their own right."<sup>124</sup> Noting that the parents are the real party of interest in the wrongful death action, the court adopted this joinder requirement to protect a defendant from having to pay punitive damages to the parents in both actions.<sup>125</sup>

In justifying the joinder requirement, the court relied on *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*<sup>126</sup> In *Nicholson*, the court recognized a spouse's right to maintain a cause of action for loss of consortium.<sup>127</sup> Prior to *Nicholson*, loss of consortium actions were not recognized for a variety of reasons, including fear of double recovery.<sup>128</sup> In addressing this fear, the *Nicholson* court held double recovery could be avoided by "compel[ling] joinder of one spouse's action for loss of consortium with the other spouse's action for personal injury."<sup>129</sup> In addition, the court stated, "Not only does joinder avoid the problem of double recovery, it recognizes that, in a very real sense, the injury involved is to the marriage as an entity."<sup>130</sup>

In adopting its joinder requirement, *DiDonato* court stated, "This case is like *Nicholson* . . . in that the family unit allegedly has been injured by a single negligent act or course of conduct."<sup>131</sup> The court noted that punitive damages are available in both the

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124. *Id.* at 434, 358 S.E.2d at 495.

125. *Id.* at 432, 358 S.E.2d at 494.

126. 300 N.C. 295, 266 S.E.2d 818 (1980).

127. *Id.*

128. In *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), the North Carolina Supreme Court gave the following reasons for not allowing recovery for loss of consortium: (1) historically the wife had no action for consortium; (2) consortium included a predominant factor of service and that any attempt to separate that service element from society, companionship, and affection was impossible; (3) the wife's damages were too remote a consequence of a defendant's negligent injury of her husband to have been proximately caused by that injury; and (4) to allow a wife's action for loss of consortium, particularly when the main component of that action was compensation for lost service, would allow double recovery.

129. *Nicholson*, 300 N.C. at 303, 266 S.E.2d at 823.

130. *Id.*

131. *DiDonato*, at 433, 358 S.E.2d at 495.

wrongful death action and the parents' personal injury suit.<sup>132</sup> The *DiDonato* court concluded, "If the actions [were] tried separately, defendants could be punished twice for a single act of negligence."<sup>133</sup> As a result, the court adopted a mandatory joinder requirement to prevent the parents from "reap[ing] a windfall not contemplated by the legislature when it permitted actions for wrongful death."<sup>134</sup>

In *Greer*, the plaintiffs settled their claim prior to the filing of *DiDonato*.<sup>135</sup> In fact, Mrs. Greer did not qualify as administratrix until one year after *DiDonato*.<sup>136</sup> The North Carolina Supreme Court held, "[I]t was impossible for plaintiff to anticipate and comply with the mandatory joinder requirement announced in *DiDonato*, and we decline to apply that requirement to this case."<sup>137</sup> The court concluded:

In cases such as this . . . defendants' right not to be assessed with punitive damages that have already been paid can be protected in another, simpler way. If they allege that part of the moneys the parents received in settlement of their claims was for punitive damages, defendants would have a right . . . to support that contention with evidence and have the jury consider it in evaluating the Administratrix's claim for punitive damages, if that claim goes to the jury.<sup>138</sup>

Thus, as a result of *Greer*, failure to comply with *DiDonato*'s mandatory joinder requirement does not necessarily bar a claim for punitive damages. *Greer*, in effect, has carved out an exception to *DiDonato*. However, the extent of this exception is uncertain.

*Greer* stated that *DiDonato*'s mandatory joinder requirement would not apply "in cases such as this."<sup>139</sup> The facts in *Greer*, however, present two possible interpretations for when the mandatory joinder requirement may be disregarded. One interpretation is that the joinder requirement will not apply in any situation where the parents have settled their claims prior to bringing the wrongful death action. Such an interpretation would appear consistent with

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132. *Id.* at 434, 385 S.E.2d at 495.

133. *Id.*

134. *Id.*

135. *Greer*, 331 N.C. at 373, 416 S.E.2d at 176.

136. *Id.*

137. *Id.*

138. *Id.* (quoting *Greer v. Parson*, 103 N.C. App. 463, 467, 405 S.E.2d 921, 924 (1991)).

139. *Id.*

the Court of Appeals statement that "*DiDonato* does not forbid the settlement of claims, joinable or otherwise."<sup>140</sup> A more narrow interpretation of *Greer*, however, would be that the joinder requirement will not apply only when settlement occurred prior to *DiDonato*. The *Greer* court based its decision on the fact that it was impossible for the plaintiffs "to anticipate and comply with the mandatory joinder requirement."<sup>141</sup> In any settlement occurring after *DiDonato*, it is no longer impossible for plaintiffs to anticipate and comply with the joinder requirement. Hence, under this narrow interpretation, failure to comply with the joinder requirement may bar claims for punitive damages.

### CONCLUSION

In upholding *DiDonato's* preclusion of certain damages, *Greer* preserved the inconsistencies created when the court extended the rights and protections afforded by the wrongful death statute, but then limited the damages expressly provided in the act. Relying on *DiDonato*, *Greer* held that as a matter of law a plaintiff is barred from pursuing a claim for pecuniary loss and loss of companionship. The court itself has recognized that damages in any wrongful death action are to some extent uncertain and speculative.<sup>142</sup> However, in cases involving a viable fetus, the court has held that some damages are automatically reduced to the point of preclusion. The problem with this approach is that it does not allow a plaintiff to bring these claims to court, even though the legislature has expressly permitted such actions by those coming under the statute's provisions. In order to alleviate such inconsistencies, these damages should not be precluded as a matter of law. Instead, plaintiffs should be able to present their claim and support it with any available evidence. After presenting such evidence, if the trial judge finds that the damages would be too speculative, then he can simply remove that claim from jury consideration.

In examining *DiDonato's* mandatory joinder requirement, the *Greer* decision provides an avenue by which plaintiffs may bring claims for punitive damages without complying with the joinder requirement. However, extent of this exception is unclear. The facts of *Greer* yield two possible interpretations. A broad reading of *Greer* would hold that the joinder requirement will not apply

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140. *Greer*, 103 N.C. App. at 467, 405 S.E.2d at 924.

141. *Greer*, 331 N.C. at 373, 416 S.E.2d at 176.

142. *DiDonato*, at 431, 358 S.E.2d at 494.

whenever the parents settle their claims prior to bring the wrongful death action. However, a more narrow reading would hold that plaintiffs may bringing an action for punitive damages only when they could not anticipate and comply with joinder requirement. In essence, under this narrow interpretation, one may bypass the joinder requirement only when the parents have settled their claims prior to *DiDonato*. Hence, although *Greer* broadened *DiDonato's* holding with respect to punitive damages, it remains unclear exactly how broad the *Greer* rule is.

*John M. McCabe*