IN THE
Court of Appeals of Maryland

No. 78
September Term, 2018

TIMOTHY HEIDENBERG,

Petitioner,

v.

CLAUDIA GRIER,

Respondent.

Appeal from the Circuit Court for Howard County
(Mary M. Kramer, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

BRIEF OF *AMICUS CURIAE* THE MARYLAND DEFENSE COUNSEL, INC.

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STATEMENT OF THE CASE

This amicus adopts the statement of the case as set forth in the petitioner's brief.

QUESTIONS PRESENTED

This amicus adopts the questions presented as set forth in the petitioner's brief.

STATEMENT OF FACTS

This amicus adopts the statement of facts as set forth in the petitioner's brief.

STANDARD OF REVIEW

This appeal presents itself following the denial of relief requested pursuant to Md. Rule 2-502. The decision as to whether to grant a hearing pursuant to Rule 2-502 is reviewed under the abuse of discretion standard. *A.S. Abell Co. v. Skeen*, 265 Md. 53, 60 (1972). Once the hearing is granted, the substance of that decision is reviewed under the standard of review applicable to the specific error alleged. That is, factual findings are only reversed if they are clearly erroneous, *Goss v. C.A.N. Wildlife Tr., Inc.*, 157 Md. App. 447, 455-56 (2004), but legal issues are reviewed under the *de novo* standard of review, *Schisler v. State*, 394 Md. 519, 535 (2006).

Here, the trial court upon consideration of the petitioner's Rule 2-502 motion "adopt[ed] [Judge McCrone's] decision, presuming that it was based on the arguments made by the Plaintiff." Accordingly, unlike *A.S. Abell Co.*, this decision was not the denial to consider a Rule 2-502 motion that is reviewed under the abuse of discretion standard; but was a legal issue that is reviewed under the *de novo* standard.

ARGUMENT

This amicus concurs with the petitioner, that the parent-child immunity applies to bar the Claudia Grier's ("Grier's") claim—but that error is not the most egregious part of this appeal. Here, most troubling is the ease with which now no fewer than five judges have summarily rejected Timothy Heidenberg's ("Heidenberg's") arguments without so much as attempting to articulate a reasoned analysis. The currency of the judiciary lies in its legitimacy. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."). Indeed, the *sine qua non* of legitimate judging is reasoned analysis. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 366-67 (1978) ("[Adjudication] assumes a burden of rationality not borne by any other form of social ordering.").

But here, like a parent justifying a decision to a child with the phrase "because I said so," the trial court has unilaterally abrogated parent-child immunity by relying solely on its status as arbiter and without making any attempt to provide a reason for its decision. *Compare* E. 261 ("Judge McCrone made his decision without holding a hearing, which under the rule probably, definitely was inappropriate. . .") *with* E. 262 ("And – so I will adopt Judge McCrone's decision because I don't feel comfortable going behind his work." *See also* E. 218 ("I do not overrule my colleagues.")). Query how the judiciary is to maintain its integrity and legitimacy when it is comfortable adopting "inappropriate" decisions for no reason other than loyalty to the judge who made it.

"[A] decision without principled justification would be no judicial act at all." *Planned Parenthood*, 505 U.S. at 865. If the decision of the trial court here is to be considered a "judicial act," then the parties are entitled to learn the "principled justification" for it. Section One will articulate how the legitimacy of our profession depends on its ability to espouse reasoned and predictable outcomes. Section Two, then, will articulate how prior to the Circuit Court's decision, the reasoned and predictable outcome would be to apply the doctrine of parent-child immunity to apply even when the child perishes. Finally, Section Three will demonstrate why Grier's wrongful death claim must also fail because a cause of action never existed for Michelangelo against Heidenberg. Primary, however, if our judiciary is inclined to force an uninsured father to defend himself in a trial for the accidental death of his own child in the face of abundant authority to the contrary, the parties would simply like to learn why.

I. The Circuit Court's Refusal to Articulate its Decisions Compromises the Law's Legitimacy.

Our profession depends on predictability—that ability to anticipate how the law will treat a dispute under the circumstances of the case. Benjamin N. Cardozo, *The Growth of The Law* 33, 44 (1924) ("Law...must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty. . . Law [is] that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies."). Stated differently:

> When we study law we are not studying a mystery but a well known profession… In societies like ours the command of the

> public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it [is the business of the legal profession] to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1896).

In order to effectively advise and advocate, attorneys must be able to understand, articulate, and rely upon a series of foundational premises in order to generate as much consensus among the stakeholders of the case as possible in order to resolve disputed issues. For example, under H.L.A. Heart's famous hypothetical, if parties are to resolve a dispute as to whether a rule forbidding "vehicle[s] in public park[s]" has been violated, the parties must first reach consensus as to foundational premises such as what constitutes a vehicle. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

Here, for time immemorial the law has accepted as a foundational premise that the doctrine of parent-child immunity bars a child's negligence claim against his or her parent. *See, e.g.,* S*mall v. Morrison*, 118 S.E. 12, 16 (N.C. 1923) ("If this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai."). In the United States, the doctrine then came into vogue at the turn of the nineteenth century in three cases referred to as the "great

trilogy." Edwin D. Akers & William H. Drummond, *Tort Actions Between Members of the Family – Husband and Wife – Parent and Child*, 26 Mo. L. Rev. 152, 182 (1961) (referring to *Hewlett v. George*, 9 So. 885 (Miss. 1891); *McKelvey v. McKelvey*, 77 S.W. 664, 664 (Tenn. 1903), and *Roller v. Roller*, 79 P. 788, 789 (Wash. 1905)). This Court adopted the doctrine almost nine decades ago in *Schneider v. Schneider*, 160 Md. 18, 22 (1930). And controversy notwithstanding, the courts in this State have steadfastly rejected challenges to it on no fewer than twelve occasions:

> [T]his Court consistently has refused wholly to abrogate the doctrine. *See Eagan v. Calhoun*, 347 Md. 72, 81, 698 A.2d 1097, 1102 (1997); *Renko v. McLean*, 346 Md. 464, 480-81, 697 A.2d 468, 476 (1997); *Warren v. Warren*, 336 Md. 618, 626, 650 A.2d 252, 256-57 (1994); *Smith v. Gross*, 319 Md. 138, 145, 571 A.2d 1219, 1222 (1990); *Frye v. Frye*, 305 Md. 542, 543, 505 A.2d 826, 827 (1986).
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> . . .
>
> In addition to its application of the doctrine in the instant matter, the Court of Special Appeals has brought the parent-child immunity defense to bear in *Shell Oil Co. v. Ryckman*, 43 Md. App. 1, 3, 403 A.2d 379, 380-81 (1979), *Montz v. Mendaloff*, 40 Md. App. 220, 221, 388 A.2d 568, 569 (1978), *Sanford v. Sanford*, 15 Md. App. 390, 395, 290 A.2d 812, 816 (1972), and *Latz v. Latz*, 10 Md. App. 720, 730, 272 A.2d 435, 440-41, *cert. denied*, 261 Md. 726 (1971). Federal courts, on issues governed by Maryland law, have held the defense to be dispositive. *See Sherby v. Weather Bros. Transfer Co.*, 421 F.2d 1243, 1246 (4th Cir. 1970); *Villaret v. Villaret*, 83 U.S. App. D.C. 311, 169 F.2d 677, 678 (D.C. Cir. 1948); *Zaccari v. United States*, 130 F. Supp. 50, 53 (D. Md. 1955).

Bushey v. N. Assur. Co. of Am., 362 Md. 626, 645 (2001).

Therefore, when a court repeatedly says: "for acts of passive negligence incident to the parental relation, there is no liability," *Yost v. Yost*, 172 Md. 128, 134 (1937), attorneys should be able to advise their clients with confidence that a parent accused of being passively negligent to their child is immune from suit. The legitimacy of the profession depends on it.

To the contrary, rejecting precedent in the absence of a compelling justification to do so (or in this case, any justification at all) permits a degree of unpredictability that compromises the integrity and legitimacy of the profession, and increases the necessity for litigation—playing directly into the hands of cynics who claim that the arc of the law invariably bends in favor of lawyers. Those same critics often posit that judges are largely motivated by reducing both their case backlog and the extent to which they are reversed. *See* Hon. Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 Fl. L. Rev. 1259, 1271-73 (2005) ("So backlog pressure keeps [the Judge] working hard, and reversal threat keeps him working carefully."). While lawyers get to enjoy job security, and judges reduce the risk of embarrassment, the loser in this transaction, then, is the client[1] who must endure meritless litigation due to the institutionalized disincentives that prevent the efficient resolution of disputes.

That is not to say that there are instances where courts rightfully depart from settled precedent; but make no mistake, when they do, there is a principled justification

[1] Especially the uninsured client who is shouldering the bill for his defense. E. 227 ("In this case Your Honor, there's no insurance. That has been acknowledged by both sides, and that my client is (indiscernible) defense out of his own pocket, and his insurance company has denied indemnification and defense.").

for it. *Brown v. Board of Education* is the most poignant example of this. But if we are deserving of the right to call ours a "profession" we must be vigilant to ensure that it continues to "possess and deploy cogent tools of inquiry -- primarily deduction, analogy, precedent, interpretation, rule application, the identification and balancing of competing social policies, the formulation and application of neutral principles, and judicial restraint" that give us a legitimate claim to that status. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 Ind. L.J. 1, 2 (1993). It is only those cogent tools of inquiry that separate our status as a profession—like a doctor—from a commodified trade—like a plumber.

> Once lawyers could be said to serve "the law." Now they serve the client. It is a profound difference. The word "law" has, it is true, a number of uses. One is to denote an ingenious machinery for social control that is based on widely shared social values such as liberty and efficiency and that is operated in accordance with norms of disinterestedness and predictability. That such a machinery is a public good of great value would be obvious even without the example of the former communist states, whose people understand better than we -- or at least more consciously than we -- that the creation of such a machinery is a prerequisite to freedom and prosperity. Indeed, this has been understood since Aristotle's day. But "law" is not just a system of social control; the word is also used to denote a ghostly entity that somehow subtends, organizes, validates, and criticizes the system. That entity -- which is not a real entity, but a fantasy -- is, I have been arguing, the intellectual by-product of the cartelization of the legal profession.

Id. at 36-37. If our profession believes that the law is more than a mere means of social control to be manipulated for the selfish desires of ourselves and our clients, then we

must insist on the intellectual discipline to articulate the principled justifications for its outcomes, lest it rightfully be rebuked as an illegitimate commodity.

The practical reality is this—denying the defense's motion to dismiss without a hearing was obvious and undeniable error. As evidence that the previous sentence is not hyperbole, Judge Kramer even agreed that the denial of the defense's motion to dismiss was "definitely inappropriate." E. 261. Rule 2-311(f) provides that "the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section." The doctrine of parent-child immunity is a defense. The parties asked for a hearing. No hearing was granted. The court rendered a decision that was dispositive of that defense. Therefore, the denial was error. Had the parties been afforded a hearing as required by the Rules, or had the trial judge issued a memorandum opinion, the parties could presumably have learned why the motion was denied; but as the case is postured now, all the parties know is that: 1) Judge McCrone denied the petitioner's motion to dismiss for reasons he declined to articulate, E. 46; and 2) Judge Kramer denied the relief sought by the petitioner's Rule 2-502 motion for the same mysterious reason Judge McCrone denied the petitioner's motion to dismiss. E. 262.

Now the parties are stuck in a procedural quagmire trying to deal with a case where no judge will provide a rationale for the court's decision with respect to the doctrine of parent-child immunity. What was the scope of Judge McCrone's decision? Did Judge McCrone make a ruling on the merits of the motion or for some procedural reason? On remand how will the court fashion jury instructions? How are the parties to

strategize for the remainder of the litigation? How will the court's refusal to address this issue impede settlement discussions? Why should the parties have to endure a trial that will undoubtedly be both incredibly expensive and emotionally unbearable when they will inevitably be right back here at its conclusion asking the same thing they are now—whether the parent-child immunity applies? Absent correction by this Court all these questions and more will torment not the judges or the lawyers, but the individual parties themselves—both financially and emotionally—just because of an error in the application of Rule 2-311(f), the refusal of subsequent tribunals to consider correcting it, and the refusal of no fewer than five judges to articulate the principled justification for the decision.

II. Parent Child Immunity Applies to Bar Michelangelo's Survivorship Claim

"A right of action at law is not one open to any and all persons against any others, without reference to relationships which may exist between them." *Schneider*, 160 Md. at 22. "[F]or acts of passive negligence incident to the parental relation, there is no liability." *Yost*, 172 Md. at 134. Importantly, neither party here disputes the legitimacy of the parent-child immunity doctrine. *See* E. 247 ("[W]e do not suggest that – the parent-child immunity no longer exists in this State, it does."). Grier even goes so far as to concede that "[h]ad Michelangelo been merely injured in the subject incident, and not killed, he would have no cause of action against his father, due to the application of parent-child immunity." E. 42. Grier's only position is that parent-child immunity has no application "where either parent or child dies, and there is no longer a relationship to protect." E. 10.

Grier's position is erroneous for several reasons. First, Courts in this jurisdiction and others have routinely applied the doctrine to parent-child immunity regardless of whether either the parent or child perished in the occurrence giving rise to the claim. Second, Grier's reliance on *Bushey* is misplaced because none of the justifications relied upon by the Court in that Case are applicable here. The parties rightly agree that at least some of the justifications for upholding the doctrine include "family harmony and integrity, parental authority, to avoid fraud or collusion between the parent and child, . . . and to avoid dissipation of assets." E. 247-48. The dispute appears to be whether there is any family harmony to be preserved when a child's parents are separated and the child dies.

This Court has repeatedly held that "for acts of passive negligence incident to the parental relation, there is no liability," *Yost*, 172 Md. at 134, and this Court has never created an exception when the negligence results in death. To illustrate, the relationships in *Smith v. Gross* are nearly identical as the relationships in the case *sub judice*. In *Smith*, the father was alleged to have negligently operated an automobile resulting in the death of his passenger son. 319 Md. 138, 140-41 (1990). The son's parents were separated, and the mother pursued a claim against the father both in the name of the son as a survivorship claim and in her own right as a wrongful death claim. *Id*. at 141. Just like in this case, the parent-child relationship between father and son ceased upon the child's death. *Id*. Just like in this case, the mother in *Smith* argued "that '[t]he parent-child immunity doctrine is inapplicable to the case at bar because there is no parent-child relationship to protect.' She points to the fact that the child never lived with his father.

She asserts that 'parental discipline is not capable of impairment' because 'there isn't any family relationship' between the father and the child." *Id*. at 147. This Court roundly rejected that argument and held that "[t]he death of the child did not serve to remove the immunity dictated by the rule and resurrect the action." *Id*. at 150.

Likewise, in *Latz v. Latz*, the Court of Special Appeals applied the doctrine of parent-child immunity where a child's negligence resulted in the parent's death. 10 Md. App. 720 (1971). In *Latz*, the mother's estate mounted a head-on challenge to the legitimacy of the doctrine—arguing that the doctrine should be abrogated. By the same logic Greir employs here, in *Latz* the parent-child relationship terminated upon the death of the claimant just like it did when Michelangelo tragically perished. Nevertheless, the Court of Special Appeals articulated an honest analysis of the doctrine and its legitimate weaknesses, but nevertheless held that the doctrine would continue to apply until the legislature saw fit to change it via the democratic process.[2] *Id*. at 734.

Nevertheless, in support of her position, Grier cites *Bushey*, 362 Md. at 649 for the proposition that parent-child immunity does not survive the death of the child. E. 36. In *Bushey*, an older sister was operating a vehicle that was occupied by her younger sister as a passenger. *Id.* at 629. The older sister attempted to pass a vehicle by crossing a

[2] As Heidenberg notes in his brief, the General Assembly has, in fact, elected to abrogate the doctrine of parent-child immunity in auto-tort cases up to the limits of applicable liability insurance. CTS. & JUD. PROC. § 5-806. If the General Assembly were inclined to object to the doctrine as it is applied when one claimant parishes, presumably it would have acted in like fashion. The maxim *expressio unius est exclusio alterius*, then, would suggest that by legislating in the realm or parent-child immunity with respect to auto-torts up to the applicable limits of insurance, the legislature did not otherwise intend to abrogate the common law.

double yellow line, and in so doing, struck another vehicle head on. *Id.* Both sisters died as a result of the collision. *Id.* Thereafter, the sisters' parents pursued a wrongful death claim against the older sister; and the parents, as representatives of the younger sister's estate, pursued a survivorship claim against the older sister on the younger sister's behalf. *Id.* at 630.

In *Bushey*, this Court relied upon four observations for permitting the parents to pursue a wrongful death claim against their deceased daughter. First, the Court observed that "[t]he perquisite of the wrongful death statute is satisfied here because the injured person, Miranda, could sue her sister." *Id.* at 649. Second, the Court observed that "neither family harmony nor parental discipline can be affected in any way by the litigation because both children are dead." *Id*. Third, the Court observed "the prevention of fraud and collusion" presented no cognizable risk because all the witnesses to the occurrence had perished. *Id*. at 650. And finally, the Court rejected the assertion that litigation would deplete family resources because whatever assets the daughters had would be distributed to the parents by way of intestate succession. *Id*. at 650. Here, literally none of the reasons relied upon by the *Bushey* Court for refusing to apply the doctrine of parent-child immunity apply.

First, for the reasons more fully explored in Part III, *infra*, the prerequisite to trigger the wrongful death statute is inapplicable here because the decedent in this case would have been incapable of pursuing a claim against his father. Unlike *Bushey*, this case does not arise from a claim between two sisters. Of course, there is no immunity between the older and younger sister in *Bushey* because the immunity only exists

between parent and child—not between siblings. This case, however, arises from a father's putative negligence with respect to his son.

As to the second justification, the *Bushey* Court noted that "neither family harmony nor parental discipline can be affected in any way by the litigation because both children are dead." *Id*. at 649. Similarly, Grier argues that because the parents are separated and Michelangelo is deceased, there is no family harmony to be preserved. E. 248 ("there is no family harmony or integrity to be preserved."). What Grier suggests is that separated families grieving over the loss of a child are deserving of less protection than the traditional nuclear family. Aside from being incredibly demeaning to the many blended families that would take umbrage to the assertion that they have no "harmony or integrity to be preserved," this Court has already held that the relationship between the parents is irrelevant in determining the application of parent-child immunity:

> It does not follow that merely because the parents' relationship had not culminated in marriage and because the mother, the father, and the child did not reside together in a common home, there was no family relationship within the ambit of the rule between the father and the child. Rights and obligations, privileges and duties -- the elements of parenthood -- existed between the father and child despite that the child "lived with his mother from the time of his birth until his death and never lived with his father." The maintenance of a common home is not the *sine qua non* of the elements of parenthood. The primary requisite of a father-child relationship is not that a person reside with the child but that the person is, in fact, the father of the child. It is by reason of being the father that certain rights, privileges, obligations, and duties arise.

Smith, 319 Md. at 147-48.

Moreover, the practical reality is that given the differences between the nuclear and blended family, parent-child immunity issues are much more likely to arise in the context of blended families as opposed to nuclear families. Consider the following syllogism:

- Minor children can generally only pursue litigation through their parent;
- Married parents hold their marital property as tenants by the entirety; therefore
- When a married parent sues another parent on behalf of their child, the parent assists the child in retitling that parent's property in the name of the child and holding it in trust for the benefit of the child.

William McCurdey calls this reasoning the "possibility of succession." *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1073 (1930) ("It has been suggested that if a parent is compelled to pay damages to a minor child he would, as next of kin of the child, reacquire the amount so paid in the event of the child's death during minority, and that, therefore, he should not be compelled to pay damages which he might later on get back."); *see also Schneider*, 160 Md. at 23 ("And if the child should have property of his own, a parent suing would be in the position of seeking to gain for herself some of that property, while charged with the function of protecting the child's interest in it. . . . [O]ne person cannot at the same time occupy the position of parent and natural guardian, fulfilling the functions devolved upon that position, and the position of plaintiff demanding damages from the child at law."). Simply put, (absent a reason to collude, *i.e.*, insurance) nuclear families are not incentivized to assist children in litigating against

another parent because it results in a sham transaction where a parent is essentially moving their own assets from one pocket to another. Absent insurance, married parents have no reason to do this.

Separated parents, on the other hand, often have a significant incentive to assist their child in litigating against another parent. Unlike married parents, separated parents do not hold their assets jointly. The ability of a minor child under those circumstances to recover in tort against a negligent parent would incentivize the non-negligent parent to pursue litigation on the child's behalf to recover from the assets of the allegedly negligent parent. Anyone who has been a parent knows that there will inevitably be instances where a parent's negligence results in (hopefully only minor) injuries to a child. Indeed:

> During the long and intimate family relation of a parent and his minor child, living in the household of the parent, it is extremely likely that circumstances may arise resulting in some injury to the child, which injury may be imputed to the negligence of the father because of the condition of the family dwelling, or the act of the parent himself or that of his servant or agent. To permit each of such act of real or alleged negligence to be the basis of an action for damages against the father during the child's minority or upon his majority or against the father's estate upon the latter's death would destroy the harmony of the family and militate against the peace of society.

Matarese v. Matarese, 131 A. 198, 199 (R.I. 1925)

To be sure, parent-child immunity is even more critical to the harmony of blended families as it is to nuclear families. Abrogating the doctrine of parent-child immunity would affirmatively encourage vexatious litigation between separated parents. With a frequency equal or greater than that which separated parents go to court for domestic

accommodations following the disagreeable conduct of a separated spouse, abrogating parent-child immunity would encourage the spiteful or desperate parent to sue the other for every nick and scratch incurred by a child while in the custody of the other. As devastating as the consequences of separated parents may be for a child, this Court should not give further reason to encourage an increased litigiousness among blended families.

Setting aside the separated status of the parents here, Grier further contends that there is no family harmony to be preserved because Michelangelo has perished. But what Grier fails to account for is the fact that the parties still co-parent Michelangelo's older eight-year-old brother. E. 228. Another justification often relied on in support of the parent-child immunity is the preservation of the "family exchequer." *McCurdey*, *supra*, at 1073 ("It is said that to compel the parent to pay a sum by way of damages to a minor child would result in a depletion of the parent's funds to the detriment of other children."). Were Grier entitled to recover against Heidenberg, Grier would be financially enriched, and Heidenberg would be financially decimated in equal proportions. The result would have devastating consequences with respect to Heidenberg's ability to parent his surviving son. Without speculating about the parade of horribles that could flow from giving one parent such leverage over the other, to hold for Grier would be to allow an eight-year-old to watch one parent use a traumatic accident to force the other into insolvency via a legal apparatus endorsed by this Court. What else could be more destructive to family harmony?

In the matter *sub judice*, the parties agree as to the enforceability of parent-child immunity. Grier merely contends that the doctrine should not be enforced where the justifications for the doctrine are not present. For the forgoing reasons, unlike *Bushey*, the justifications for the doctrine are especially relevant here, in the context of blended families attempting to rear their surviving children in the face on unimaginable tragedy. Therefore, the doctrine of parent-child immunity applies here.

III. The Doctrine of Parent-Child Immunity Applies to Bar Claudia Grier's Wrongful Death Claim

Moving on from whether Michelangelo's estate has a viable survivorship claim against his father, Grier also claims damages from Heidenberg resulting from Michelangelo's death in a wrongful death action. The issue, then, is whether Grier can recover herself even though her son has no cause of action. Grier acknowledged that parent-child immunity has traditionally served as a bar to a wrongful death action. E. 41 ("So as not to mislead, the *Spangler* Court does discuss defenses to wrongful death actions and recognizes that parent-child immunity has previously served as a bar to a wrongful death action."); E. 37-38 ("It is true that the Court of Appeals [held that a parent's wrongful death claim arising from the death of a child caused by the negligence of a parent] almost thirty (30) years ago in *Smith*, 319 Md. at 138."). Nevertheless, Grier contends that this Court's opinions in *Mummert v. Alizadeh*, 435 Md. 207 (2013) and *Spangler v. McQuitty*, 449 Md. 33 (2016) effectively overrule *Smith*. For the following reasons, although a plaintiff's right to recover in a wrongful death claim is not absolutely

contingent on the decedent's right to recover in all circumstances, the application of parent-child immunity bars Grier's recovery here.

Md. Code § 3-902(a) of the Courts and Judicial Proceedings Article provides that "[a]n action may be maintained against a person whose wrongful act causes the death of another." Maryland's "Lord Campbell's Act" is in derogation of the common law, and, therefore, should be strictly construed. *McKeon v. State ex rel. Conrad*, 211 Md. 437 (1956). Under CTS. & JUD. PROC. § 3-903, there is no dispute that Grier would be a permissible wrongful death beneficiary. Rather, the issue is whether under CTS. & JUD. PROC. § 3-902, Heidenberg committed a "wrongful act." CTS. & JUD. PROC. § 3-901(e) defines a wrongful act as "an act, neglect, or default including a felonious act ***which would have entitled the party injured to maintain an action and recover damages if death had not ensued."*** (emphasis added).

In its brief and argument to the trial court, Grier accurately represented that this Court in *Mummert* repudiated the overbroad proposition that if a decedent could not have brought a cause of action for injury at the time of death, the wrongful death action similarly is precluded. But it is similarly overbroad to suggest that the plaintiff and the victim's ability to recover are entirely independent of each other. Stated differently, in *dicta* the *Smith* Court stated that "[t]he Maryland law appears to be that if a decedent could not have brought a cause of action for injury at the time of death, the wrongful death action similarly is precluded." 319 Md. at 143 n.4. That quote has been disavowed, but only to the extent it is inconsistent with *Mummert*. 435 Md. at 230 ("To the extent that our statements in *Phillip Morris v. Christensen* and *Smith v. Gross* appear

inconsistent or in conflict with our holding in the present case, they are disavowed."). While this Court would later come to disavow the overbroad *dicta* in *Smith's* decision, it is not true that *Mummert* operates to wholly overrule the holding of that case.

> In *Mummert*, a patient died after limitations had run on her medical negligence claims. Her surviving family members, the Mummerts, brought a wrongful death action within the three-year statute of limitations applicable to their claims. The circuit court nonetheless dismissed the action, reasoning that the family members could not pursue their wrongful death claims because the patient herself could not have initiated a timely medical negligence action at the time of her death.

FutureCare Northpoint, L.L.C. v. Peeler, 229 Md. App. 108, 132 (2016).

This Court, then, continued to distinguish the application of the statute of limitations defense from others such as contributory negligence, assumption of risk, and parental immunity. In this Court's words, "Those defenses are distinguishable from a statute of limitations defense, however, because, where those defenses apply, the decedent did not have a viable claim from the outset. Thus, the wrongful death statute's requirement of an act 'which would have entitled the party injured to maintain an action and recover damages if death had not ensued' barred the wrongful death claims in those instances." *Mummert*, 435 Md. at 221 (quoting *Smith v. Gross*, 319 Md. 138, 144 (1990)). Indeed, two decades prior, aside from the unfortunate overstatement in footnote four of its opinion, this Court in *Smith* recognized the same limitations at issue in *Mummert*:

> Actions under Maryland's Lord Campbell's Act, however, are not as purely derivative as survival actions. That statute's requirement of an act "which would have entitled the party injured to maintain an action and recover damages if death had not ensued," clearly excludes a wrongful death action if

> there would be no cause of action on the decedent's part, had the decedent survived. *See State, Use of Bond v. Consol. Gas, etc. Co.*, 146 Md. 390, 126 A. 105 (1924) (holding, prior to the "fall of the citadel," that a wrongful death action based on an allegedly defective product did not lie on behalf of survivors of a deceased child who was not in privity with the defendant seller). Of particular significance here is that the decedent, if surviving, not only must have been able to "maintain an action" but also to "recover damages." We have, in effect, interpreted this language to include defenses. . . . ***Thus, the issue here is whether the defense of parental immunity is an exception to the general rule.***

319 Md. at 155 (emphasis added). In *Mummert*, this Court held that the statute of limitations defense was an exception to the general rule, but otherwise affirmed its holding in *Smith* that parent-child immunity was not.

Three years after *Mummert*, this Court yet again considered potential exceptions to the general rule that defenses to a decedent's claim against a tortfeasor bars related wrongful death claims. In *Spangler v. McQuitty*, the plaintiff's parents filed a claim against several doctors on behalf of their child who was born with birth defects. On behalf of their son, the parents settled with some defendants and recovered against others. During the litigation of the child's claim, the plaintiff died. Thereafter, the parents pursued an additional wrongful death lawsuit in their own right arising out of the same facts. In that case, after the resolution of the plaintiff's individual claim, the doctrine of *res judicata* precluded further litigation following his death. The question, then, was whether the preclusion of the plaintiff's claim prevented the parents from pursuing a wrongful death claim. Just like in *Mummert*, this Court in *Spangler* drew a distinction

between defenses that precluded the existence of a claim by the decedent and defenses that would subsequently apply to preclude an otherwise valid claim:

> Maryland recognized only certain defenses, which barred a decedent's personal injury claim, and in turn, precluded a wrongful death action by a decedent's beneficiaries. *Id.* These defenses included contributory negligence, *see, e.g.*, F*razee v. Balt. Gas & Elec. Co.*, 255 Md. 627, 258 A.2d 425 (1969); assumption of the risk, *see, e.g., Balt. & Potomac R.R. v. State ex rel. Abbott*, 75 Md. 152, 23 A. 310 (1892); ***parental immunity***, *see, e.g., Smith v. Gross*, 319 Md. 138, 571 A.2d 1219 (1990); and a lack of privity of contract between a decedent and a manufacturer, *see, e.g., State ex rel. Bond v. Consol. Gas, Elec. Light & Power Co.*, 146 Md. 390, 126 A. 105 (1924). ***We further observed that the statute of limitations defense at issue in the case, was distinguishable from the commonly-recognized defenses, because where the latter defenses applied, "the decedent did not have a viable claim at the outset."*** *Mummert*, 435 Md. at 221, 77 A.3d at 1057.

449 Md. at 66-67 (emphasis added).

Accordingly, although this Court has since walked back some of the overbroad *dicta* in *Smith*, it has continuously held firm to the central tenet of its holding; that is, the doctrine of parental immunity is recognized as a defense that precludes a wrongful death beneficiary from pursuing a claim against a parent. To hold otherwise would be to endorse an absurd result whereby everyone but the decedent has the legal capacity to recover for the decedent's death. Therefore, consistent with *Smith*, *Mummert*, and *Spangler*, the defense of parent-child immunity bars not only the survivorship claims, but also any attendant wrongful death claims premised on that negligence.

CONCLUSION

For the forgoing reasons this *amicus* respectfully prays that this Court REVERSE the decision of the Circuit Court for Howard County.

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT COMPLIANCE WITH RULE 8-112

1. This brief contains six-thousand, three-hundred fifty (6,350) words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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CERTIFICATE OF REDACTION

I HEREBY CERTIFY the foregoing does not contain any restricted information, pursuant to Maryland Rule 20-201(h)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this thirteenth (13th) day of May 2019, a copy of the foregoing *Amicus Brief* was filed using the MDEC filing system and served electronically on all counsel of record:

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