UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2375

September Term, 2012

PEGGY McQUITTY, et vir.

v.

DONALD B. SPANGLER, et al.

Woodward,
Wright,
*Eldridge, John C.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: August 7, 2015

*Judge John C. Eldridge participated in the hearing of this case while specially assigned to this Court but did not participate in the adoption of this opinion.

Appellants, Peggy and Gary McQuitty, appeal the decision of the Circuit Court for Baltimore County, in which the court dismissed their wrongful death action against appellees, Donald B. Spangler, M.D. and his professional group, Drs. Glowacki, Elberfeld & Spangler, P.A. Appellants brought their wrongful death suit in May 2012, because their son, Dylan McQuitty ("Dylan"), died in 2009 allegedly as a result of injuries caused by appellees' actions during Dylan's birth in 1995. Appellants, as guardians, parents, and next friends of Dylan, had previously initiated a personal injury action on Dylan's behalf against appellees in September 2001, and received a judgment in his favor in September 2006, which was affirmed after several rounds of appeal. In December 2012, the trial court found that, under the wrongful death statute, the judgment in favor of Dylan in his personal injury action barred appellants' subsequent wrongful death action.

Appellants present one issue for our review, which we have rephrased as a question:

> Under the principles enunciated in *Mummert v. Alizadeh*, 435 Md. 207 (2013), does a judgment in favor of a decedent in a personal injury action preclude a subsequent wrongful death claim brought by the decedent's survivors on the basis of the same conduct as the underlying personal injury action?

We answer this question in the negative, concluding that appellants' wrongful death action is not barred by the judgment in favor of their son in his personal injury action. We therefore reverse the decision of the circuit court and remand for further proceedings.

BACKGROUND

On May 8, 1995, Dylan was born with severe cerebral palsy. On September 5, 2001, appellants, as Dylan's guardians, parents, and next friends, filed a complaint against appellees and Dr. Harrold Elberfeld in the circuit court, alleging medical malpractice and breach of informed consent.[1] The suit sought damages for the injuries Dylan suffered at birth, and the consequences of those injuries to Dylan. Subsequently, Dr. Elberfeld was dismissed after entering a settlement with appellants.

In April 2004, a jury returned a verdict in favor of appellees on the medical malpractice claim, but failed to reach a decision on the breach of informed consent claim. A second trial began on the breach of informed consent claim two years later. On September 26, 2006, a jury found in favor of Dylan and awarded him (1) $156,000 for past medical expenses and costs, (2) $8,422, 515 for future medical and rehabilitation care and costs, (3) $1,000,000 for Dylan's loss of future earning capacity, and (4) $3,500,000 for Dylan's past and future physical and emotional pain and suffering and loss of enjoyment of life. On September 27, 2006, the circuit court entered a judgment against appellees for the total amount of $13,078,515.

Appellees filed post-trial motions for remittitur and judgment notwithstanding the verdict ("JNOV"). The circuit court granted appellees' JNOV motion, and Dylan

[1] Franklin Square Hospital was also named as a defendant, but the court later granted summary judgment in its favor.

subsequently appealed. On September 25, 2008, this Court affirmed. Dylan petitioned the Court of Appeals, which issued a ruling in *McQuitty v. Spangler*, 410 Md. 1 (2009) ("*McQuitty I*"). The Court reversed this Court and the trial court's grant of JNOV, and remanded the case for further proceedings. *Id.* at 33.

On September 26, 2009, before the completion of the remand proceedings, Dylan died. Appellants, as co-representatives of Dylan's estate, were substituted as proper party plaintiffs in the litigation.

In light of Dylan's death, appellees filed various post-trial motions, requesting a new trial or, in the alternative, reconsideration, as well as a revision of judgment reducing the jury award for Dylan's future medical and rehabilitation expenses. The circuit court denied appellees' post-trial motions, but on January 25, 2010, denied in part and granted in part their motion for remittitur, which was still outstanding from January 2007. The court reduced the jury's award for non-economic damages to the then existing statutory maximum of $500,000, and further reduced the total judgment by fifty percent to reflect Dr. Elberfeld's *pro rata* share of liability, ultimately concluding that the total judgment should be $5,039,257.50. The court also used its discretion to calculate the post-judgment interest from the date of the original judgment, September 27, 2006.

Appellees then filed several renewed and amended motions for a new trial and for a revised judgment. The circuit court denied appellees' second round of motions, and appellees appealed.

The Court of Appeals granted certiorari before any proceedings occurred in this Court and issued *Spangler v. McQuitty*, 424 Md. 527 (2012) ("*McQuitty II*"). In *McQuitty II*, the Court of Appeals affirmed the circuit court's rulings on appellees' motions, thus upholding the reduced judgment, and held that the circuit court had correctly determined that the interest should be calculated from the date of the original judgment. *Id.* at 530-31, 548. On March 23, 2012, Dylan's estate recovered money damages from appellees in complete satisfaction of the judgment in favor of Dylan.

On May 17, 2012, appellants filed a wrongful death action against appellees in the circuit court. On August 1, 2012, appellees filed a motion to dismiss appellants' wrongful death complaint. The circuit court held a hearing on December 6, 2012, and granted appellees' motion to dismiss based on its interpretation of the wrongful death statute. Appellants timely noted the instant appeal on January 4, 2013.

On October 18, 2013, the day that appellees' brief was filed in this Court, the Court of Appeals released its decision in *Mummert v. Alizadeh*, 435 Md. 207 (2013). Appellants argued in their reply brief that *Mummert* controls the disposition of the instant appeal. On November 21, 2013, on our own motion, this Court directed appellees to file a memorandum addressing the application of *Mummert*, and allowed appellants to file a response to appellees' memorandum.

STANDARD OF REVIEW

Appellants ask this Court to review the circuit court's grant of appellees' motion to dismiss. The parties do not dispute any of the material facts, and thus we must determine only "whether the trial court was legally correct." *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 732 (2011) (citations and internal quotation marks omitted). We review *de novo* the trial court's interpretations of Maryland law. *Id.*

DISCUSSION

Maryland's Wrongful Death Act

Maryland's Wrongful Death Act allows an action to be maintained "against a person whose wrongful act causes the death of another." Md. Code (2006, 2013 Repl. Vol.), § 3-902(a) of the Courts & Judicial Proceedings (I) Article ("CJ"). "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." CJ § 3-901(e). The primary beneficiaries of wrongful death actions are the spouse, parent, and child of the decedent. CJ § 3-904(a)(1). In matters like the instant case, where the decedent is a minor child, the Wrongful Death Act does not limit damages to "pecuniary losses," if any, but rather compensates the decedent's parents for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable." CJ § 3-904(d).

Inspired by England's "Lord Campbell's Act," Maryland originally enacted the Wrongful Death Act in 1852 to remedy the common law's unaccommodating treatment of a tort victim's family:

> The common law not only denied a tort recovery for injury once the tort victim had died it also refused to recognize any new and independent cause of action in the victim's dependents or heirs for their own loss at his death. In response to this harsh rule, the English legislature created a cause of action for wrongful death by enacting the Fatal Accidents Act of 1846, also known as Lord Campbell's Act. Every American state subsequently adopted its own wrongful death statute.

Mummert, 435 Md. at 214-15 (citations and internal quotation marks omitted).

Independent Cause of Action: Majority & Minority Views

The extent to which courts have treated a wrongful death claim as independent of the decedent's own personal injury claim has varied across jurisdictions. The Restatement (Second) of Judgments describes how wrongful death actions can be characterized as either derivative or independent from the injured person's own claim:

> If the claim for wrongful death is treated as wholly "derivative," the beneficiaries of the death action can sue only if the decedent would still be in a position to sue. . . . Accordingly, settlement of the decedent's personal injury claim or its reduction to judgment for or against the alleged tortfeasor extinguishes the wrongful death claim against that tortfeasor. Similarly, issue preclusion applicable against the decedent is applicable also against the claimant in the wrongful death action. If, on the other hand, the claim for wrongful death is treated as wholly "independent," the decedent's disposition of his personal injury claim would have no effect on the wrongful death claim. The situation would be as though the injured person and his beneficiaries each had a separate legal interest in his life, assertable by separate action.

Restatement (Second) of Judgments § 46 cmt. b (1982). The Restatement explains the position taken by the majority of courts:

> In the distinct majority of jurisdictions, the rule is that the wrongful death action is "derivative," i.e., an action by the beneficiaries under the wrongful death statute is permitted only if the decedent had a claim at the time of his death. On this interpretation of the applicable wrongful death statute, the injured person and his statutory beneficiaries are in effect successively eligible representatives to bring an action for loss resulting from the tortious act. A judgment in an action by the decedent for his injuries has the same preclusive effects on them as it has on him.

Id.

In 1906, the Court of Appeals declared in *Stewart v. United Electric Light & Power Co.* that the Wrongful Death Act "has created a new cause of action for something for which the deceased person never had, and never could have had, the right to sue; that is to say, the injury resulting from his death." 104 Md. 332, 341 (1906). Thus Maryland adopted the minority position that a wrongful death claim is independent of the decedent's personal injury claim.

The *Mummert* Decision

In *Mummert*, the decedent's husband and three children ("the Mummerts") brought a wrongful death action against Dr. Massoud Alizadeh, the decedent's physician. 435 Md. at 210-11. The Mummerts claimed that Dr. Alizadeh negligently failed to timely diagnose the decedent's colorectal cancer. *Id.* at 211.

Dr. Alizadeh filed a motion to dismiss on the grounds that, even though the Mummerts had timely filed their action within three years of the decedent's death per the statute of limitations in the Wrongful Death Act, their claims were barred, because the statute of limitations for the decedent's personal injury action had expired before the decedent's death. *Id.* The circuit court agreed with Dr. Alizadeh and dismissed the wrongful death action. *Id.* The Court of Appeals issued a writ of certiorari prior to consideration by this Court in order to decide whether the Mummerts' right to bring their wrongful death action was contingent on the decedent's ability to bring a timely personal injury claim at the time of her death. *Id.* at 212.

The Court of Appeals reversed the circuit court's ruling. *Id.* In doing so, the Court reaffirmed the independent nature of wrongful death actions, as announced in 1906 in *Stewart*:

> **[W]e have long held that the Legislature intended the wrongful death statute to be a new cause of action, separate and independent largely from the decedent's own negligence or other action or a survival action**, meant to preserve an action the decedent had the ability to bring before her death. We explained this distinction:
>
> > [The wrongful death statute] has not undertaken to keep alive an action which would otherwise die with the person, but, on the contrary, has created a new cause of action for something for which the deceased person never had, and never could have had, the right to sue; that is to say, the injury resulting from his death.

Id. at 219-20 (second alteration in original) (emphasis added) (quoting *Stewart*, 104 Md. at 341). Thus, according to the Court, "the wrongful death statute was enacted to allow 'a spouse, parent, or child, or a secondary beneficiary who was wholly dependent on the decedent, to recover damages for his or her own loss accruing from the decedent's death.'" *Mummert*, 435 Md. at 220 (quoting *Eagan v. Calhoun*, 347 Md. 72, 82 (1997)).

The Court, however, recognized that "in some sense" a wrongful death claim is derivative of a decedent's personal injury claim, because the "two actions stem from the same underlying conduct, which must have resulted in the decedent having a viable claim when [he or] she was injured." *Mummert*, 435 Md. at 222. Accordingly, "where certain defenses would bar a decedent's claim, a wrongful death claim brought by the decedent's surviving relatives is also barred." *Id*. at 221. As examples of such defenses, the Court cited to cases involving contributory negligence,[2] assumption of risk,[3] parental immunity,[4] and lack of privity of contract.[5] *Id*. In those instances, the Court stated that "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." *Id*. (quoting *Smith v. Gross*, 319 Md. 138, 144 (1990)).

[2] *Frazee v. Balt. Gas & Elec. Co.*, 255 Md. 627 (1969).

[3] *Balt. & Potomac R.R. v. State ex rel. Abbott*, 75 Md. 152 (1892).

[4] *Smith v. Gross*, 319 Md. 138 (1990).

[5] *State ex rel. Bond v. Consol. Gas, Elec. Light & Power Co.*, 146 Md. 390 (1924).

The Court then distinguished those defenses from the statute of limitations defense, because, "where those defenses apply, the decedent did not have a viable claim *from the outset*." *Mummert*, 435 Md. at 221 (emphasis added). By contrast, the statute of limitations barred an otherwise viable claim of the decedent by the mere lapse of time. *See id*. at 222. The Court concluded:

> That the Legislature's purpose was to create a new and independent cause of action when it passed the wrongful death statute suggests that it did not intend for a statute of limitations defense against the decedent's claim to bar consequently a subsequent wrongful death claim.

Id.

The Court also distinguished cases in which wrongful death actions were barred by the decedent's release of the defendant in his negligence action. *Id.* at 221-22 (approving of the holding in *State ex rel. Melitch v. United Rys. & Elec. Co.*, 121 Md. 457 (1913)). The Court explained:

> A release is distinguishable, however, because a decedent who executes a release has acted affirmatively and purposefully to extinguish the underlying claim. This is different from a statute of limitations defense where there may be no evidence necessarily that the decedent intended to allow the statute of limitations to run out on her claim. Moreover, in our view, whether a release by the decedent bars a wrongful death claim by her beneficiaries depends in part on the sweep of the language of the particular release.

Mummert, 435 Md. at 221-22 (footnote omitted); *see also State ex rel. Cox v. Md. Elec. Rys. Co.*, 126 Md. 300 (1915) (upholding the dismissal of a wrongful death claim where the wrongful death claimants settled previously with the defendant in a separate suit).

Finally, the Court reviewed cases from other jurisdictions interpreting language similar to that in Maryland's wrongful death statute regarding the issue of whether a decedent's failure to bring a timely negligence claim before death would bar a subsequent wrongful death claim. *Mummert*, 435 Md. at 224-26. Although the Court found no clear majority view, it did note two noteworthy differences underlying the split of authority. *Id*. "First, courts in those jurisdictions holding that a wrongful death action is not contingent on the decedent's filing or ability to file a timely negligence claim before death tend to interpret their wrongful death statute, as we do in Maryland, as creating a new and independent cause of action." *Id.* at 225 (citations omitted). "The second major difference underlying the split of authorities is their respective interpretations of the practical outcome of holding that the wrongful death claim is barred." *Id*. at 226. The Court determined that "it would be illogical for, by operation of a statute of limitations that applies to the decedent's separate claim, a wrongful death claim to be time-barred before it can accrue." *Id*. at 227. Therefore, the Court held that under Maryland's wrongful death statute, "a wrongful death claimant's right to sue is not contingent on the decedent's ability to file a timely negligence claim prior to her death." *Id*. at 228.[6]

[6] The *Mummert* Court acknowledged that its holding "may conflict or be inconsistent with a few statements made in earlier opinions by this Court (all of which, however, were *dicta*), as well as the case law relied on by the trial court in this case." *Mummert v. Alizadeh*, 435 Md. 207, 229 (2013). The Court then explicitly disavowed the inconsistent language from its previous holdings in *Smith*, 319 Md. at 143 n.4, and *Philip Morris v. Christensen*, 394 Md. 227, 268 (2006), as well as a portion of this Court's decision in *Benjamin v. Union*

(continued...)

Parties' Contentions

Appellants contend that *Mummert* is dispositive of the matter *sub judice*, because the opinion concluded that there is no requirement that a decedent have a viable cause of action at the time of death in order for his beneficiaries to maintain a wrongful death claim. Appellants argue that

> the holding of the Court of Appeals in *Mummert* has mooted the issue of *res judicata* in this case. The decision in *Mummert* confirmed that wrongful death actions in Maryland are separate and independent claims, and that the statutory definition of "wrongful act" merely requires that the decedent had a viable, actionable claim against the defendant, as Dylan clearly did.

Appellees respond that *Mummert* is not dispositive of matter *sub judice*, nor is its holding as sweeping as appellants suggest. According to appellees, *Mummert*'s holding is limited to the conclusion that a violation of the statute of limitations for the underlying personal injury claim cannot preclude a subsequent wrongful death action. Appellees contend that the Court of Appeals' decision to uphold the preclusive effect of certain defenses barring the underlying claim, as well as settlements and releases, compels this Court to hold that the judgment in Dylan's favor in his personal injury action also bars appellants' wrongful death claim. Specifically, appellees argue that Dylan's pursuit and acceptance of a personal injury judgment qualifies as "affirmative and purposeful conduct" that demonstrated his intent to "affirmatively and purposefully [ ] extinguish the underlying

[6](...continued)
Carbide Corp., 162 Md. App. 173, 189-90 (2005). *Mummert*, 435 Md. at 228-31.

claim," which in *Melitch* barred a subsequent wrongful death claim. *See Mummert*, 435 Md. App. at 221-22 (approving of the holding in *Melitch*, 121 Md. at 457). Furthermore, appellees contend that the "concern of possible double recovery" should foreclose appellants' wrongful death claim, because although appellants would recover damages from the wrongful death action in their individual capacity, appellees could ultimately pay twice for the same injuries arising from the same tortious act.[7]

Both parties overstate the impact of *Mummert* to the case *sub judice*. First, *Mummert* does not mandate a holding in favor of appellants. The *Mummert* Court held that not *all* defenses to a decedent's personal injury claim would bar a subsequent wrongful death action, but did not hold that *every* such defense lost its preclusive effect. 435 Md. at 220-22. The only defense vis-a-vis the decedent's claim that *Mummert* expressly removed from the arsenal of the wrongful death defendant is the expiration of the limitations period in the decedent's personal injury claim. *Id.* at 210, 232. The Court restricted its holding to the facts

[7] In their memo, appellees also argue that appellants' release of Dr. Elberfeld bars appellants' wrongful death claim under *Melitch v. United Rys. & Elec. Co.*, 121 Md. 457 (1913). We decline to consider the release and this argument for three reasons. First, as appellants indicate, appellees did not raise the applicability of the release in the court below and thus waived the issue under Maryland Rule 8-131(a). Second, "appellee[s] ha[ve] not stated that [their] case is exceptional, warranting a review of evidence outside the record that was before the trial court." *Wilson v. Wilson*, __ Md. App. __, __, No. 497, September Term 2014 (filed July 1, 2015), slip op. at 15 n.3 (citation and internal quotation marks omitted). Third, appellees' counsel stated at oral argument before this Court that it was not relying on the release to support its position that the reasoning in *Melitch* bars appellants' wrongful death claim.

before it, and made no specific comment on which other defenses, if any, may no longer preclude subsequent wrongful death actions. *Id.* at 222-32.

The fact that some defenses vis-a-vis a decedent's claim maintain their preclusive effect after *Mummert*, however, does not compel a holding for appellees. Instead, *Mummert* raises the following question relevant to the matter *sub judice*: Is a judgment in favor of the decedent in his personal injury action similar to the defenses that *Mummert* upheld, namely, defenses barring such personal injury action from the outset? In answering that question, we are unpersuaded by appellees' analogy of a pre-existing judgment in favor of Dylan to the defenses upheld in *Mummert*, and conclude instead that the rationale expressed by the Court of Appeals in that case supports a holding in favor of appellants.

Defenses Barring the Underlying Claim

We conclude that a successful judgment in favor of a decedent in a personal injury action is not similar to the defenses upheld in *Mummert* that barred such action. The Court of Appeals distinguished these defenses from the statute of limitations violation in *Mummert* on the grounds that the former foreclosed the defendant's liability such that the decedent never had a viable claim:

> **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.

Id. at 221 (emphasis added) (citation omitted); *see also id.* at 229 ("[W]e held that a wrongful death claim should be dismissed because the decedent lacked privity of contract with the defendant manufacturer and, thus, never had a claim in the first instance."). These defenses preclude wrongful death actions, because the statute's definition of "wrongful act" requires that the defendant have been liable to the decedent at some point. CJ § 3-901(e). In sum, the decedent must have had a viable personal injury claim at the time of the injury. *See Mummert*, 435 Md. at 222.

A judgment in Dylan's favor on his personal injury claim is not a bar to that claim—it is the ultimate validation of the claim. The preclusive effect of such judgment flows from the principles of *res judicata*. Here, *res judicata* does not bar appellants' wrongful death action, because *res judicata* only applies to actions between the same plaintiffs and defendants. *See Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012). In their wrongful death action, appellants are suing in their own right, and for their own injuries, not on behalf of Dylan, as they did in his personal injury action. Accordingly, we hold that the judgment in favor of Dylan in his personal injury action against appellees is not a defense that bars appellants' wrongful death claim.

Dylan's Affirmative Conduct & Possibility of Double Recovery

Next, we reject appellees' argument that Dylan's "affirmative and purposeful conduct" in pursuing a judgment against appellees bars appellants' wrongful death claim. Contrary to appellees' argument, the Court of Appeals in *Mummert* did not speak generally

of "affirmative and purposeful *conduct*," but instead observed that the decedent in *Melitch*, by executing a release, had "acted affirmatively and purposefully to *extinguish the underlying claim*." *Mummert*, 435 Md. at 221-22 (emphasis added). Dylan, on the hand, never extinguished his claim against appellees, but instead actively pursued the claim to the point of judgment.

Finally, regarding the danger of double recovery, we disagree with appellees' contention that, if a wrongful death action is permitted in the instant case, they will pay twice for the same tortious conduct. Instead, in our view, allowing a wrongful death action will result in a single recovery for a double wrong. *Cf. Jones v. Flood*, 118 Md. App. 217, 223-24 (1997), *aff'd*, 351 Md. 120 (1998). We base this view on the *Mummert* Court's emphasis on the independent nature of wrongful death actions and the logical consequences that flow therefrom.

As previously mentioned, the Court stated:

> "[The wrongful death statute] has not undertaken to keep alive an action which would otherwise die with the person, but, on the contrary, has created a new cause of action **for something for which the deceased person never had, and never could have had, the right to sue; that is to say, the injury resulting from his death.**"

Mummert, 435 Md. at 219-20 (alteration in original) (quoting *Stewart*, 104 Md. at 341). Thus *Mummert* indicates that, except in cases in which a decedent released a defendant from all future claims arising out of a particular incident, wrongful death plaintiffs will recover damages to them, not the decedent, arising out of a decedent's death. For example, appellees

speculate about whether appellants could recover economic damages relating to the care of Dylan in their wrongful death action, where Dylan failed to recover such damages in his personal injury action. Damages relating to the cost of Dylan's care, whether recovered or not, accrued *before Dylan's death*, whereas the damages appellants could recover from a wrongful death suit would relate to the injury resulting from death, and thus would begin to accrue *at time of Dylan's death*. *See ACandS, Inc. v. Asner*, 104 Md. App. 608, 645 (1995) (stating that damages in a survival action are limited to the time between injury and death, whereas damages in wrongful death actions compensate persons who are damaged because of a decedent's death), *rev'd on other grounds*, 344 Md. 155 (1996).

We recognize, however, that there exists the possibility for some overlap between damages in personal injury actions and wrongful death actions. For example, loss of future earnings can be recovered in a personal injury action, as well as, in certain circumstances, in a wrongful death suit. *See Jones*, 351 Md. at 130-31. We conclude that the potential existence of an overlap in damages should not bar wrongful death actions filed subsequent to a recovery in a personal injury case. Instead, any overlap between damages can be avoided by the trial court on a case-by-case, damages-by-damages basis.

In taking this approach, we find the reasoning of the Superior Court of New Jersey, Appellate Division in *Alfone v. Sarno* instructive. 403 A.2d 9 (N.J. Super. Ct. App. Div. 1979), *affirmed as modified*, 432 A.2d 857 (N.J. 1981), *overruled on other grounds by LeFage v. Jani*, 766 A.2d 1066 (N.J. 2001). The issue in *Alfone* is identical to the one before

us in the instant appeal: Whether a claim under the wrongful death statute can be maintained "where the deceased during her lifetime had obtained a judgment in a personal injury action against [the] defendant, which was ultimately satisfied, based upon the same negligent acts which allegedly caused the death." 403 A.2d at 10.

New Jersey, like Maryland, takes the "minority approach" of considering a claim under the wrongful death statute to be a separate and independent cause of action. *See id.* at 13. This principle, however, is "qualified [ ] by the strong policy against the recovery of duplicate damages." *Id*. at 15. The New Jersey court explained how such double recovery could occur:

> "After deceased's death, damages under a survival statute are limited to those on account of the period between his injury and death a period that has become defined by the event of death itself. If, on the other hand, deceased recovers before his death, his recovery for permanent injuries will be based, under the prevailing American rule, on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury. Presumably any settlement would reflect the legal liability under this rule. The danger of double recovery becomes clear when it is recalled that any benefits of which the survivors were deprived, by the death, would have come out of these very prospective earnings if deceased had lived. At least in the case of serious and apparently permanent injuries, therefore, there is real danger of double recovery if a wrongful death action is allowed after a recovery or release by deceased during his lifetime."

Id. at 17 (quoting 2 Harper and James, Torts § 24.6 (1956)).

The New Jersey court resolved the possibility of a double recovery as follows:

> We conclude that **an approach crafted to avoid double recovery as to any particular item of damages is fairest** to all and would in

> large measure satisfy those who object to the minority approach. Such an approach is articulated by the Restatement, Judgments 2d, § 92.1(2)(b) (Tentative Draft. No. 3, 1976), as follows:
>
> > **If a wrongful death action is permitted even though the decedent had obtained a judgment for his personal injuries, the judgment precludes recovery of damages in the wrongful death action for such elements of loss as could have been recovered by decedent in his action.**

Alfone, 403 A.2d at 17 (emphasis added).

In *Alfone*, the New Jersey court was not confronted with "the specter of a double recovery," because the damages sought and recovered by the decedent did not overlap with the damages recoverable by her surviving parents and daughter. *Id*. at 18. The New Jersey court stated: "[The decedent] recovered for her pain, suffering and disability, past and future, as well as her incurred and projected medical expenses. *She made no claim for future lost earnings[,] the real wellspring of potential double damage claims*." *Id*. (emphasis added). Therefore, the New Jersey court concluded that the decedent's survivors could maintain an action under the wrongful death statute, notwithstanding the decedent's recovery of a judgment in her personal injury action, and satisfaction thereof. *Id*.

In the matter *sub judice*, there is no "specter of a double recovery." *Id*. Although Dylan recovered damages for the loss of future earnings, appellants cannot recover damages for those earnings in a wrongful death action, because "[p]arents may recover a pecuniary value for the loss of an employed deceased minor child's future earnings, at least to the date the deceased would have become an adult, had he/she lived." Richard J. Gilbert & Paul T.

Gilbert, Md. Tort Law Handbook 169 (3rd ed. 2000) (footnote omitted); *see also Barrett v. Charlson*, 18 Md. App. 80, 86 (1973) (stating that Maryland law has limited "the measure of the pecuniary damages which could be awarded to the parents of a minor child by confining such damages to the services the child could have rendered during its minority only"). Dylan was not employed at the time of his death. Moreover, the only other damages recoverable by appellants in their wrongful death action are solatium damages,[8] which are personal to appellants and not recoverable by Dylan in his personal injury action. *See* MPJI-CV 10:23; *see also Scamardella v. Illiano*, 126 Md. App. 76, 94 (1999). Accordingly, we hold that appellants' wrongful death action is not precluded by a judgment in Dylan's favor in his personal injury action based on the same negligent acts that caused his death.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. APPELLEES TO PAY COSTS.

[8] Solatium damages in the context of the instant case are damages for "the mental anguish, emotional pain and suffering, and the loss of society, companionship, comfort, protection, care, attention, advice, counsel or guidance, a parent has experienced or probably will experience in the future." MPJI-CV 10:23; *see also* CJ § 3-904(d); *Daley v. United Servs. Auto. Ass'n*, 312 Md. 550, 553 n.2 (1988).