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Notes: Torts — Parent-Child Immunity: Parent-Child Tort Immunity Defense Is Applicable in Wrongful Death and Survival Actions despite the Modern Trend toward Abrogation of the Doctrine. Smith v. Gross, 319 Md. 138, 571 A.2d 1219 (1990)

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TORTS—PARENT-CHILD IMMUNITY: PARENT-CHILD TORT IMMUNITY DEFENSE IS APPLICABLE IN WRONGFUL DEATH AND SURVIVAL ACTIONS DESPITE THE MODERN TREND TOWARD ABROGATION OF THE DOCTRINE. *Smith v. Gross*, 319 Md. 138, 571 A.2d 1219 (1990).

I. INTRODUCTION

In the last several decades there has been a substantial erosion of the parent-child immunity doctrine, which allows a parent to escape liability for torts committed against a child.[1] This erosion has come in the form of exceptions to the doctrine in cases where courts have recognized that application of the immunity would not serve the policies behind the doctrine.[2]

In *Smith v. Gross*,[3] however, the Court of Appeals of Maryland reaffirmed its commitment to the parental immunity doctrine. The court in *Smith* held that neither a wrongful death action nor a survival action could be maintained against a defendant who could have used the immunity defense against the decedent had the decedent lived.[4] Although this decision is consistent with Maryland precedent, it runs counter to the modern trend of abrogating the rule in cases where the policy underlying the rule cannot be furthered.[5]

II. BACKGROUND

At English common law a child was considered to be a separate legal person from his or her parents.[6] As such, a child was entitled

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1. *See* Frye v. Frye, 305 Md. 542, 561, 568-87, 505 A.2d 826, 836, 840-49 (1986).
2. *See* Hebel v. Hebel, 435 P.2d 8, 13 (Alaska 1967) (immunity doctrine will not bar a motor tort action because liability insurance negates the concern for family harmony); Attwood v. Estate of Attwood, 276 Ark. 230, 238, 633 S.W.2d 366, 370 (1982) (immunity doctrine will not bar an action for injuries caused by willful and wanton conduct); Dzenutis v. Dzenutis, 200 Conn. 290, 291, 512 A.2d 130, 133 (1986) (immunity doctrine will not bar an action for injury sustained by minor at father's work site). *See also* RESTATEMENT (SECOND) OF TORTS § 895G comments d - i (1979).
3. 319 Md. 138, 571 A.2d 1219 (1990).
4. *Id.* at 149, 571 A.2d at 1224.
5. *See, e.g.*, Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); RESTATEMENT (SECOND) OF TORTS § 895G comments d - i (1979); 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 8.11 (2d ed. 1986) [hereinafter HARPER].
6. *See* RESTATEMENT (SECOND) OF TORTS § 895G comment b (1979); W. PROSSER & W. KEETON, THE LAW OF TORTS § 122, at 904 (5th ed. 1984).

to own property and enter into contracts.[7] The child could bring suit against all others, including his or her parents, regarding these property and contract rights.[8] A child could also maintain a criminal action against a parent if the parent acted unreasonably in disciplining the child.[9] Although it is unclear whether a child could maintain a personal tort action against a parent, there are no decisions indicating that such an action would not lie, subject only to the parent's privilege to reasonably discipline the child.[10]

In 1891, the Supreme Court of Mississippi held in *Hewlett v. George*[11] that a minor child could not maintain a personal tort action against a parent.[12] In *Hewlett*, a daughter alleged that her mother had willfully and maliciously imprisoned her in an insane asylum so her mother could obtain her property. The court in *Hewlett* fashioned the parent-child immunity doctrine on the principle that permitting the suit would disrupt the family peace.[13] The court reasoned that the state's criminal laws would provide the daughter with adequate protection.[14]

Even though the court in *Hewlett* cited no supporting authority, many courts adopted the parent-child immunity doctrine in both intentional and negligent tort actions.[15] Numerous courts adopted the doctrine based on the theory that family unity and tranquility must

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7. HARPER, *supra* note 5; W. PROSSER & W. KEETON, *supra* note 6. *See generally*, Akers & Drummond, *Tort Actions Between Members of the Family - Husband & Wife - Parent & Child*, 26 MO. L. REV. 152 (1961).
8. *See* Young v. Wiley, 183 Ind. 449, 107 N.E. 278 (1914); Clark v. Smith, 13 S.C. 585 (1879).
9. *See* Neal v. State, 54 Ga. 281 (1874); Hinkle v. State, 127 Ind. 490, 26 N.E. 777 (1891).
10. *See* RESTATEMENT (SECOND) OF TORTS § 895G comment b (1979); HARPER; McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 527 (1960).
11. 68 Miss. 703, 9 So. 885 (1891).
12. *Id.* at 705, 9 So. at 887.
13. The *Hewlett* court reasoned:

> [S]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society . . . [denies] the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

Id. at 705, 9 So. at 887.
14. *Hewlett*, 68 Miss. 703, 704, 9 So. 885, 887 (1891).
15. *See, e.g.*, Materese v. Materese, 47 R.I. 131, 131 A. 198 (1925) (no action permitted where a child is injured while a passenger in automobile negligently operated by parent); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (no action permitted when minor child is beaten by parents); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) (civil action precluded against father convicted of raping daughter).

be preserved.[16] Others reasoned that parents must be allowed a certain measure of discretion in the discipline and care of their children.[17] Still others determined that a family's financial resources must be protected from the disproportionate enrichment of the plaintiff family member.[18]

In 1930, Maryland adopted the parent-child immunity doctrine in *Schneider v. Schneider*,[19] holding that a parent could not sue a minor child for injuries resulting from the child's negligent driving.[20] The court in *Schneider* reasoned that a parent could not simultaneously stand in the roles of adversary and guardian.[21] The court stated, "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."[22]

In 1971, in *Latz v. Latz*,[23] the Court of Special Appeals of Maryland, bound by the *Schneider* decision, held that parental immunity applied to bar a plaintiff-parent from maintaining a wrongful death action against a minor child.[24] In *Latz*, a parent was killed while a passenger in an automobile negligently driven by her unemancipated, minor daughter. While noting the trend of abrogating the parent-child immunity doctrine, the court chose to leave such abrogation in Maryland to the legislature.[25]

In *Frye v. Frye*,[26] the Court of Appeals of Maryland reaffirmed its commitment to the parental immunity rule with respect to motor torts.[27] In *Frye*, a child was injured by his father's negligent driving. In dismissing the child's tort action, the court of appeals stressed the policies of fostering family harmony and supporting parental authority.[28] The court also stated that because statutory public policies

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16. *See, e.g., McKelvey*, 111 Tenn. 388, 77 S.W. 664. *See generally* Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence, Modern Cases*, 6 A.L.R.3d 1066 (1981).
17. *See, e.g.*, Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938), *rev'd*, 369 Mass. 350, 339 N.E.2d 907 (1975).
18. *See, e.g.*, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).
19. 160 Md. 18, 152 A. 498 (1930).
20. *Id.* at 22-23, 152 A. at 499.
21. *Id.*
22. *Id.*
23. 10 Md. App. 720, 272 A.2d 435, *cert. denied*, 261 Md. 726 (1971).
24. *Id.* at 725, 272 A.2d 438.
25. *Id.* at 734, 272 A.2d 442-43.
26. 305 Md. 542, 505 A.2d 826 (1986).
27. The court in *Frye* distinguished its recent abrogation of interspousal immunity in Boblitz v. Boblitz, 269 Md. 242, 462 A. 2d 506 (1983) from parent-child immunity. The court of appeals stated that the two immunities are distinguishable in that they are based on separate policies and have different legal histories. *Frye*, 305 Md. at 557-58, 505 A.2d at 834.
28. *Frye*, 305 Md. at 557-58, 567, 505 A.2d at 834, 839.

concerning compulsory liability insurance laws and family unity would be affected by abrogation of the parent-child immunity doctrine, the legislature, not the judiciary, should effect the abrogation.[29]

Commentators, however, have sharply criticized the parent-child immunity rule.[30] One criticism is that the justifications for the rule do not outweigh the importance of compensating the injured person.[31] Other critics argue that it is absurd to believe that an uncompensated tort makes for family peace and tranquility.[32] Finally, some critics argue that the scope of the immunity doctrine is too broad, and should be replaced with a narrower parental privilege applying only to those actions growing directly out of the family relationship.[33]

Responding to the potentially unjust results of the immunity doctrine, many courts created exceptions to the doctrine in cases where the underlying policies could not be furthered by its application. Thus, courts allowed suits between parents and emancipated children.[34] Similarly, exceptions were made where the parent and

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29. *Id.* at 567, 505 A.2d at 839.
30. *See* RESTATEMENT (SECOND) OF TORTS § 895G (1979); HARPER, *supra* note 5, at 574-81; W. PROSSER & W. KEETON, *supra* note 6, at 905-06. *See generally* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 496-508 (1982) (critically analyzing the rationales in support of the parent-child immunity doctrine).
31. RESTATEMENT (SECOND) OF TORTS § 895G comment c (1979). As the Supreme Judicial Court of Maine stated:

> The strong trend against the across-the-board application of a rule of parental immunity in tort cases reflects a growing recognition that such a sweeping application results in excessive protection of the interests favored by the rule in derogation of the general principle that there should be no wrong without a remedy.

Black v. Solmitz, 409 A.2d 634, 635 (Me. 1979).
32. PROSSER, *supra* note 6, at 905.
33. *See* RESTATEMENT (SECOND) OF TORTS § 895G comment j (1979); *see also* Framm, *Parent-Child Tort Immunity: Time For Maryland to Abrogate an Anachronism*, 11 U. BALT. L. REV. 435, 466 (1982).

A growing minority of jurisdictions have completely abrogated the parent-child immunity doctrine, replacing it with more flexible rules revolving around parental privilege. Many abrogating courts reasoned that it is the injury itself, not the suit, that disrupts family life. The Wisconsin Supreme Court took the lead in abrogating the immunity doctrine in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). The *Goller* court held that no immunity existed except in situations incident to the parental role. *Id.* at 413, 122 N.W.2d at 198. In Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), the California Supreme Court abrogated the immunity rule and held that the standard should be that of a reasonable and prudent parent. *Gibson*, 3 Cal. 3d at 921, 479 P.2d at 653, 92 Cal. Rptr. at 293. *Accord* Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980).
34. *See, e.g.*, Waltzinger v. Birsner, 212 Md. 107, 128 A.2d 617 (1956). The court of appeals reasoned that the need for parental discretion was absent due to

child stood in a business relationship and the injury arose out of that relationship.[35] Courts reasoned that the parent was not acting in a parental role at the time of the injury, and therefore, should not be entitled to use the parent-child immunity defense.[36] Numerous courts abrogated the immunity with respect to automobile accidents.[37] Others permitted wrongful death and survival actions, reasoning that because the parent-child relationship was terminated by death the policy of upholding the unity of that relationship was inapplicable.[38]

In *Mahnke v. Moore*,[39] the Court of Appeals of Maryland carved out an exception to the immunity rule for "injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."[40] In *Mahnke*, a young girl was forced to watch her father murder her mother, spend a week with the corpse, and then watch her father commit suicide. The court in *Mahnke* held that the father had abandoned his parental obligation and destroyed the family unity by his conduct, thereby forfeiting his right to use the immunity defense.[41]

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the child's majority. *Id.* at 126, 128 A.2d at 627.

There are five methods by which a child may become emancipated: (1) by written or oral agreement or by some act the parent relinquishes control; (2) the parent abandons, neglects, or is cruel to the child; (3) the child enters into a valid marriage; (4) the child reaches the statutory age of majority; and (5) the child enlists in the military. Note, *Right of Action of a Minor Child Against a Parent Tort Feasor*, 12 MD. L. REV. 202, 211 (1951).

35. *See* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); *see also* Hatzinicolas v. Protopapas, 314 Md. 340, 550 A.2d 947 (1988) (parent-child immunity will not bar a child's recovery in negligence from a parent's business partner, where the partnership was responsible for an injury and partner is entitled to contribution from the parent partner).
36. *See* Felderhoff v. Felderhoff, 473 S.W.2d 928 (1971); Lusk v. Lusk, 113 W.Va. 17, 19, 166 S.E. 538, 539 (1932).
37. *See* Sorensen v. Sorensen, 369 Mass. 350, 339 N.E.2d 907 (1975) (immunity is abrogated to the extent of parent's automobile liability insurance); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971) (high incidence of vehicle liability insurance has made parent-child immunity anachronistic as applied to automobile accident litigation); Williams v. Williams, 369 A.2d 669 (Del. 1976) (parent-child immunity does not apply to the extent of automobile liability insurance). *But see* Schneider v. Coe, 402 A.2d 682 (Del. 1979) (immunity is applicable where duty arises from family relationship notwithstanding existence of insurance).
38. *See* Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. 1961) (wrongful death action based on alleged negligent driving permitted because policy behind immunity rule is inapplicable due to death of child). *Accord* Johnson v. Myers, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972); Plumley v. Klein, 31 Mich. App. 26, 187 N.W.2d 250 (1971), *aff'd*, 388 Mich. 1, 199 N.W.2d 169 (1972); Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962); RESTATEMENT (SECOND) OF TORTS § 895G comment g (1977).
39. 197 Md. 61, 77 A.2d 923 (1951).
40. *Id.* at 68, 77 A.2d at 926.
41. *Id.* The court stated:

The court of appeals emphasized that it was making an exception to the parent-child immunity rule because the policies underlying the rule could not be served by its application.

In addition to the exception for outrageous intentional torts, Maryland has also abrogated the parent-child immunity doctrine for emancipated children. In *Waltzinger v. Birsner*,[42] a parent was injured while riding in an automobile operated in an allegedly negligent manner by her emancipated adult son. In allowing the action, the Court of Appeals of Maryland reasoned that the need for parental discretion was absent because of the child's majority.[43]

Despite these exceptions, Maryland has refused to follow the modern trend of abrogating the rule with respect to negligence cases, and especially automobile accident cases. Instead, Maryland continues to cling to the seminal case of *Schneider* by applying the parent-child immunity doctrine to negligent automobile accident cases. In *Smith v. Gross*,[44] the Court of Appeals of Maryland applied this archaic doctrine to a case where alleged negligence resulted in the death of a child.

III. FACTS

In *Smith*, two-year-old Roland Randolph Gross, Jr. was killed in an automobile accident, allegedly resulting from his natural father's negligent driving.[45] The child was born out of wedlock to Virginia Lee Smith and Roland Randolph Gross, Sr. Their son had always lived with his natural mother, never with his father.[46] The child's mother, as both the personal representative of the child's estate and in her individual capacity as mother, brought a wrongful death

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> [T]here can be no basis for the contention that the daughter's suit against her father's estate would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquility are to be preserved. . .[w]hen, as in this case, the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit.

Id.

42. 212 Md. 107, 128 A.2d at 617 (1957).
43. *Id.* at 126, 128 A.2d at 627.
44. 319 Md. 138, 571 A.2d 1219 (1990).
45. *Id.* at 141, 571 A.2d at 1220.
46. The court noted that the child's illegitimacy was irrelevant to the decision. The rule attached in this case because the father was the child's *natural* father. *Id.* at 146 n.5, 571 A.2d at 1222 n.5.

action[47] and a survival action[48] against the father.[49] She claimed punitive damages in both actions.[50] Applying the parent-child immunity rule, the Circuit Court for Dorchester County granted the father's motion to dismiss the actions for failure to state a claim upon which relief can be granted.[51] The mother appealed, and the Court of Appeals of Maryland certified the case *ex mero motu* before a decision by the Court of Special Appeals of Maryland.[52]

IV. REASONING/HOLDING

In wrongful death and survival actions, the general rule is that defenses which would have been good against the decedent, had the decedent lived, are also good against the decedent's personal representatives and survivors.[53] The issue presented in *Smith* was whether the parental immunity defense is a defense that may be raised by operation of this general rule.[54] In affirming the circuit court's dismissal, the court of appeals held that the parental immunity defense may be raised in such actions, thereby precluding the mother from proceeding against the father both in her own right as a parent and as the personal representative of the child's estate.[55] Consistent with Maryland precedent,[56] the court stated that parental immunity bars all negligence actions, and specifically those actions involving motor torts.[57] In upholding the parent-child immunity doctrine, the court of appeals emphasized the importance of protecting the family integrity and supporting parental discretion in the discipline and care of the child.[58]

The court acknowledged that its continued refusal to abrogate the parent-child immunity rule for motor torts is inconsistent with

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47. *See* MD. CTS. & JUD. PROC. CODE ANN., §§ 3-901 to 3-904 (1989). "Wrongful act" is defined 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." *Id.* at § 3-901(e).
48. *See* MD. EST. & TRUSTS CODE ANN. § 7-401(x) (1974).
49. *Smith*, 319 Md. at 141, 571 A.2d at 1220.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 144-45, 571 A.2d at 1221-22.
54. *Id.*
55. *Id.* at 149, 571 A.2d at 1224.
56. Frye v. Frye, 305 Md. 542, 505 A.2d 826 (1986); Yost v. Yost, 172 Md. 128, 190 A. 753 (1937) (child cannot sue a parent for non-support; a parent is generally not liable for passive negligence incident to the parental relation); Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).
57. *Smith*, 319 Md. at 145, 571 A.2d at 1222.
58. *Id.* at 147-48, 571 A.2d 1222-23.

the modern trend.[59] In support of its holding, the court cited *Frye*, in which it had stated that because the legislature had enacted compulsory motor vehicle liability insurance laws, and failed to make an exception to the immunity rule in motor tort cases, the judiciary should not do so on its own.[60] The court in *Frye* reasoned that because insurance laws are part of an elaborate scheme created for the general welfare and protection of Maryland's citizens, any exception that would affect the scheme is best left to the legislature.[61] Consistent with this precedent, the *Smith* court refused to make an exception to the immunity rule which would impact Maryland's wrongful death and survival statutes. The court stated that the General Assembly has had ample opportunity to legislate such an exception, if that was its intent.[62]

Significantly, the court in *Smith* refused to make an exception to the immunity rule in a situation where negligence results in the death of a child. After noting the general rule that defenses which would have been good against the decedent, had the decedent lived, are also good against the decedent's personal representatives and survivors,[63] the court found that a parental relationship did exist between the defendant-father and the child at the time of the accident.[64] The court then reasoned that because the parent-child immunity rule was applicable during the life of the child, the mother's actions were barred under both the survival and wrongful death statutes.[65] Without further elaboration the court stated, "The death of the child did not serve to remove the immunity dictated by the rule and resurrect the action."[66]

The court analyzed the relationship of the child and the father, prior to the child's death, and determined that the father had not forfeited his rights nor obligations as a parent.[67] This forfeiture test was used in *Mahnke* where the court held that the father's estate was not entitled to use the immunity defense, because the father's intentional tort against his daughter had led to forfeiture of his

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59. *Id.* at 145, 571 A.2d at 1222.
60. *Id.* (citing Frye v. Frye, 305 Md. 542, 562-67, 505 A.2d 826, 836-39 (1986)).
61. *Frye v. Frye*, 305 Md. at 567, 505 A.2d at 839. *But see* HARPER, *supra* note 5, at 574-76 (agreeing with the rationale put forth by courts abrogating immunity because of the existence of vehicle liability insurance).
62. *Smith*, 319 Md. at 149, 571 A.2d at 1224.
63. *Id.* at 144, 571 A.2d at 1221.
64. *Id.* at 148, 571 A.2d at 1223-24.
65. *Id.* Wrongful death and survival actions have long been codified in Maryland. The wrongful death statute was enacted in 1852. Acts of 1852, ch. 299 § 1. The survival statute was enacted in 1798. Acts of 1798, ch. 101, sub. ch. 8, § 5.
66. *Id.* at 150, 571 A.2d at 1224.
67. *Id.* at 148, 571 A.2d at 1223.

parental rights.[68] The court's application of this test in *Smith* suggests that it might make an exception to the rule in a negligence action, if it were shown that the defendant parent had "abandoned the parental relationship."[69]

V. ANALYSIS

In *Smith*, the Court of Appeals of Maryland applied parental immunity to wrongful death and survival actions. Although the decision is consistent with precedent[70] in negligence actions, it is inconsistent with the modern trend and view of most commentators.[71] The court should have examined the sound logic behind the modern trend towards abrogation, and should have held the parent-child immunity doctrine invalid as applied to wrongful death and survival actions.

A primary weakness in the court's reasoning in *Smith* is that it fails to distinguish between situations where the policy behind the immunity rule can be furthered by its application, and situations where no policy can be furthered. For example, in holding the parent-child immunity rule applicable in wrongful death and survival actions, the court stressed that public policy requires supporting family unity and protecting parental discretion in the discipline and care of the child.[72] The court failed to explain, however, how the policy will be served by applying the immunity rule in cases where the parent-child relationship is terminated by death.

This is the illogical reasoning the dissent questioned.[73] While the dissent agreed with the majority that under Maryland precedent the immunity would have applied had the child lived, it argued that the immunity defense should not be placed in the same category as other derivative defenses[74] in wrongful death or survival actions.[75] Using

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68. Mahnke v. Moore, 197 Md. 61, 68, 77 A.2d 923, 926 (1951).
69. *Smith*, 319 Md. at 148, 571 A.2d at 1223.
70. *See supra* notes 15-20 and accompanying text; *see also* Montz v. Mendaloff, 40 Md. App. 220, 388 A.2d 568 (1978) (minor child injured when an automobile was negligently driven by the mother even though the mother's negligence may have been gross); Sanford v. Sanford, 15 Md. App. 390, 290 A.2d 812 (1972) (minor child injured when an automobile was negligently driven by father); Latz v. Latz, 10 Md. App. 720, 272 A.2d 435, *cert. denied*, 261 Md. 726 (1971) (mother killed while a passenger in an automobile negligently driven by her minor daughter). *But see Montz*, 40 Md. App. at 226-29, 388 A.2d at 571-73 (Gilbert, C.J., concurring).
71. *See supra* notes 30-33 and accompanying text.
72. *Smith*, 319 Md. at 146, 571 A.2d at 1222-23.
73. *Id.* at 150, 571 A.2d at 1224-25 (Eldridge, J., dissenting).
74. "Circumstances such as contributory negligence and assumption of risk [and

the same rationale espoused by many courts and commentators advocating abrogation in these actions, the dissent reasoned that the death which led to the action precludes the policy of preserving the parent-child relationship from being served.[76]

The majority interpreted the survival and wrongful death statutes as permitting only those actions that could have been successfully maintained by the decedent, had the decedent lived.[77] The majority arrived at this conclusion by focusing on the phrase, "a personal action which the decedent might have commenced or prosecuted"[78] from the survival statute, and the phrase, "which would have entitled the party injured to maintain an action and recover damages if death had not ensued"[79] from the wrongful death statute. Read literally, the language of these statutes seems to bar a wrongful death or survival action where parental immunity would have prevented the suit had the decedent lived. Therefore, on its face the majority's conclusion appears to be valid.

The dissent, however, looked beyond this seemingly valid conclusion to find an error in its logic. The conclusion is illogical because no policy can be served by application of the immunity rule in this case. The existing parent-child relationship was severed by the child's death. The dissent correctly pointed out that this reasoning was previously used by the Court of Appeals of Maryland in making two exceptions to the rule.[80] In *Mahnke*, an outrageous intentional tort severed the parent-child relationship; in *Waltzinger*, emancipation severed the relationship; and in *Smith*, death severed the relationship. In all three of these circumstances no policy can be served by application of the immunity rule.

The dissent further argued that where the defenses of contributory negligence, assumption of risk, and lack of privity suggests that there is no cognizable cause of action, the parental immunity defense means that although there is a cognizable cause of action, the action will not be permitted because of overriding policy concerns.[81] If the facts of a case are such that these policy concerns cannot be addressed, as in wrongful death and survival actions, then it is illogical

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lack of privity] bar *every* tort action, regardless of the identity or relationship of the parties." *Id.* at 152, 571 A.2d at 1226 (emphasis added).

75. *Id.* at 150-53, 571 A.2d at 1224-26. The *Smith* dissent contends that, "[a]n immunity such as parent-child immunity, on the other hand, does not mean that no cause of action exists. It means that a recovery will not be permitted because of overriding public policy." *Id.* at 152, 571 A.2d at 1226.
76. *Id.* at 154-55, 571 A.2d at 1226-27.
77. *Id.* at 143, 571 A.2d at 1221.
78. *Id.* at 142, 571 A.2d at 1221 (citing the Maryland survival statute).
79. *Id.* at 143, 571 A.2d at 1221 (citing the Maryland wrongful death statute).
80. *Id.* at 154, 571 A.2d at 1226 (Eldridge, J., dissenting).
81. *Id.* at 152-53, 571 A.2d at 1225-26.

to apply the immunity rule. The statutes, described by the court as "clear and certain,"[82] are certainly flexible enough to allow for a cause of action where no policy can be served by precluding the action.

A further weakness in the majority's reasoning is its insistence that any exception to the immunity rule must be made by the legislature.[83] This follows *Frye* where the court refused to make a motor tort exception, reasoning that such an exception would affect legislatively created compulsory liability insurance laws.[84] Consistent with that decision, the court in *Smith* declined to make an exception to the immunity which would affect the legislatively created wrongful death and survival actions.[85] The court inferred, from the legislature's failure to expressly except the immunity in these actions, that the legislature intends for the immunity to apply in such actions.[86]

There are two flaws in the *Smith* majority's reasoning with respect to the legislature's inaction. First, the legislature could not have excluded the immunity rule from application in wrongful death or survival actions when those statutes were enacted, because they were enacted long before the Maryland judiciary adopted the immunity rule.[87] In addition, the legislature has never acted to explicitly amend the statutes to include the immunity rule within the wrongful death and survival statutes. It may be that the legislature does not view the immunity defense as applicable in such actions, and therefore, has seen no need to expressly exclude the immunity from them. This legislative silence leaves the decision squarely with the judiciary.

This leads to the majority's second flaw with respect to the legislature's inaction. As the dissent noted, the parental immunity rule is a judicial creation, not a legislative one.[88] In addition, the court has not hesitated to make exceptions to the rule where policy would not be served by its application.[89] While the circumstances of

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82. *Id.* at 149, 571 A.2d at 1224.
83. *Id.*
84. Frye v. Frye, 305 Md. 542, 567, 505 A.2d 826, 839 (1986).
85. *Smith*, 319 Md. at 149, 571 A.2d at 1224.
86. The *Smith* majority stated: "If the legislature intended that the judicially created parent-child immunity rule be excepted from the legislatively created survival and wrongful death action, it has had ample opportunity to say so." *Id.* at 149, 571 A.2d at 1224.
87. The Maryland judiciary adopted the parent-child immunity doctrine in Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930), whereas the survival statute was enacted in 1798, Acts of 1798, ch. 101, subch. 8, § 5, and the wrongful death statute was enacted in 1852, Acts of 1852, ch. 299, § 1.
88. *Smith*, 319 Md. at 156, 571 A.2d at 1227 (Eldridge, J., dissenting).
89. *See* Hatzinicolas v. Protopapas, 314 Md. 340, 550 A.2d 947 (1988) (immunity will not bar child's recovery in negligence from parent's business partner); Waltzinger v. Birsner, 212 Md. 107, 128 A.2d 617 (1957) (immunity will not

Mahnke (intentional tort) and *Waltzinger* (emancipated child) are different from the circumstances of *Smith* (death of child resulting from negligence), the premise used by the court of appeals to make exceptions to the immunity rule in *Mahnke* and *Waltzinger* is just as valid when applied to *Smith*. That premise is that the circumstances of the case are such that the policies behind the immunity rule cannot be furthered by its application to the case. This same reasoning has led numerous other courts to take the initiative and except the immunity in wrongful death actions instead of waiting for their legislatures to do so.[90]

VI. IMPACT/RAMIFICATION

Nevertheless, the *Smith* court's application of the parent-child immunity doctrine to wrongful death and survival actions reinforces the Maryland judiciary's commitment to the doctrine. Barring action by the legislature to except immunity in these situations, it appears that Maryland's erosion of this doctrine ended with *Mahnke* and *Waltzinger*.

The decision in *Smith* hints at only a single possibility that judicial exception to immunity will be made in a wrongful death or survival action. This small window of opportunity appears in the majority's analysis of the defendant parent's relationship to the child prior to the child's death.[91] The court suggests that it would make an exception to the immunity in a wrongful death action if the defendant parent had forfeited his or her parental rights and obligations. Although not as clear, an exception based on this same reasoning might also be made in a negligence action where no death had resulted.

Parental immunity should be viewed as a flexible policy to be applied only when the policy overrides the importance of compensating the injured person. This is the view that led the Court of

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bar recovery by emancipated child); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (intentional tort by father against daughter resulted in forfeiture of parental right to immunity).

The *Smith* dissent contended:

"In both [*Mahnke*] and [*Waltzinger*], where no parent-child relationship still existed, the Court did not recognize an immunity. In this case, the death of Gross, Jr. severed the parent-child relationship and terminated the basis for immunity." *Smith*, 319 Md. at 154, 571 A.2d at 1226 (Eldridge, J., dissenting).

90. *See, e.g.*, Barnwell v. Cordle, 438 F.2d 236 (5th Cir. 1971); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Dorsey v. State Farm Mut. Auto. Ins. Co., 9 Ohio St. 3d 27, 457 N.E.2d 1169 (1984).

91. *Smith*, 319 Md. at 148, 571 A.2d at 1223.

Appeals of Maryland to make an exception in *Mahnke*.[92] Had the court in *Smith* continued with the reasoning espoused in *Mahnke* and *Waltzinger*, the result in *Smith* may have been different. As in these earlier cases, no policy can be furthered by application of parental immunity in *Smith*.

VII. CONCLUSION

The decision leaves a wide gap between the law in Maryland and the modern trend with respect to parental immunity in both negligence actions, and wrongful death and survival actions. The court rejected the modern view that even if retention of the rule is justified by public policy, it should not be extended beyond the bounds necessary to achieve the policy goals. Instead, the court held that immunity applies in wrongful death and survival actions, despite the fact that no policy can be furthered by such application. Therefore, without legislative action, Maryland courts will continue to cling to the parent-child immunity doctrine.

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92. *See* Mahnke v. Moore, 197 Md. 61, 67, 77 A.2d 923, 925 (1951) (quoting Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) with approval). The court in *Dunlap* stated the following view of the parental immunity rule:

> On its face, the rule is a harsh one. It denies protection to the weak upon the ground that in this relation the administration of justice has been committed to the strong and that authority must be maintained. It should not be tolerated at all except for very strong reasons; and it should never be extended beyond the bounds compelled by those reasons.

Id. at 909.