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I. Introduction

What rights does a fetus possess? Most legal discussion concerning fetal rights focuses on abortion. However, other areas of the law also raise important questions about fetal rights. One of these developing areas is the tort of wrongful death. In wrongful death, the broad, central question regarding the rights of a fetus becomes: Under what conditions does a fetus have the right to access the courts and recover for damage done to it while in the womb?[1]

Recently, the Oklahoma Supreme Court in *Nealis v. Baird*[2] issued a very important ruling concerning the wrongful death of a fetus. The court held that a nonviable, yet prematurely born alive fetus is "one" under Oklahoma's wrongful death statute,[3] even though such fetuses live only short periods of time and have, by definition, no chance to survive. Therefore, these nonviable fetuses can, for the first time, access Oklahoma courts and recover damages in wrongful death suits. This holding extends fetal rights under Oklahoma law. The previous Oklahoma standard reflected the current majority position in the United States, which requires a fetus to become viable before it may recover for wrongful death.

Nealis v. Baird provides a noteworthy opinion on a number of levels. The court in *Nealis* very consciously and openly announced that it granted certiorari to settle a question of first impression and to provide a precedential ruling on an area of substantive law.[4] The court split five-to-four on this controversial, precedent-setting issue.[5] The closeness of the vote is especially interesting because three justices who were not part of the permanent Oklahoma Supreme Court sat by designation.[6] In

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1. Although this note and other literature in this area of the law speak of the fetus as acting, a representative of the fetus actually brings the suit on behalf of the dead fetus. In fact, a representative must handle *all* wrongful death suits because, by definition, the plaintiff must be dead to have the possibility of a wrongful death suit.

2. 1999 OK 98, 996 P.2d 438.

3. Title 12, section 1053(a) of the Oklahoma Statutes provides in part,

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action, had he lived . . . .

12 OKLA. STAT. § 1053 (1991).

4. *Nealis*, 1999 OK 98, ¶ 1, 996 P.2d at 441-42.

5. *Id.* ¶ 69-71, 996 P.2d at 463.

6. Justice Boudreau certified his disqualification; Judge Lumpkin sat in his place and voted with the majority. *Id.* ¶ 69, 996 P.2d at 463. Justice Kauger recused; Judge Struhbar sat in his place and voted with the dissent. *Id.* Judge Johnson sat in the vacant seat created by Justice Wilson's death and voted with the dissent. *Id.*

addition, the court adopted a minority position, admitting that only "sketchy"[7] precedent existed in support of the position. Finally, the court purposefully left open perhaps the most controversial question for future consideration.[8]

This note examines the *Nealis* case and the changes it brings to Oklahoma's wrongful death law. This note also considers what lies in the future for Oklahoma in this area of the law. This note urges the Oklahoma legislature to clearly define the wrongful death statute and protect all fetuses under the statute; even if it does not, this note urges the Oklahoma Supreme Court to extend protection to all fetuses under the wrongful death statute.

Part II of this note introduces some terms and concepts that are helpful when studying wrongful death of a fetus. Part III reviews the history of the wrongful death cause of action. Part IV sets out the basics of the *Nealis* decision, while Part V analyzes the heart of the *Nealis* opinion. Part VI critiques the new standard *Nealis* announces, and Part VII concludes by considering what lies ahead for Oklahoma in this area of the law.

II. Defining Key Terminology and Concepts

Wrongful death is a complicated area of the law. Confusion stems primarily from the many different uses of medical terminology and the numerous fine distinctions courts draw when analyzing fact patterns involving fetuses.

One confusing term is viability. *Black's Law Dictionary* defines viability as "[t]hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[9] Viability is difficult to pinpoint because it differs with each pregnancy and because human understanding of viability grows and changes with new medical discoveries. A key idea in viability, however, is the ability to survive outside the womb — that life can be "continued indefinitely" outside the womb.[10]

Courts and scholars also vary drastically in their definitions of the term "birth."[11] The word "live" is often used with the word "birth" in confusing ways. For example, a nonviable fetus can undergo a "live birth" and live outside the womb temporarily; yet, it has no hope of surviving. Early courts seem to have only considered a birth of a viable fetus a "live birth." Yet, some courts, such as the *Nealis* court, are now debating the ramifications of the "live birth" of a nonviable fetus.

To aid in the analysis of cases involving the wrongful death of fetuses, one can group such cases into four categories.[12] Group one includes cases in which a fetus

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7. *Id.* ¶ 40, 996 P.2d at 454.

8. *Id.* ¶ 41, 996 P.2d at 455.

9. BLACK'S LAW DICTIONARY 1565 (6th ed. 1990).

10. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1962 (29th ed. 2000) (defining viability as the "ability to live after birth" and defining viable as "capable of living; especially said of a fetus that has reached such a stage of development that it can live outside of the uterus").

11. Sarah J. Loquist, Note, *The Wrongful Death of a Fetus: Erasing the Barrier Between Viability and Nonviability*, 36 WASHBURN L.J. 259, 284 (1997) (stating at least three definitions of live birth that courts have used: viability, momentary birth, and sustained independence).

12. Even in very recent years, some commentators only recognized three categories: live birth,

reaches the developmental stage of viability, is born alive, and then dies from injuries suffered while in the womb. Group two includes cases in which the fetus reaches the developmental stage of viability, but is stillborn because of the injuries suffered. The third group includes cases in which a fetus is born "alive" before reaching the developmental stage of viability; it would have no hope of surviving, however, once out of the womb. The fourth group includes cases in which a fetus is stillborn before it reaches the developmental stage of viability.[13]

All jurisdictions allow wrongful death actions for cases in group one, viable fetuses that undergo a live birth.[14] The majority of jurisdictions also allow group two — viable, stillborn fetuses — to bring wrongful death actions.[15] The current majority position holds that viability is a condition precedent to recovery. That is, only a fetus that has reached viability at the time of its birth can bring a wrongful death suit. The *Nealis* decision recently put Oklahoma among the minority group of states that extend wrongful death protection to group three, fetuses that undergo live birth before reaching viability.[16] The *Nealis* court specifically declined to answer the question of whether Oklahoma's wrongful death statute includes group four — nonviable, stillborn fetuses.[17] A few states have gone beyond Oklahoma's current stance and include all four categories under their wrongful death statutes.[18]

III. Historical Background — Wrongful Death of a Fetus

A. Evolution of the Tort of Wrongful Death Under the Common Law

The early common law in England did not allow recovery for wrongful death of any type.[19] Three principles governed personal injury situations resulting in death.[20] First, if the tortfeasor died before recovery, the victim's right of recovery died with the tortfeasor.[21] Second, if the victim died, the victim's right of recovery died with

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viability, and nonviability. *See* Jill D. Washburn Helbling, Note, *To Recover or Not To Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363 (1996). Nonetheless, some recent decisions, such as *Nealis*, have carved out a narrow fourth area within the nonviability category.

13. A simple chart might help clarify the categories:

	Type of Birth (live or still)	
Development (viable or non-viable)	1. Viable, live born	2. Viable, stillborn
	3. Nonviable, live born	4. Nonviable, stillborn

14. *See infra* notes 65, 75, 79.

15. *See* Daniel S. Meade, *Wrongful Death and the Unborn Child: Should Viability Be a Prerequisite for a Cause of Action*, 14 J. CONTEMP. HEALTH L. & POL'Y 421, 432 (1998); *see also infra* note 75.

16. *See infra* note 82.

17. Nealis v. Baird, 1999 OK 98, ¶ 40, 996 P.2d 438, 454.

18. *See infra* note 81 and accompanying text.

19. W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 127, at 945 (5th ed. 1984).

20. *Id.* § 125A, at 940.

21. *Id.*

the victim.[22] Third, if the victim died, no one besides the victim, including his family, could claim a right of recovery.[23] This early law resulted in at least two major problems. First, the law resulted in the logical problem that "from the defendant's point of view, it was cheaper to kill a person than to scratch him."[24] Second, the law created the practical and social problem that when the head of a household and breadwinner was wrongfully killed, the family was often left destitute.[25] To combat these problems, legislators began enacting survival statutes and wrongful death statutes.[26] Basically, survival statutes allow a cause of action to survive beyond the lives of the parties,[27] and wrongful death statutes allow a representative to sue on behalf of the party and benefit from the deceased's rights.[28]

The most famous example of the early common law position on wrongful death is Lord Ellenborough's ruling in the English case *Baker v. Bolton.*[29] In *Baker*, a stagecoach overturned, injuring a man and killing his wife. The law as it then existed allowed the man to sue for his own injuries, but not for injuries sustained by his wife.[30] The basic legal premise of the case was that a human death could not be classified as an "injury" in civil court.[31] This decision was rooted in the principle discussed earlier that if a person dies as a result of an injury, the right to complain dies with the victim. No representative could complain on behalf of the dead.

In response to the problems with early injury laws, Parliament enacted the Fatal Accidents Act of 1846, more commonly known as Lord Campbell's Act.[32] In the years following, every American state enacted a wrongful death statute.[33] Most of the wrongful death statutes provided damages to certain surviving family members according to their losses.[34] Some provided damages to the estate.[35] A few states provided for both loss to family members and the estate.[36]

Assessing damages has always been a difficult problem in wrongful death suits. Early on, courts limited recovery to losses of tangible pecuniary benefits.[37] Modern

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22. *Id.*
23. *Id.*
24. *Id.* § 125A, at 942.
25. *Id.* § 127, at 945.
26. *Id.* § 125A, at 942.
27. *Id.*
28. *Id.* § 127, at 947.
29. 1 Camp. 493, 170 Eng. Rep. 1033 (1808), *reprinted in* PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., ADVANCED TORTS: CASES AND MATERIALS 57 (2d ed. 1997).
30. *Id.*
31. Meade, *supra* note 15, at 426; *see also* Higgins v. Butcher, 1 Brownl. & Golds. 205, 123 Eng. Rep. 756, Noy 18, 74 Eng. Rep. 989, Yelv. 89, 80 Eng. Rep. 61 (1606) (holding that in the case of a man beating his wife to death, the wife has only a criminal remedy, not a civil remedy).
32. KEETON, *supra* note 19, § 127, at 945.
33. KUTNER & REYNOLDS, *supra* note 29, at 57, 61 n.5.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See generally* Meade, *supra* note 15.

courts tend to also allow for loss of society (love and affection) and loss of services (benefits that the deceased could have performed in the future).[38]

B. Evolution of Wrongful Death of a Fetus

1. The Single Entity View

The early American wrongful death statutes did not compensate for prenatal injuries. The most famous and influential decision reflecting this early view was *Dietrich v. Inhabitants of Northampton.*[39] A young Oliver Wendell Holmes wrote for the *Dietrich* majority, which denied the representative of a fetus recovery under the state's wrongful death statute. In *Dietrich*, a four- to five-month pregnant woman tripped on a defect in the road and gave birth prematurely. The child lived ten to fifteen minutes and then died.[40]

In denying recovery, the court argued that the child was "part of the mother at the time of the injury."[41] Scholars have labeled this idea, rooted in the science of the day, the "single entity" view.[42] This view dominated the American courts for the next sixty years. The court also expressed concern with the danger of remoteness in determining damages. That is, courts would face more difficulty calculating damages to a fetus than the mother.[43]

Decisions following *Dietrich* tended to develop four main arguments against allowing recovery for prenatal injuries. First, courts cited lack of precedent. Second, courts reasoned that because no precedent existed, legislatures, not judges, ought to decide the issue. Third, courts relied on the "scientific" single entity view — that a child was not a distinct being, but instead part of the mother. Fourth, courts expressed concerns about the difficulty of proving damages and the likelihood of fraudulent claims.[44]

2. The Move to the Live-Birth Standard

Some criticized the single entity view, despite its long-term popularity in the courts. Besides the logical problem that killing a fetus resulted in less punishment than injuring it, medical and legal arguments also developed against the view. Long

38. KUTNER & REYNOLDS, *supra* note 29, at 57, 61 n.5; Meade, *supra* note 15, at 426-27.

39. 138 Mass. 14 (Mass. 1884).

40. An administrator brought suit for the child's death to benefit the surviving mother. The plaintiffs relied on a well-known proposition set forth by Lord Coke — that when a man beats or poisons a pregnant woman, that man can be charged with murder. *Id.*

The court spent much of its decision refuting this argument. The court began by citing English legal scholars that disagreed with Lord Coke. *Id.* at 15-16. Next it looked to the complete absence of case law allowing an infant who was alive to recover for injuries suffered while in the womb. *Id.* Extending the lack-of-precedent argument, the court noted that courts dealt with the matter of fetal injury only in criminal situations, never in the civil context. *Id.*

41. *Id.* at 17.

42. Meade, *supra* note 15, at 427-28.

43. *Dietrich*, 138 Mass. *passim.*

44. *See* Newman v. City of Detroit, 274 N.W. 710 (Mich. 1937); Buel v. United Rys. Co. of St. Louis, 154 S.W. 71 (Mo. 1913); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. Comm'n. App. 1935) (opinion adopted by Tex. Sup. Ct.).

before jurisdictions accepted the live-birth standard, strong voices began promoting the concept of prenatal recovery. A famous example is a dissent by Justice Boggs of the Illinois Supreme Court in *Allaire v. St. Luke's Hospital.*[45]

Allaire involved a crippled child suing a hospital for trespass on the case. The hospital staff had negligently handled his pregnant mother, causing damage to her and later resulting in defects to him.

Justice Boggs agreed that no precedent supported the allowance of recovery for prenatal injuries.[46] However, Justice Boggs felt that "truth" and "natural justice" should override precedent when the precedent becomes outdated.[47] Boggs looked to medical science, which showed that fetuses in advanced stages of pregnancy (viability) could live outside the mother.[48] Yet, precedent at the time followed the single entity view and held that injury to a viable fetus only resulted in damage to the mother because the fetus was part of the mother.[49] If such a child was injured and left to live deformed with no legal remedy, Boggs argued, the law was "sacrificing truth to a mere theoretical abstraction."[50] Boggs posed the poignant question, "Should compensation for his injuries be denied on a mere theory — known to be false — that the injury was not to his person, but to the person of the mother?"[51] Near the turn of the century, courts were not ready to accept Boggs' views. However, Justice Boggs' idea of moving beyond the outdated single entity view and allowing recovery for prenatal damages for live-born children would become the law of every state by the second half of the century.

Bonbrest v. Kotz[52] was the first case to allow live-born children to recover for prenatal injuries. In *Bonbrest*, representatives of a young child sued doctors for malpractice for injuries the child received during the delivery process. The court denied a summary judgment motion by the defendants as a matter of law.

The *Bonbrest* court rejected the single entity view, noting that, based on modern science, a viable child was not part of the mother.[53] It noted that "[t]he law is presumed to keep pace with the sciences."[54] It also brought up the interesting question that if civil law, property law, and criminal law considered fetuses separate entities and beings from the mother, why not the common law of torts?[55] The court acknowledged the lack of precedent for recovery and the dominance of the Holmes single entity view, but argued for a "progressive science of the law,"[56] stating that the law "is not an arid and sterile thing, and it is anything but static and inert."[57] In

45. 56 N.E. 638 (Ill. 1900).
46. *Id.* at 640 (Boggs, J., dissenting).
47. *Id.* at 641-42 (Boggs, J., dissenting).
48. *Id.* at 641 (Boggs, J., dissenting).
49. *Id.* at 638.
50. *Id.*
51. *Id.* at 642 (Boggs, J., dissenting).
52. 65 F. Supp. 138 (D.D.C. 1946).
53. *Id.* at 140.
54. *Id.* at 143.
55. *Id.* at 140-41.
56. *Id.* at 142.
57. *Id.*

breaking with single entity precedent and forming a new live-birth standard, the court commented:

> [H]ere we find a willingness to face the facts of life rather than a myopic and specious resort to precedent to avoid attachment of responsibility where it ought to *attach* and to permit idiocy, imbecility, paralysis, loss of function, and like residuals of another's negligence to be locked in the limbo of uncompensable wrong, because of a legal fiction, long outmoded.[58]

The first court of final jurisdiction adopted the ideas of *Bonbrest* three years later in *Williams v. Marion Rapid Transit, Inc.*[59] Eventually, every state would adopt the ideas of *Bonbrest* and allow wrongful death recovery to viable fetuses born alive.

Although *Bonbrest* narrowly applied to fetuses that were viable when injured and then born alive, cases such as *Smith v. Brennan*[60] allowed recovery regardless of the time of injury, so long as the child subsequently became viable and was born alive.[61] Therefore, injuries suffered by a nonviable fetus could become recoverable, so long as the fetus later reached viability and was born alive.[62]

In *Smith*, an infant sued for injuries he received in the womb that caused him to be born deformed. The New Jersey court adopted the *Bonbrest* "born alive" rule. It went on to hold, "We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence."[63] One practical factor the New Jersey court considered was that viability is different in different pregnancies, and that viability would be very difficult to determine in borderline cases. The court also noted that much legal and medical thought recognized the child as a separate entity beginning at the time of conception, not just upon reaching viability. The court concluded that regardless of the time of injury, the same injustice results to the child.[64]

In time, every state adopted *Smith*'s extension of the *Bonbrest* holding, allowing all viable live-born fetuses to recover for injuries suffered before or after viability. One legal commentator has noted, "Currently, every jurisdiction permits a child, who is subsequently born alive, to bring an action for prenatal injuries, and allows a wrongful death action if the child dies of such injuries after birth. Generally, the born alive rule is applicable even if the child dies shortly after birth."[65]

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58. *Id.*

59. 87 N.E.2d 334 (Ohio 1949).

60. 157 A.2d 497 (N.J. 1960).

61. *Id.* at 504.

62. *See id.* Modern cases focus more on the status of the fetus at the time of death than at the time of injury, perhaps because of precedent like *Smith*. Of course, both statuses would become important in a discussion of causation.

63. *Id.*

64. *Id.*

65. Meade, *supra* note 15, at 430. When the courts adopted the live-birth standard, they seemed to focus on a normal pregnancy. Terminology gets confusing in this area because later courts, such as the *Nealis* court, discuss live birth in the context of a nonviable fetus. It seems that courts in this category assume viability when discussing live birth, although it is unclear in some cases. Courts at this stage of

3. The Move to the Viability Standard

The majority of states now include all viable fetuses under their wrongful death statutes.[66] This includes stillborn fetuses and live-born fetuses. Two main factors led to the adoption of the viability standard. First, courts began noting that enforcing a live-birth standard produced unjust results.[67] For example, if a child was born alive but died a few minutes later due to medical malpractice during the delivery, survivors could receive compensation. However, if a fetus died in the womb as a result of the same malpractice, survivors could not recover. Reaction to such seeming injustice caused courts to move to the more objective viability standard based on the fetus's development.[68] The second reason for the move toward the viability standard was the emphasis placed on viability in the abortion arena.[69]

Verkennes v. Corniea[70] first allowed recovery for a stillborn fetus under a wrongful death statute. In *Verkennes*, the mother's uterus ruptured during labor, killing the viable child and the mother.[71] The representative of the child alleged negligence against the hospital.[72] The court adopted the logic of Justice Boggs' dissent and the *Bonbrest* majority.[73] The court in *Verkennes* reasoned that because a viable fetus could live outside the mother, "[i]t seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises under the statute cited."[74] The view adopted in *Verkennes* exemplifies the majority view in the United States today.[75]

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legal development had not even granted recovery to a viable fetus that is stillborn, much less a fetus that has not progressed to viability.

Approximately eleven states have never moved beyond this view and only allow recovery for a viable, live-born fetus. *See* Bayer v. Suttle, 100 Cal. Rptr. 212 (Cal. Ct. App. 1972); Davis v. Simpson, 313 So. 2d 796 (Fla. Dist. Ct. App. 1975); Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983); Milton v. Cary Med. Ctr., 538 A.2d 252 (Me. 1988); Smith v. Columbus Cmty. Hosp. Inc., 387 N.W.2d 490 (Neb. 1986); Graf v. Taggert, 204 A.2d 140 (N.J. 1964); Endresz v. Friedberg, 248 N.E.2d 901 (N.Y. 1969); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Witty v. Am. Gen. Capital Distrib., Inc., 727 S.W.2d 503 (Tex. 1987); Webb v. Snow, 132 P.2d 114 (Utah 1942); Kalafut v. Gruver, 389 S.E.2d 681 (Va. 1990).

66. *See* Meade, *supra* note 15, at 432; *see also supra* note 65; *infra* note 79.

67. Meade, *supra* note 15, at 431.

68. *Id.*

69. *Id.* at 432.

70. 38 N.W.2d 838 (Minn. 1949).

71. *Id.* at 839.

72. *Id.*

73. *Id.* at 840-41.

74. *Id.* at 841.

75. Roughly thirty-one states take this position. *See* Santana v. Zilog, Inc., 878 F. Supp. 1373 (D. Idaho 1995); Wade v. United States, 745 F. Supp. 1573 (D. Haw. 1990); Espadero v. Feld, 649 F. Supp. 1480 (D. Colo. 1986); Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962); Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993); Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985); Aka v. Jefferson Hosp. Ass'n, Inc., 42 S.W.3d 508 (Ark. 2001); Simon v. Mullin, 380 A.2d 1353 (Conn. Super. Ct. 1977); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557 (Del. Super. Ct. 1956); Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88 (Ill. 1973); Britt v. Sears, 277 N.E.2d 20 (Ind. Ct. App. 1971); Humes v. Clinton, 792 P.2d 1032 (Kan. 1990); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975); Toth

4. The Move Beyond Viability

Despite the pervasiveness of the majority view, it has come under much criticism. For example, some commentators argue that the viability standard strays from basic tort principles: "Focusing on a viability bright line test leads the courts applying that test to drift away from the basic principles of our tort law, that we compensate victims for the harm they have suffered through someone else's intentional or negligent actions."[76] Others argue that the viability standard is too arbitrary: "[T]he majority of jurisdictions have simply exchanged one arbitrary distinction for another by adopting the viability requirement in place of the live birth requirement."[77] Prosser and Keeton have criticized the standard on a number of points:

> Viability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[78]

A handful of states protect fetuses beyond viability under wrongful death statues.[79]

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v. Goree, 237 N.W.2d 297 (Mich. 1975); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949); Rainey v. Horn, 72 So. 2d 434 (Miss. 1954); Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1994); White v. Yup, 458 P.2d 617 (Nev. 1969); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980); Miller v. Kirk, 905 P.2d 194 (N.M. 1995); DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984); Stidam v. Ashmore, 167 N.E.2d 106 (Ohio Ct. App. 1959); Libbee v. Permanente Clinic, 518 P.2d 636 (Or. 1974); Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67 (R.I. 1991); Crosby v. Glasscock Trucking Co., Inc., 532 S.E.2d 856 (S.C. 2000); Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc., 425 A.2d 92 (Vt. 1980); Moen v. Hanson, 537 P.2d 266 (Wash. 1975); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107 (Wis. 1967). Apparently Wyoming has not decided the issue.

76. Meade, *supra* note 15, at 442.

77. Loquist, *supra* note 11, at 287.

78. KEETON, *supra* note 19, § 55, at 369.

79. Approximately seven states protect fetuses beyond viability. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955); Group Health Ass'n. v. Blumenthal, 453 A.2d 1198 (Md. 1983); Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. 1995); Nealis v. Baird, 1999 OK 98, 996 P.2d 438; Hudak v. Georgy, 634 A.2d 600 (Pa. 1993); Wiersma v. Maple Leaf Farms, 1996 SD 16, 543 N.W.2d 787; Farley v. Sartin, 466 S.E.2d 522 (W.Va. 1995). However, Georgia is unique in that it announced a "quick" standard, *see Porter*, 87 S.E.2d at 103, and therefore does not fit into much of the discussion except that it does have a standard beyond viability.

South Carolina appears, based on some confusing dicta, to be in the same category as Oklahoma, although research does not reveal a case that expressly holds so. *See* Crosby v. Glasscock Trucking Co., Inc., 532 S.E.2d 856 (S.C. 2000). Some dicta in *Crosby* asserts that "[t]he fact that a fetus is born alive, however, is indisputable evidence that it is *viable* because it has in fact lived independently of its mother." *Id.* at 857. This seems at odds with the common notion that viability implies that the fetus can sustain life outside the womb indefinitely. Viability, by definition, also does not seem to recognize the

Significantly, many of the states that have gone beyond the viability standard have done so with some direction from the legislature.[80] Most states that have moved beyond the viability standard have gone on to protect *all* nonviable fetuses (categories three and four, in addition to one and two).[81] In *Nealis*, Oklahoma may have joined a minority within the minority,[82] as a state that protects group three (nonviable, live birth) but does *not* also protect group four (nonviable, stillbirth). Oklahoma's position regarding nonviable, stillborn fetuses remains unresolved as the Oklahoma Supreme Court explicitly declined to decide that issue in *Nealis*.[83]

IV. Overview of Nealis v. Baird

A. Facts

The facts in this case revolved around the pregnancy of Sheila Nealis and the lawsuit she brought against three doctors that treated her during that pregnancy. Nealis visited Dr. Blake Baird on August 28, 1991, in Perry, Oklahoma. This was her one and only visit with Dr. Baird. Nealis claimed that her pregnancy was normal until this visit. Dr. Baird examined Nealis and warned her about her smoking habit. During the exam, Nealis claimed to feel "unusual discomfort" and experience an "uneasy feeling" as she left the clinic. Soon after the visit, she claimed to have cramping, sickness, and the discharge of fluid and blood.

Because of her pain and symptoms, Nealis returned to the same clinic the next day where Dr. Michael Hartwig examined her. Dr. Hartwig diagnosed her as threatening miscarriage and ordered an ultrasound. The ultrasound, performed on August 30, 1991, showed no abnormalities.

During the next month, Nealis continued to have bleeding and cramping but did not visit any doctors.[84] On September 30, 1991, she went to the Perry Memorial Hospital emergency room. The hospital records reflected that she claimed the bleeding began an hour before, not the month before. Dr. Hartwig examined her a

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very category the *Nealis* court sought to protect: a nonviable fetus born alive. *Crosby*, at its essence, does not seem to protect nonviable, stillborn fetuses. *Id.* Perhaps, South Carolina would protect fetuses beyond viability, but research reveals no case that clearly holds so. *See supra* notes 11, 12, 62 and Part II (discussing the confusion of defining terms in this area of the law).

80. *See* Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. 1995); Wiersma v. Maple Leaf Farms, 1996 SD 16, 543 N.W.2d 787. It could be argued, although less directly, that Georgia received direction from its legislature. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955). Four states have adopted such a standard judicially. *See* Group Health Ass'n. v. Blumenthal, 453 A.2d 1198 (Md. 1983); Nealis v. Baird, 1999 OK 98, 996 P.2d 438; Hudak v. Gregory, 634 A.2d 600 (Pa. 1993); Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

81. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955); Connor v. Monkem Co., Inc., 898 S.W.2d 89 (Mo. 1995); Wiersma v. Maple Leaf Farms, 1996 SD 16, 543 N.W.2d 787; Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

82. This minority within a minority includes Maryland and Pennsylvania. *See* Group Health Ass'n. v. Blumenthal, 453 A.2d 1198 (Md. 1983); Hudak v. Georgy, 634 A.2d 600 (Pa. 1993).

83. *Nealis*, 1999 OK 98, ¶ 41, 996 P.2d at 455.

84. The record strongly suggests, but does not absolutely prove, that Nealis had appointments she failed to keep during this time. *Id.* at n.2, ¶ 6, 996 P.2d at 442 n.2 & 442-43.

second time and again diagnosed her as threatening miscarriage. Dr. Hartwig admitted Nealis to the hospital and ordered a second ultrasound. Nealis claimed that she felt pulling and tugging during the exam. The radiologist reported a possible placental abruption. The hospital discharged Nealis on October 1, 1991. Written instructions allowed Nealis to return to normal activities, but the record indicates that Dr. Hartwig verbally instructed Nealis to stay in bed.

When Nealis failed to keep her appointments on October 9 and October 25, 1991, Dr. Baird and Dr. Hartwig sent her a certified letter releasing her from their care. Neither physician treated Nealis again, and neither referred her to another doctor. Nealis claimed that she was disappointed with their care and made an appointment for December 5, 1991, with another clinic.[85] She continued to cramp and bleed during this time.

On November 25, 1991, Nealis went to the Perry Memorial Hospital emergency room a second time. She was having contractions in addition to her bleeding and cramping. She saw a third doctor, Dr. Jim Knecht. Some dispute existed regarding the age of the fetus, but a third ultrasound ordered by Dr. Knecht, combined with previous records, showed the gestational age of the fetus to be twenty to twenty-one weeks.

Dr. Knecht ordered the maximum dose of tocolytic drug,[86] but Nealis's contractions continued.[87] Dr. Knecht prescribed Demerol to relax Nealis and to prevent premature labor, despite the danger that Demerol could suppress respiration in newborns. Nurses monitored the fetal heart tones every twenty minutes. Based on all the data, Dr. Knecht gave instructions that if the baby was born, it was to be treated as a twenty- to twenty-one-week-old fetus and no resuscitation was to be performed.

Baby Nealis emerged, despite the efforts to suppress labor, at 3:20 A.M. on November 26, 1991. Attendants did not suction the child's airways, nor did they give the child the antidote to Demerol. The doctor had the umbilical cord cut and the baby taken to the nursery. The baby was ten inches and 347 grams. One nurse claimed the baby gasped a few times. The Apgar scores[88] were zero, however. Dr.

85. The pregnancy ended prior to this appointment.

86. "Tocolytic agents" are a group of various drugs (most commonly progesterone, ethanol, prostaglandin synthetase inhibitors, or calcium antagonists) given to arrest labor. Ralph C. Benson, *Preterm Labor and the Low-Birth-Weigh Infant*, *in* OBSTETRICS AND GYNECOLOGY 682, 686-87 (David N. Danforth ed., 4th ed. 1982). Medical experts debate their effectiveness, despite years of testing. *See id.* These agents work best in the early stages of labor and usually only delay the birth a few hours. *Id.*

87. Dr. Knecht consulted Dr. Mary Wren, the resident labor and delivery doctor of Oklahoma Memorial Hospital in Oklahoma City. The doctors concluded that a transfer would not benefit Nealis because the fetus was not viable. In the case of a nonviable fetus, Dr. Wren's facilities in Oklahoma City could offer no treatment other than the kind being given by Dr. Knecht in Perry. Dr. Wren also recommended the use of pain medicine.

88. Apgar scores are part of a system introduced in 1952 that measures the health and development of newborns. L. Stanley James & Karlis Adamsons, *The Newborn Infant*, *in* OBSTETRICS AND GYNECOLOGY 836, 844 (David N. Danforth ed., 4th ed. 1982). The scores rank heart rate, respiratory effort, muscle tone, reflex ability, and color on a scale of 0-2. *Id.*

Knecht recorded the birth as a stillbirth and initially gave the family the choice of a funeral or a laboratory disposal. Later he told the family that the remains of the baby would go to a funeral home because the baby was bigger than first expected.

B. Procedural History

Sheila Nealis and her husband Michael Nealis, individually and as the representatives of baby Matthew Nealis, sued the three physicians who treated Mrs. Nealis: Dr. Baird, Dr. Hartwig, and Dr. Knecht. Claim one attacked Dr. Baird and Dr. Hartwig, alleging that negligent prenatal care caused damage to all three plaintiffs. Claim two alleged that negligent acts and omissions by all three doctors led to the wrongful death of the baby, Matthew Nealis. A jury returned a verdict for the defendant doctors on both claims in September 1996.[89]

The Oklahoma Court of Civil Appeals ultimately affirmed the lower court completely on count one (personal injury) and partially on count two (wrongful death) — as to Dr. Knecht only.[90] The court essentially left Dr. Baird and Dr. Hartwing open to liability on the wrongful death charge in a new trial.[91]

Plaintiffs, Dr. Baird, and Dr. Hartwig petitioned the Oklahoma Supreme Court. Although the court dealt with numerous issues in the *Nealis* opinion, the court primarily reviewed the issue of whether the trial court gave the proper jury instruction concerning the wrongful death of fetuses in Oklahoma.[92]

C. Issue

The Oklahoma Supreme Court stated that it granted certiorari "to settle the first impression question whether a claim may be brought under Oklahoma's wrongful death statute on behalf of a nonviable fetus born alive."[93] The court eventually answered the question in the affirmative.[94] The court specifically examined the legitimacy of the following jury instruction from the Nealis trial:

> "For Plaintiffs to recover damages for the death of Matthew Nealis, Plaintiffs have the burden of providing both of the following propositions:

Baby Matthew Nealis scored zero in every category. This means Nealis had no heart rate or respiratory effort, his muscle tone was limp, his reflexes gave no response, and his color was pale.

89. *Nealis*, 1999 OK 98, ¶ 13, 996 P.2d at 444.

90. The Oklahoma Court of Civil Appeals initially affirmed the trial court on claim one, but reversed the second claim and remanded it for a new trial. *Id.* ¶ 14, 996 P.2d at 444. The defendant doctors protested, and the court granted a rehearing. *Id.* Upon rehearing, the court reaffirmed the verdict as to claim one in favor of the doctors. *Id.* The court affirmed the trial court's verdict on claim two for Dr. Knecht only (which was a partial reversal of its previous ruling). *Id.* The court reversed and remanded the trial court's judgment on the second claim with regard to Dr. Baird and Dr. Hartwig (which was a partial reaffirmation of its previous ruling). *Id.*

91. As will be discussed later, the Oklahoma Supreme Court reached the same practical results, but for a much different reason.

92. *Nealis*, 1999 OK 98, ¶ 15, 996 P.2d at 444-45.

93. *Id.* ¶ 1, 996 P.2d at 441-42 (footnote omitted).

94. *Id.* ¶ 37, 996 P.2d at 453.

> *First, that Matthew Nealis was a viable fetus or child at the time of his birth.*
>
> Secondly, that a negligent or intentional act or omission of one or more of the Defendants was a direct cause of the death of said Matthew Nealis.
>
> As used in these instructions, a human fetus is 'viable' if the fetus, at the time of premature birth, is capable of living outside the womb of the mother assuming the fetus receives necessary medical care.
>
> *If you find that Matthew Nealis was not a viable fetus, you must return a verdict in favor of all of the defendants on Plaintiffs* [sic] *wrongful death claim.* If you find that Matthew Nealis was a viable fetus, you should proceed to determine the other issues set forth in this Instruction."[95]

D. Holding and Reasoning

The court eventually held that the trial court's instructions were improper and that a nonviable fetus born alive can recover under Oklahoma's wrongful death statute.[96] The court examined three main areas in its analysis. First, it traced the history of wrongful death law in general.[97] Second, the court considered Oklahoma case law.[98] Finding no controlling precedent on point, the court finally analyzed the language and intent of the Oklahoma wrongful death statute.[99]

The court found nothing in the statute to prohibit an extension of protection to a nonviable fetus born alive.[100] Furthermore, the *Nealis* court claimed it was not

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95. *Id.* ¶ 16, 996 P.2d at 445 (quoting the jury instructions given at trial).

96. *Id.* ¶¶ 41-45, 998 P.2d at 455-56. However, the court held the error was harmless as to Dr. Knecht. *Id.*

97. *Id.* ¶¶ 19-30, 996 P.2d at 446-51.

98. *Id.* ¶¶ 31-34, 996 P.2d at 451-52.

99. *Id.* ¶¶ 35-41, 996 P.2d at 452-55.

100. *Compare with In re* Starks, 2001 OK 6, 18 P.3d 342. In *In re Starks*, the court found nothing in the statutory scheme to support applying it to a fetus, and held the statutory scheme did not evolve from the common law and therefore did not find support there for the inclusion of fetuses. *Id.* ¶ 15, 18 P.3d at 345-46.

> Similarly, our decision pertaining to recovery for the wrongful death of a fetus as discussed in *Evans v. Olson*, and its progeny, including our more recent holding in *Nealis v. Baird*, wherein we extended our holding in *Evans* to a nonviable fetus that was born alive, does not necessitate that we extend the protections set forth in the Oklahoma Children's Code to fetuses. In the instance of a wrongful death action for the loss of a nonviable fetus born alive, the recovery is predicated on our holding that the word "one" as used by the legislature in the wrongful death statute, is synonymous with the word "person." We reasoned in *Nealis* that "once live birth occurs, the debate over whether the fetus is or is not a person ends and the live born child attains the legal status of 'one.'" As such, we found nothing in the language or intent of Oklahoma's wrongful death statute to prohibit its application to a nonviable fetus born alive. Its application proved to be an extension of the common law to adapt to present day life. Such is not the case when we consider the Oklahoma Children's Code. We find nothing in the language or intent of the Children's Code to support its application to a fetus, viable or nonviable, and the statutory

persuaded by the arguments against extending protection. Therefore, the court chose to reach beyond the previous standard of viability and include nonviable fetuses born alive in Oklahoma's wrongful death statute. The court chose to defer ruling on the status of a nonviable fetus that is stillborn (category four).[101]

The Oklahoma Supreme Court admittedly reached the same practical result as the Oklahoma Civil Court of Appeals, but it vacated the previous lower court's ruling in order to "provide a precedential ruling on a question of substantive law not previously determined by this court."[102]

V. Analysis and Critique of the Nealis v. Baird Opinion

A. History

It seems somewhat odd, at first glance, that the court would spend so much time in the opinion tracing the history of wrongful death law. The *Nealis* court knew that even after it traced the history of wrongful death of a fetus, it would cite little substantive support for an extension of the law beyond the current majority position of viability. In fact, the court admitted that case law was "sketchy" for the standard it announced. The court's strategy in tracing the history of wrongful death law as it applies to a fetus seemed to be an attempt to portray the area of law as a recently developing area full of progress and fluidity, an area in which policy is as important as precedent. The court portrayed the early dissenters, opponents of the single entity view, and those who pushed for extended fetal protection as brave, progressive heroes, champions of modern science and human rights. The court sought to put itself in that tradition as a progressive court taking "one more step along the road first traveled by Lord Campbell's Act and its American successors."[103] Thus, the *Nealis* court attempted to turn a problem, lack of precedent, into a battle cry for continuing progress.

B. Oklahoma Case Law

In *Nealis*, both the plaintiffs and defendants claimed to have controlling authority. The court mainly considered three Oklahoma cases. The defendants argued that *Evans v. Olson*[104] and *Guyer v. Hugo Publishing Co.*[105] required the viability standard; the plaintiffs argued that *Graham v. Keuchel*[106] removed the viability requirement.

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scheme itself did not evolve from the common law.

Id. (citations omitted).

101. *Nealis*, 1999 OK 98, ¶ 41, 996 P.2d at 455.

102. *Id.* ¶ 1, 996 P.2d at 442. The Oklahoma Supreme Court answered all other smaller issues that the parties raised on appeal in the negative. *Id.* ¶ 2, 996 P.2d at 442. This note does not address these peripheral issues.

103. *Id.* ¶ 62, 996 P.2d at 462.

104. 1976 OK 64, 550 P.2d 924.

105. 1991 OK CIV APP 121, 830 P.2d 1393.

106. 1993 OK 6, 847 P.2d 342.

In *Evans*, parents sued a hospital and its employees for the wrongful death of a viable fetus.[107] The *Evans* court adopted the view that a viable, stillborn fetus (category two) could recover under Oklahoma's wrongful death statute.[108] In *Guyer*, representatives of a nonviable, stillborn fetus sued the other driver in an automobile accident and his employer for wrongful death.[109] The appellate court held that Oklahoma wrongful death actions were limited to viable, unborn children under *Evans*.[110] The defendants in *Nealis* argued that these two cases support the proposition that, in Oklahoma, no action for wrongful death of a nonviable fetus exists under any circumstance.[111]

The plaintiffs argued that *Graham* relaxed the viability standard.[112] In *Graham*, doctors neglected to correctly treat a woman's blood disorder between pregnancies.[113] This caused the next child to be born with a blood disease and die four days later.[114] Representatives sued for wrongful death on behalf of the child, and the court allowed recovery. The plaintiffs argued in *Nealis* that because this tort occurred before the child was even in the womb, the decision removed viability as a consideration in wrongful death suits involving fetuses.[115]

The *Nealis* court rejected both arguments. It noted that the defendants' authority was inadequate because it only dealt with stillborn fetuses; whereas, the instant case had to do with a live-born fetus.[116] The court rejected the plaintiffs' reading of *Graham* as overbroad.[117] The court held that *Graham* dealt only with the time of the tortious act, not the state of the fetus when born.[118]

The *Nealis* court correctly found no controlling authority in Oklahoma case law. The court faced a unique situation in which a nonviable fetus was born alive. No Oklahoma Supreme Court case had addressed this situation before; thus, it was a case of first impression. Finding no controlling case law, the court then had to decide whether the old viability standard still applied in this new, unique fact pattern. To decide the case, the court turned to an analysis of the language and intent of the wrongful death statute.

C. The Wrongful Death Statute

Title 12, section 1053 of the Oklahoma Statutes states:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action

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107. *Evans*, 1976 OK 64, ¶ 1, 550 P.2d at 925.
108. *Id.* ¶ 10, 550 P.2d at 927-28.
109. *Guyer*, 1991 OK CIV APP 121, ¶¶ 1-2, 830 P.2d at 1393.
110. *Id.* ¶ 8, 830 P.2d at 1394.
111. Nealis v. Baird, 1999 OK 98, ¶ 33, 996 P.2d 438, 452.
112. *Id.* ¶ 34, 996 P.2d at 452.
113. Graham v. Keuchel, 1993 OK 6, ¶ 3, 847 P.2d 342, 346.
114. *Id.*
115. *Nealis*, 1999 OK 98, ¶ 34, 996 P.2d at 452.
116. *Id.* ¶ 33, 996 P.2d at 452.
117. *Id.* ¶ 34, 996 P.2d at 452.
118. *Id.*

> therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action, had he lived, against the latter, or his representative, for an injury for the same act or omission.[119]

The *Nealis* court focused on two key phrases in its statutory interpretation: (1) "the death of one"; and (2) "had he lived."[120]

Concerning the first phrase, "the death of one," the *Nealis* court noted that it had used the word "person" as a synonym for "one" in the past.[121] The court also explained that in previous decisions, it had considered a fetus a person — even if the fetus had never drawn an independent breath.[122] Therefore, by the court's own words, a fetus is seemingly "one" under the meaning of the statute.

The court further consulted *Webster's Dictionary*, which defines a person as a human, as opposed to an animal or thing.[123] The court reasoned that a fetus is a human person throughout the pregnancy; it does not become a human person at viability. Any other notion, the court believed, would be based upon outdated science.[124]

Further, the *Nealis* court acknowledged, but rejected, the distinction between personhood as biological existence and legal personhood.[125] The court argued that even if it made such a distinction, the distinction would become irrelevant upon live birth.[126] The key factor in the court's analysis seems to be that the entity in question breathed outside the womb — for however short a time. For the *Nealis* majority, whatever debate may exist regarding the status of a fetus, the debate ends at the moment of live birth.[127]

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119. 12 OKLA. STAT. § 1053 (1991).

120. *Nealis*, 1999 OK 98, ¶¶ 35, 38, 996 P.2d at 453.

121. *Id.* ¶ 35, 996 P.2d at 453.

122. *Id.*

123. *Id.* ¶ 36, 996 P.2d at 453.

124. *Id.*

125. *Id.* ¶ 37, 996 P.2d at 453.

126. *Id.*

127. *Id.* The majority seemed to make something of a "step-down" argument. The court first noted that some precedent suggests that all fetuses are "persons" and therefore probably fall within the meaning of "one" as used in the statute. *Id.* However, it acknowledged that the status of a fetus in the womb is a highly controversial and debated topic. *See id.* Then the court "stepped down" and argued that regardless of the status of a fetus in the womb, the facts of *Nealis* presented an easier situation because a live birth occurred. Although the status may be questionable when the fetus is in the womb, it is much clearer when the fetus is outside the womb. The court appeared confident that even those who might not accept the argument that all fetuses are "one" must at least agree to this lower argument that a live-born fetus at any developmental state is "one" for purposes of the statute. *Id.* The following passage seems to be the heart of the *Nealis* holding and the future battleground for cases concerning nonviable, stillborn fetuses:

> We have held that the word "one" as used in the statute is synonymous with the word "person." *We have also settled that a fetus is a person for purposes of § 1053 even if it has never drawn an independent breath.*
>
> . . . .

However, under the Oklahoma statute, not only must the entity in question be "one," it must be one who could sue "had he lived."[128] Defendants argued that a nonviable fetus has never been "alive" at all and therefore could not fall within the phrase "had he lived."[129] The court countered with the idea that modern science "accept[s] as a given that human life begins at conception."[130] Therefore, according to the *Nealis* court, nonviable fetuses are "alive" in the womb and can therefore recover under the wrongful death statute when that life is wrongly taken from them.

Furthermore, the court read the phrase "had he lived" very loosely, viewing the phrase as a broad hypothetical that covers virtually any entity that could be called "one."[131] The court did not interpret the phrase to require that the injured fetus

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> It might be argued that the words "one" or "person" imply more than mere biological existence, that there is a distinction between one's biological existence as a human being and a "person" to whom legal rights must be extended. Whether such a distinction is tenable and, if so, the identification of qualities which are essential to personhood are matters of deep social and political division. Whatever argument can be made that a nonviable fetus is not a "person" when *en ventre*, we reject the notion that the distinction between biological existence and personhood can extend beyond live birth. *We hence hold that once live birth occurs, the debate over whether the fetus is or is not a person ends and the live born child attains the legal status of "one."*

Id. ¶¶ 35-37, 996 P.2d at 443 (footnotes omitted). The majority's argument is similar to the majority's argument in *Hudak v. Gregory*, 634 A.2d 600 (Pa. 1993). The court in *Hudak* did not see its role as settling the debate on when a fetus becomes a person or as setting a new precedent beyond viability. Rather, it viewed its role as affirming an old, "unremarkable" proposition that an infant born "alive" — at whatever stage of development, for however short a time — is a "person" under Pennsylvania's wrongful death statute. *Id.* at 603.

> This case does not attempt to address the issue of whether there is a point in time, prior to birth, when a fetus becomes a person for purposes of our wrongful death and survival acts. Rather, today we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person. Since live birth has always been and should remain a clear line of demarcation, an action for wrongful death and survival can be maintained on behalf of the Hudak triplets.

Id. (citation omitted).

Similarly in *Group Health Ass'n v. Blumenthal*, the court held that "the concept of viability has no role in a case, such as this, where the child is born alive." 453 A.2d 1198, 1206 (Md. 1983).

These cases again highlight the confusion in the law over the term "live birth." *See supra* notes 11, 12, 51, 61. Many cases, however, still hold that viability is a condition precedent to recovery. Apparently that notion also somehow crept into Oklahoma law because it was part of the jury instruction in the *Nealis* case. *See Nealis*, 1999 OK 98, ¶ 16, 996 P.2d at 445. So whether one characterizes *Nealis* as an extension of fetal rights or just a reminder of unremarkable, older principles, *see In re Starks*, 2001 OK 6, ¶ 15, 18 P.3d 342, 345-346 (containing language that hints at both), *Nealis* definitely brings a practical change. Prior to *Nealis*, at least some, if not all, juries received instructions that made viability a condition precedent to recovery in the wrongful death of a fetus.

128. 12 OKLA. STAT. § 1053 (1991).

129. *Nealis*, 1999 OK 98, ¶ 38, 996 P.2d at 453.

130. *Id.*

131. *Id.* ¶ 38, 996 P.2d at 453-54.

actually possess the potential to go on to live and sue.[132] This loose interpretation of the phrase "had he lived" is a questionable part of the court's opinion.

In a wrongful death hypothetical, a family breadwinner could conceivably sue, had he or she not been killed wrongfully. A child could possibly sue, had he not been killed wrongfully. Even a viable fetus could theoretically continue living and sue. In the case of a nonviable fetus born alive, however, there is by definition *no* chance of it living and suing. It seems odd then to allow a representative to sue in place of "one" who could have sued himself "had he lived" when it was *impossible* at the time of injury and birth for that "one" fetus to go on to live and sue.[133]

D. A Passionate Yet Cautious Finish

After the *Nealis* court explored the three main areas — history, Oklahoma precedent, and the statutory language — the court, using language from *Bonbrest*, concluded that it should not be tied to precedent when the precedent is outdated and illogical.[134] The court contended that it could find nothing in the statute's language or intent that would prevent its application to a nonviable fetus that is born alive.[135] The court also did not find the arguments from case law or other sources persuasive.[136] Furthermore, the *Nealis* court saw no conflict between its decision and the federal abortion cases.[137] Therefore, the court extended Oklahoma's wrongful death statute to include nonviable fetuses born alive.[138]

In an unexpected turn at the end of the opinion, despite the court's strong language that *all* fetuses are "human," are "one," and are "living" from conception, the court did not extend wrongful death protection to all fetuses. "While much of what we have said could apply equally to *nonviable, stillborn fetuses, we explicitly limit today's decision to nonviable fetuses born alive.*"[139] Therefore, although the *Nealis* opinion announced a new standard, it left open an important question and thus assured a controversial future in this area of the law in Oklahoma.[140]

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132. "The phrase 'had he lived' in our wrongful death statute merely expresses in the subjunctive mood the contrary-to-fact situation that if the decedent had lived, which he did not, he could have brought a personal injury action for the death-causing injuries." *Id.* ¶ 39, 996 P.2d at 454.

133. *See generally* Miller v. Kirk, 905 P.2d 194, 197 (N.M. 1995).

134. *Nealis*, 1999 OK 98, ¶ 40, 996 P.2d at 454.

135. *Id.*

136. *Id.*

137. *See id.* ¶ 40, 996 P.2d at 454-55. The relationship between wrongful death of a fetus and abortion falls outside the scope of this note. However, the short answer to the conflict is that "personhood" can be defined different ways. Federal courts can define it one way under the Fourteenth Amendment, and states can define it in other ways in areas such as wills and torts.

138. *Id.* ¶ 41, 996 P.2d at 455.

139. *Id.*

140. The dissent raised some solid points of objection. First, it pointed out that requiring viability is the majority position. *Nealis*, 1999 OK 98, ¶ 1, 996 P.2d at 463 (Hodges, J., dissenting). The dissent argued that good policy reasons backed the precedent. *Id.* ¶ 2, 996 P.2d at 463 (Hodges, J., dissenting). Second, the dissent reiterated the fact that the viability standard is a common-sense recognition of the fact that nonviable fetuses simply cannot live outside the womb. *Id.* ¶ 3, 996 P.2d at 463 (Hodges, J., dissenting).

VI. Analysis and Critique of the New Standard Adopted in Nealis v. Baird

A majority of states, including Oklahoma, have witnessed the problems of a live-birth standard in the case of a viable fetus. The problems have caused the majority of states to move to the more objective viability standard. Now, with respect to nonviable fetuses, however, Oklahoma has adopted what amounts to a live-birth standard. The main problem that surrounds this newly announced Oklahoma position is that it is open to the same criticisms that surrounded the original live-birth standard in the early development of wrongful death law.[141]

A. Live-Birth Standard Produces Arbitrary and Unjust Results

First, the Oklahoma conditional-liability standard, turning on whether a live birth occurs, can produce seemingly unjust results. Take the example of nonviable twin fetuses injured in any number of hypothetical events such as a car wreck, bar room brawl, or a medical procedure.[142] One of the twin fetuses is prematurely and violently pushed out of the womb, gasps for air, and dies within minutes. The other twin fetus dies instantly in the womb and is subsequently stillborn. Under *Nealis*, the first recovers; the second does not. Why? Because one fetus took a few breaths outside the womb? Even though the other fetus was deprived of those same breaths by the tortfeasor?

The dissent in *Nealis* strongly argued that the conditional-liability standard adopted by the majority was arbitrary and would produce unjust results, such as the example above. The dissent argued that viability should remain the standard for wrongful death cases involving fetuses. Although this note agrees with the dissent's critique of the *Nealis* standard, it argues for the adoption of a different position. This note argues for an inclusion of all fetuses under the wrongful death statute; this would also do away with the arbitrariness of the live-birth standard. If the standard included all fetuses, any fetus that is the victim of a wrongful death could recover, provided of course it could prove its case in court under the same standard as all other wrongful death cases.[143]

The dissent's third and fourth points were strongest and most interesting. Third, the dissent argued that the live-birth standard is arbitrary. *Id.* ¶ 4, 996 P.2d at 463 (Hodges, J., dissenting). It used an example involving nonviable twins to illustrate this point. *Id.* ¶ 4, 996 P.2d at 464 n.1 (Hodges, J., dissenting); *see also infra* Part VI.A.

The fourth point becomes especially pertinent in Oklahoma law. The dissent pointed out that the *Nealis* decision will make Oklahoma civil and criminal law inconsistent. *Id.* ¶ 5, 996 P.2d at 464 (Hodges, J., dissenting). One factor in the Oklahoma Court of Criminal Appeals' decision to abandon the live-birth standard in favor of viability in determining which fetuses the homicide statute protected was the civil standard of viability. *Id.* Now the two standards are inconsistent. *Id.*

141. *See supra* Part III.B.3.

142. Judge Hodges gave this example in his dissent. *Nealis*, 1999 OK 98, ¶ 4, 996 P.2d at 464 n.1 (Hodges, J., dissenting).

143. However, either a return to viability *or* an extension of rights to all fetuses would be more logical than the conditional live-birth standard. If courts refuse to protect all nonviable fetuses upon the logic that nonviable fetuses are not persons, this makes some sense. However, protecting some nonviable fetuses who are fortunate enough to breathe momentarily outside the womb (remember that nonviable

B. Live-Birth Standard Does Not Promote Liability Based on Fault

In addition to unjust results to the injured, the standard tends to "reward" the more harmful tortfeasor. That is, it fails to apply liability to the harshest torts. If a tortfeasor *crushes the arm* of a nonviable fetus, he *can* be held liable. If a tortfeasor *kills* a nonviable fetus in the womb, he *cannot* be held liable. Tortfeasors who harm a nonviable fetus are equally blameworthy regardless of whether the subsequent birth is live or still. Blameworthy tortfeasors should be punished equally. When tort law strays from fault-based liability, unjust results tend to follow: tortfeasors are not always punished and the injured are not always compensated.

C. Live-Birth Standard Seems To Be in Tension with the Strong Language in Nealis

The *Nealis* majority went to great lengths to argue that all fetuses are "humans," "persons," and "living" from conception. It then seems illogical to treat the two groups (live-born fetuses and stillborn fetuses) differently and to make premature birth the dividing line of recovery. If nonviable, stillborn fetuses are living people, should they be denied access to the courts for unjust injuries they suffered solely because the tortfeasor did not force their mothers into premature labor? This seems especially odd because the birth of a nonviable fetus would only momentarily allow the baby to breathe outside the womb before its certain death. The court, by putting off the decision for another day, excluded nonviable, stillborn fetuses from the Oklahoma wrongful death statute.[144]

VII. Oklahoma's Future in This Area of Law

The Oklahoma Supreme Court will eventually have to answer the question it purposefully left open in *Nealis*. In the future, it will hear a wrongful death case involving a nonviable, stillborn fetus, and it will have to decide whether Oklahoma's wrongful death statute includes such fetuses or not. When it does, the court should include all fetuses under the wrongful death statute. The court has already moved past the viability standard. For the reasons given in the above section, the inclusion of all fetuses under the wrongful death statute would be better than the current conditional live-birth standard.

The law currently does not protect nonviable, stillborn fetuses (class four). Yet the language of the *Nealis* opinion tends to indicate that the court leaned toward

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fetuses have no hope of long-term survival) and not others who are identical in every way but momentary birth makes no sense. Because the court has extended fetal rights beyond viability already, the return of the viability standard is highly unlikely. Therefore, the most logical and just thing to do is to allow all fetuses to recover under the wrongful death statute.

144. It should again be emphasized that the court did not affirmatively deny recovery; it merely delayed a decision that it will face in the future. The court acted wisely by showing judicial restraint and refusing to judicially legislate. However, the standard it announced does not produce the best overall policy in this area. The current policy is open for discussion until the legislature or courts speak to all the issues.

protecting all fetuses under the wrongful death statute.[145] There are essentially two situations under which the Oklahoma Supreme Court will have to make the decision whether to extend protection to all fetuses: First, the legislature may amend the statute to expressly include all fetuses, and the court will follow the new, unambiguous statute; this is the most desirable situation. Second, and more likely, the court will have to decide the issue without legislative guidance.

A. Advantages of Following Legislative Guidance

The Oklahoma legislature should speak and define the wrongful death statute to protect all fetuses. The tort of wrongful death is a creation of statute, not the common law.[146] The legislature wrote the statute; therefore, it can best define the statute's boundaries. Not only should the legislature decide the matter because it is the most capable body, but legislative action has practical importance as well. As one court stated, "Courts addressing this issue have invariably deferred to the legislature in rejecting a wrongful death action by a nonviable stillborn fetus."[147] While perhaps an overstatement, the statement does capture the general tendency in this area of the law: courts tend to follow legislative action. If the Oklahoma legislature clearly defined the legislative intent of the statute concerning fetuses, the courts could interpret the statute without speculation. Missouri and South Dakota provide two examples of courts that followed the legislature in accepting a wrongful death action by a nonviable, stillborn fetus.

In 1990, the Supreme Court of Missouri, in *Rambo v. Lawson*,[148] denied nonviable, stillborn fetuses recovery under the Missouri wrongful death statutes.[149] The Missouri court based its holding largely on its acknowledgment that "[w]e do not believe that the legislative purpose would be served."[150] In 1995, the court overturned *Rambo* in *Connor v. Monkem Co., Inc.*[151] The *Connor* court based its holding on a Missouri statute passed after the *Rambo* case.[152] The statute basically stated that unborn children are legal persons and are entitled to the same benefits and protections as every other person in the state.[153]

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145. *Nealis*, 1999 OK 98, ¶¶ 35-41, 996 P.2d at 453-55.

146. *See* KEETON, *supra* note 19, § 127, at 945.

147. Crosby v. Glasscock Trucking Co., 532 S.E.2d 856, 856 (S.C. 2000). This appears to be an overstatement as courts in states such as West Virginia have decided the issue judicially. *See* Farley v. Sartini, 466 S.E.2d 522 (W. Va. 1995). However, the opinion in *Crosby* later acknowledged this. *Crosby*, 532 S.E.2d at 861.

148. 799 S.W.2d 62, 62-63 (Mo. 1990).

149. MO. REV. STAT. § 537.080 (1986).

150. *Rambo*, 799 S.W.2d at 63.

151. 898 S.W.2d 89 (Mo. 1995).

152. The incident litigated in *Rambo* took place before the legislature enacted section 1.205. The court actually decided *Rambo* after the enactment. *See id.* at 92-93.

153. MO. ANN. STAT. § 1.205 (West 2000). The section provides in part: "[T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state." *Id.*

In the first case, *Rambo*, the Missouri Supreme Court was forced to infer legislative intent. It appears the court inferred incorrectly because the legislature explicitly expressed the opposite intent shortly after the case. On the other hand, in the second case, *Connor*, the Missouri Supreme Court had a clear legislative statement as a guide and was able to better interpret the law.

Before 1984, South Dakota had a somewhat ambiguous wrongful death statue, similar to most states' wrongful death statutes.[154] In 1984, the legislature amended the wrongful death to include the clear phrase "unborn children."[155] The South Dakota Supreme Court, in *Wiersma v. Maple Leaf Farms*,[156] interpreted the legislative amendment to protect fetuses of all stages of development under the wrongful death statute.[157]

In these cases, the courts followed clear legislative initiative in interpreting wrongful death statutes. Unfortunately, the more common reality is that courts decide the issue on their own. Most construe legislative silence as counseling against extending fetus rights in wrongful death. The Oklahoma legislature should act and settle the debate before the courts are forced to settle it judicially. In deciding this issue, the legislature should include all fetuses under Oklahoma's wrongful death statute.

B. Arguments if the Determination Is Left to Judicial Decision

If the Oklahoma legislature will not speak, the Supreme Court of Oklahoma must decide the issue it postponed in *Nealis*. Most courts have decided against protecting nonviable, stillborn fetuses under wrongful death statutes,[158] but a few have decided to extend protection.[159] The battle lines are fairly well drawn. As Justice Maddox of the Alabama Supreme Court[160] and others have noted,[161] the current arguments against extending fetal rights tend to be the same basic arguments put forth since the early cases of *Dietrich* and *Bonbrest*: (1) lack of precedent; (2) deference to the legislature; (3) the scientific argument that the fetus cannot survive outside the mother; and (4) the danger of fraudulent claims.[162] In general, courts that deny recovery to nonviable, stillborn fetuses focus on arguments that revolve around precedent;[163] courts that grant recovery tend to focus on policy arguments.[164]

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154. Helbling, *supra* note 12, at 426.

155. S.D. CODIFIED LAWS § 21-5-1 (Michie 1987).

156. 1996 SD 16, 543 N.W.2d 787.

157. *Id.* ¶ 6, 543 N.W.2d at 790.

158. Crosby v. Glasscock Trucking Co., 532 S.E.2d 856, 861-62 (S.C. 2000) (Toal, J., dissenting).

159. *Id.*

160. *See* Gentry v. Gilmore, 613 So. 2d 1241, 1246 (Ala. 1993).

161. Meade, *supra* note 15, at 440.

162. See *supra* notes 42-44 and accompanying text for very similar arguments in an earlier stage in the legal development of fetal rights.

163. *See generally* Crosby v. Glasscock Trucking Co., 532 S.E.2d 856 (S.C. 2000).

164. *See generally* Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

1. Precedent

States that deny recovery to nonviable, stillborn fetuses under their wrongful death statutes tend to focus on the fact that very few courts have extended fetal rights that far. These courts can point to a long line of case law to support this position.[165] One argument against Oklahoma extending its wrongful death statute to include nonviable, stillborn fetuses is that little case law from other jurisdictions supports such a move.

The other side of this argument is well stated in the dissenting opinion in *Crosby v. Glasscock Trucking Co.*,[166] a South Carolina case. The dissent conceded the lack of precedent.[167] However, it showed, as it traced the history of wrongful death of fetuses, that views commonly held today all lacked precedential support at one time. For example, live birth, a standard adopted by all states today, was adopted for the first time only sixty years ago (in *Bonbrest*).[168] The South Carolina court adopted viability, the majority position today, in 1964,[169] *when that position was a minority position.*[170] The dissent sought to show that in this area of the law, courts have been willing to adopt a minority position when the arguments were compelling. The dissent argued that although protecting all four categories of fetuses would make South Carolina a minority state, to do so would be consistent with reasoning in earlier cases.[171] This approach shifts the focus from what the law currently is to what the law should be.

The precedent argument should not prevent the Oklahoma Supreme Court from including nonviable, stillborn fetuses under the wrongful death statute. The court already showed in *Nealis* that when policy is compelling, it will not be bound by outdated precedent. In fact, the *Nealis* court included nonviable, live-born fetuses under the wrongful death statute despite "sketchy" case law to support that decision. Its willingness to allow policy to override precedent seems very similar to the approach of the *Crosby* dissent. It seems the lack of precedent would not prevent the Oklahoma Supreme Court from including nonviable, stillborn fetuses protection under the wrongful death statute in the future.

2. Deference to the Legislature

A majority of courts facing the decision whether to protect all fetuses under wrongful death statutes has held that, regardless of the merits of protecting all fetuses under wrongful death statutes, courts should defer to the legislature to make the decision.[172] These courts claim that a wrongful death statute is a creation of the

165. *Crosby*, 532 S.E.2d at 860 n.6 (Toal, J., dissenting).
166. 532 S.E.2d 856 (S.C. 2000).
167. *Id.* at 858 (Toal, J., dissenting).
168. *Id.* at 860 (Toal, J., dissenting).
169. Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).
170. *Crosby*, 532 S.E.2d at 859 (Toal, J., dissenting).
171. *Id.* at 864 (Toal, J., dissenting).
172. Meade, *supra* note 15, at 448-49. This reasoning is so pervasive that one commentator has argued that "the only obstacle keeping courts from expanding wrongful death actions to nonviable fetuses

legislature and its contours are best sculpted by the legislature.[173] They also argue that if courts do have to interpret the existing statutes due to legislative silence, then courts should construe them narrowly because the statutes are a "derogation of the common law."[174]

This argument would not likely prevent the Oklahoma Supreme Court from extending the wrongful death statue to include nonviable, stillborn fetuses. In *Nealis*, the court extended the wrongful death statute to include nonviable, live-born fetuses with little discussion of deference to the legislature. This shows that the Oklahoma Supreme Court will not interpret legislative silence as a demand to keep the status quo in this area of the law. Furthermore, case law exists in support of the proposition that wrongful death statutes are remedial and should therefore be construed liberally.[175] The Oklahoma Supreme Court has already shown a tendency to interpret the wrongful death statute broadly in *Nealis*. It seems likely that the Oklahoma Supreme Court will continue its broad reading of the wrongful death statute and include nonviable, stillborn fetuses in the future.

3. Survival Science

Courts that do not include nonviable, stillborn fetuses under their wrongful death statutes often focus on evidence from medical science that a nonviable fetus cannot survive outside the womb. In light of the *Nealis* opinion, this "survival science" provides only weak support to those opposed to the inclusion of all fetuses under the Oklahoma wrongful death statute. The Oklahoma Supreme Court has already moved beyond the viability standard, so the court must not have found the scientific argument supporting viability compelling. Second, language in the opinion states that modern science "accept[s] as a given that human life begins at conception."[176] Scientific arguments that focus on the merits of the viability standard are not likely to be effective before the Oklahoma Supreme Court in the future.

4. Fraudulent Claims

Those opposed to expanding wrongful death statutes to include nonviable, stillborn fetuses warn that the expansion of fetal rights in wrongful death suits could lead to many false claims. As courts push the line back toward conception, more factors exist that could theoretically interfere with a pregnancy. Therefore, it is extremely hard for a plaintiff to show that a tortfeasor was the but-for cause of the death, when thousands of things could happen in the course of a pregnancy to injure a child.

Admittedly, plaintiffs may have more difficulty building a case if injury is close to conception; however, this is not a valid reason to deny recovery to all nonviable, stillborn fetuses (category four) across the board. The burden of proof would remain

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is the courts' instinct that the legislature must provide direction." *Id.*

173. *Crosby*, 572 S.E.2d at 856-57.

174. *Id.*

175. The majority in *Crosby* argued for a strict interpretation because the statute is a "derogation of common law." *Id.* The dissent countered that remedial statutes are a common exception to that rule. *Id.* at 863 (Toal, J., dissenting).

176. Nealis v. Baird, 1999 OK 98, ¶ 38, 996 P.2d 438, 453.

the same in all cases. Just because plaintiffs may present some false or confusing claims, this should not preclude the legitimate and provable claims.

VIII. Conclusion

In *Nealis*, the Oklahoma Supreme Court extended protection under Oklahoma's wrongful death statute to nonviable, live-born fetuses. This was an extension of the previous standard and the current American majority position of viability. The court issued a thorough opinion, one that is historically and logically sound. Yet, the live-birth standard for nonviable fetuses that the court announced has some problems. Namely, the standard tends to produce unjust results and tends to stray from the basic tort principle of liability based on fault. Additionally, tension exists within the court's own language, which claims that all fetuses are "human," are "persons," and are "living" from conception.

The Oklahoma Supreme Court must decide a difficult question in the future: whether to extend the wrongful death statute to include all fetuses. The language of the opinion seems to hint that the court might lean toward extending fetal rights. A future court will have to determine the following issue: whether live birth in the case of a nonviable fetus makes the situation "fundamentally different" and therefore worthy of a different standard than stillbirth, or whether the "person," "human," and "living" (from conception) status of all fetuses mandates equal treatment under the law.

The Oklahoma legislature should act and more clearly define the wrongful death statute. Without legislative clarification, the most consistent route for the Oklahoma Supreme Court to take, in light of its previous decisions, is to include all fetuses (all four categories) under the Oklahoma wrongful death statute.

If a plaintiff has sufficient proof that a tortfeasor caused the wrongful death of a nonviable fetus, courts should not bar recovery as a matter of law merely because circumstances caused the fetus to be stillborn rather than momentarily live born. The Supreme Court of Oklahoma should extend the same protection under its wrongful death statute to all fetuses and hold tortfeasors liable when wrongful death occurs.

Cory Hicks