IN THE SUPREME COURT OF FLORIDA

JENNIFER RIPPLE, etc.,

Petitioner,

v.

CBS CORPORATION, et al.,

Respondents.
_____/

Case No. SC22-597

L.T. Case No. 4D20-1939

ANSWER BRIEF OF RESPONDENTS CBS CORPORATION, GENERAL ELECTRIC COMPANY, THE GOODYEAR TIRE & RUBBER COMPANY, JOHN CRANE INC., AND WARREN PUMPS, LLC

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STATEMENT OF THE CASE AND FACTS

The common law generally recognizes a spouse's loss of consortium claim—but not when the spouses married after the injury at issue occurred. The marriage before injury rule requires spouses to take each other as they find them and precludes a person from recovering loss of consortium damages by marrying into the cause of action. The lead question presented by this case is whether the Legislature clearly abrogated that common law rule, and authorized marrying into a loss of consortium claim, when the injured spouse dies and the estate seeks loss of consortium damages for the surviving spouse under the Florida Wrongful Death Act. As the Fourth District has repeatedly and correctly held, the answer is no.

Jennifer Ripple and her deceased husband, Richard Counter, married shortly before Counter's death, long after he allegedly experienced decades of asbestos exposures, and even after he was diagnosed with terminal cancer. In the wrongful death action that followed, their marriage's timing led the trial court to reject claims for Ripple's loss of consortium and Counter's adult children's pain and suffering. The Fourth District affirmed as to Ripple but reversed as to the adult children. Counter's estate petitioned for review.

In this Answer Brief, Respondents CBS Corporation, General Electric Company, The Goodyear Tire & Rubber Company, John Crane Inc., and Warren Pumps, LLC (collectively, "Defendants"), will demonstrate that the Fourth District correctly applied Florida law in holding that the Legislature has not abrogated the marriage before injury rule for claims under the Wrongful Death Act. Defendants will also show that the district court did err, however, in departing from the act's text, and invoking judicial estoppel, to hold that where a defendant relies on the marriage before injury rule to bar a spouse from recovering loss of consortium damages, then the decedent's adult children can recover damages under section 768.21(3).

In doing so, Defendants will show that the Initial Brief gets much wrong, from its premises to its conclusion. Ultimately, Defendants will show that, as three different districts have held since 1980, the marriage before injury rule is rife with public policy considerations that are squarely in the Legislature's province to weigh and address. Unless and until the Legislature does so, the judiciary should continue to apply the rule, including in the context of the Wrongful Death Act, and refrain from rewriting the act—as the district court did with section 768.21(3)—to fill any perceived gaps.

Counter's Marriages

Counter married his first wife in 1967. R 2116. They had two daughters. R 2080, 2115-16. The record does not indicate when that marriage ended or when Counter's relationship with Ripple began. The record does reflect that, as of 2015, Counter and Ripple had been in a relationship for decades but had not married. R 1630.

On May 15, 2015, Counter learned he had malignant pleural mesothelioma (R 2107, 2136), a cancer that infects the lining that surrounds the lungs. A physician informed Counter that his condition was terminal. R 2136. Six weeks later, Counter and Ripple married. R 2115.

Counter's Complaint & Death

Three weeks after the marriage, Counter filed suit in the circuit court against 24 defendants. R 1. He claimed that, between 1959 and 1991, he was repeatedly exposed to asbestos fibers while at sea during military service, while working at various industrial plants, and at his own residence. R 19-42. The sources of exposure included asbestos-containing boilers, steam condensers, pumps, insulation, gaskets, and automobile parts such as brakes and

clutches. *Id.* He alleged negligence and defective product claims against each defendant. R 9-13.

As the litigation proceeded, the number of defendants declined, with some reaching settlements or otherwise being dismissed. *See, e.g.*, 483-84, 512-13. That pattern is typical in asbestos litigation, where plaintiffs routinely file suit against large numbers of defendants and narrow the case through settlements and dismissals.

At a deposition taken shortly after the litigation began, when Counter was asked why he and Ripple had recently married, he answered, "I guess legal issues." R 1630. He added, "I thought it was time to get married because I wasn't going to be around much longer." R 1630.

Counter passed away on November 1, 2015, less than four months after he filed his complaint. R 924. The next day, Counter's counsel moved on his behalf for leave to file a complaint for wrongful death. R 924. The trial court granted leave to amend. R 955.

The Wrongful Death Complaints

The first wrongful death complaint, filed just one day after Counter died, made no mention of the Wrongful Death Act and identified "Jennifer Counter" as the personal representative of

Counter's estate. R 928. The complaint included the same negligence and strict liability claims that Counter's complaint asserted, only now against just 13 remaining defendants. R 928-44.

The estate later informed the trial court that Ripple had "since decided to retain her maiden name" and requested leave to amend the complaint to identify herself as Jennifer Ripple. R 957. The trial court permitted the amendment. R 1350.

In February 2017, the Fourth District issued its decision in *Kelly v. Georgia-Pacific, LLC*, 211 So. 3d 340 (Fla. 4th DCA 2017). *Kelly* held that a spouse whose marriage postdates the injury at issue cannot seek loss of consortium damages under the Wrongful Death Act due to the marriage before injury common law rule. Shortly afterwards, Ripple, as personal representative of Counter's estate (hereafter, the "Estate"), requested and received leave to file an amended complaint. R 1432, 1480.

The Estate's amended complaint expressly invoked the Wrongful Death Act and alleged that eight defendants wrongfully caused Counter's death by exposing him to asbestos fibers. R 1574-75. The Estate requested damages for Counter's pain and suffering (¶ 47), medical expenses (¶ 48), funeral expenses (¶ 49), net

accumulations (¶ 50), loss of support and services for Ripple (¶ 51), pain and suffering damages for Ripple (¶¶ 51-52), and, in what the Estate labeled alternatives to loss of consortium damages for Ripple, loss of support and services (¶¶ 53, 55) and pain and suffering damages (¶¶ 53-56) for Counter's two adult daughters. R 1587-88.

The Motion for Judgment on the Pleadings

One defendant, Warren Pumps LLC ("Warren"), responded to Ripple's amended complaint by filing an answer (R 1605-30) and moving for judgment on the pleadings (R 1657-63). Warren's answer expressly asserted that Ripple "***is a survivor*** under the Wrongful Death Act" (R 1625 ¶ 56) (emphasis added), but could not recover loss of consortium damages because she married Counter after his injury. *Id.* ¶ 57. Warren also asserted that "***Ripple is the surviving spouse***" of Counter and thus the adult children could not recover damages under section 768.21(3), for loss of companionship and pain and suffering, because such damages are available only where there is no surviving spouse. R 1626 ¶ 58 (emphasis added). At no point in the answer did Warren assert that Ripple was not Counter's surviving spouse under the Wrongful Death Act.

Warren's motion for judgment on the pleadings presented the same arguments. R 1657-63. As to Ripple herself, Warren relied on the Fourth District's decision in *Kelly* and the fact the relevant alleged exposures all predated the marriage, making her ineligible to recover loss of consortium damages. R 1660-61. As to the adult children, Warren relied on Ripple's presence as a surviving spouse and the statutory requirement that adult children can recover damages under section 768.21(3) only "if there is no surviving spouse." R 1661-62 (quoting § 768.21(3), Fla. Stat.). At no point in the motion for judgment on the pleadings did Warren assert that Ripple was not Counter's surviving spouse under the Wrongful Death Act. The remaining Defendants joined Warren's motion. R 1694, 1711, 1726.

After a hearing (SR 1-23), the trial court followed *Kelly* and granted the Defendants judgment on the pleadings with respect to Ripple's loss of consortium damages. R 1728. The trial court denied the motion without comment as to Counter's adult children. *Id.*

Warren subsequently renewed its arguments regarding the adult children's damages under section 768.21(3) through a motion for partial summary judgment. R 2072. The motion showed that Counter's daughters were 34 and 36 years old at the time of his

death, and thus adults, and that Ripple was Counter's surviving spouse, making Counter's adult children ineligible for loss of companionship and pain and suffering damages under section 768.21(3). R 2074. The remaining Defendants joined the motion. SR 90-91.

After a hearing (SR 24-127), the trial court applied the statute's plain language and entered summary judgment against Ripple on her claims for the adult children's damages under section 768.21(3). R 2257. The trial court's order acknowledged that Ripple was Counter's surviving spouse but ruled that, under *Kelly*, the common law rule prevented her from recovering loss of consortium damages. R 2257. Specifically, the trial court ruled:

> Florida Statutes, section 768.21(3), provides that damages [under that section] are awardable under the Wrongful Death statute for "all children of the decedent if there is no surviving spouse . . . ." As there is a surviving spouse here, the defendant contends that the adult children are barred from recovery. . . . Notwithstanding the significant practical effect of the requested ruling, this trial court is bound by Kelly and the plain language of the statute. Therefore, ***as there is a surviving spouse, albeit a spouse who is herself barred from recovery pursuant to* Kelly**, an adult child is barred from recovery [under section 768.21(3)] pursuant to the plain language of section 768.21(3) of the Wrongful Death Act.

R 2257 (emphasis added).

The Estate's Abandonment of Its Remaining Claims

At that point, the Estate still had claims pending for numerous forms of damages, including lost support and services for the adult children, medical expenses, funeral expenses, and net accumulations. R 1587-88. However, the Estate declined to pursue those damages and instead filed a notice dismissing without prejudice "all claims remaining in this action." R 2261. The Estate then asked the trial court to enter final judgment in Defendants' favor so it could appeal the earlier rulings. R 2262. The trial court did so, and the Estate appealed to the Fourth District. R 2271, 2275.

The Fourth District Appeal

On appeal, the Estate asked the Fourth District to recede from *Kelly*. 4DCA R 99. The Estate urged the court instead to follow the Fifth District's subsequent decision in *Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212 (Fla. 5th DCA 2018), which held that, notwithstanding the marriage before injury rule, a spouse could recover loss of consortium damages under the Wrongful Death Act even if the marriage postdated the underlying injury. 4DCA R at 99-116. *Domino's Pizza* certified conflict with *Kelly*, but the defendant in *Domino's Pizza* chose not to seek review in this Court. *Id.* at 114.

The Estate also argued that, if the Fourth District did not recede from its decision in *Kelly*, then section 768.21(3) should nonetheless be "liberally" construed with respect to Counter's adult children. 4DCA R 118. According to the Estate, "[t]he only way to liberally construe section 768.21(3) in a manner consistent with *Kelly* and the remedial purpose of the Act is to conclude that, under this section, only a surviving spouse who is eligible to recover can preclude adult children from recovering." 4DCA R 118-19. The Estate did not argue that Defendants had advocated Ripple was not a surviving spouse under the Wrongful Death Act or that Defendants should be estopped to argue that she was a surviving spouse.

In its decision, the district court unanimously embraced *Kelly* and held that the Wrongful Death Act did not abrogate the marriage before injury rule. 337 So. 3d at 57-58. The district court explained that it favored *Kelly*'s reasoning over the reasoning in *Domino's Pizza* because the latter failed to conduct this Court's prescribed analysis to determine whether a legislative enactment has abrogated the common law. *Id.*

Judge Gerber authored a concurrence in which he agreed with *Kelly* and disagreed with *Domino's Pizza*. *Id.* at 60 (Gerber, J.,

concurring). He suggested, though, that while *Kelly* was "correctly decided on the law," the facts of that earlier case, which involved a nearly 40-year period between the decedent's marriage and the manifestation of his disease, made the common law rule's application in that case an "unfortunate consequence" of the law. *Id.* at 61 (Gerber, J., concurring). He concluded, however, just as *Kelly* itself indicated, that "any attempt to avoid such an unfortunate consequence may come from the legislature only." *Id.* (Gerber, J., concurring).

Regarding Counter's adult children and their claims for damages under section 768.21(3), the district court did not openly embrace the Estate's "liberal" interpretation theory, although the court reached the same end by a different means. While acknowledging that the circumstances in this case do not fit the elements of judicial estoppel under Florida law, *id.* at 59 ("We recognize this case does not fit squarely within the Florida Supreme Court's description of judicial estoppel . . . ."), the district court held that Defendants were judicially estopped from relying on Ripple's surviving spouse status under section 768.21(3) to preclude Counter's adult children from seeking damages under that provision.

According to the district court, when Defendants moved for judgment on the pleadings as to Ripple's damages, Defendants "successfully took the position that the decedent's wife *was not* his 'surviving spouse' under section 768.21(2) of the Wrongful Death Act," but when Defendants subsequently moved for summary judgment on the adult children's damages, "the defendants took the totally inconsistent position that the decedent's wife *was* his 'surviving spouse' under section 768.21(3) of the Wrongful Death Act." 337 So. 3d at 59 (emphasis by district court). The district court utilized this asserted inconsistency as grounds for estoppel but nonetheless held more broadly that whenever a defendant utilizes the marriage before injury rule to bar a spouse from recovering loss of consortium damages under the act, the defendant cannot rely on the spouse's survival to prevent the decedent's adult children from seeking damages under section 768.21(3). *Id.* at 59-60.

The Estate petitioned this Court for review. In their brief on jurisdiction, Defendants asserted that if the Court granted review, then the Court should also review the Fourth District's use of judicial estoppel. This Court granted review.

SUMMARY OF ARGUMENT

Point I.A. The common law can, and sometimes must, inform the proper understanding of a statutory text. A basic rule of textual interpretation is that statutes will not be interpreted as changing the common law unless they effect the change with clarity. The common law will not be found to be displaced further than is clearly necessary. To determine when it is clearly necessary to interpret a legislative text to displace a common law principle, a court should examine whether the statute unequivocally states that it changes the common law, or whether the statute is so repugnant to the common law that the two cannot coexist.

Point I.B. Under the common law, spouses take each other as they find each other in their then-existing state of health and assume the risk of any deprivation from prior disability. Also, spouses are not permitted to marry into a loss of consortium cause of action. As a result, under the marriage before injury rule, a party must have been legally married to an injured person at the time of the injury to assert a claim for loss of consortium caused by that injury.

Florida courts have long recognized this universal common law rule. They have applied it in the context of patent and latent injuries

and have expressly deferred to the Legislature as the appropriate body to decide whether or how the rule should be abrogated.

Point I.C. The modern Wrongful Death Act, enacted in 1972, corrects an anomaly in the common law by which a person who injured another was liable for the other's injuries unless those injuries resulted in death, as personal injury claims abated at death. This Court has long required the act, and its statutory predecessors, to be read in conjunction with the common law.

Point I.D. The Fourth District has correctly determined that the marriage before injury rule applies in wrongful death actions because the Wrongful Death Act does not clearly abrogate the rule. The act does not define the term spouse but permits a spouse to recover pain and suffering damages from the date of injury, which appears to presuppose that the spousal relationship existed at that time. The act expressly preserves defenses asserted directly against a survivor, and the marriage before injury rule is a defense to a loss of consortium claim. Also, all categories of survivors are persons with either a legal or blood relationship to the decedent.

In addition, the common law rule remains in effect for common law claims, and thus, if the act is read to abrogate the rule for

wrongful death actions, then a spouse who marries a person after an injury occurs has no loss of consortium claim unless and until the person dies from the injury, at which point the act authorizes recovery from the date of injury. The absurdity of that result, and all of the foregoing, weigh against finding that the Legislature unequivocally abrogated the rule in wrongful death actions.

Furthermore, the act is not so repugnant to the common law rule that the two cannot coexist. They coexist well, with the rule serving as a check on a spouse's ability to recover loss of consortium damages, just as occurs with common law loss of consortium claims.

Point I.E. The Estate attempts to avoid the abrogation analysis, relying on multiple interpretive canons that do not obviate the need to conduct the abrogation test. When the Estate finally addresses the abrogation analysis, the Estate merely declares, erroneously, that the act's remedial nature calls for the rule's abrogation and that the act and rule cannot coexist.

Point I.F. The Estate misplaces its reliance on cases from other states and mischaracterizes the Fourth District as the only court nationwide to reach its result. The analysis under other states' laws depends on statutory text and other concerns that vary from state to

state. Indeed, the Estate relies on Louisiana cases, when Louisiana is a civil code jurisdiction and does not follow the common law tradition. In addition, the Estate's repeated claims that the Fourth District stands alone nationwide are incorrect. A federal court reached the same result under Illinois law.

Point II. Under the plain text of section 768.21(3), Counter's adult children are not eligible to recover damages under that subsection because Ripple is Counter's surviving spouse. The district court avoided that result by judicial estoppel, but Defendants never made the argument that the district court asserted Defendants made. Defendants have always maintained that Ripple is a surviving spouse who is unable to recover loss of consortium damages because the common law rule continues to apply. The district court's estoppel ruling, which the Estate never urged, is founded on a fiction.

A careful examination of the district court decision shows that, despite the extensive estoppel discussion, the court did not decide the matter based on anything Defendants actually said. The district court instead erroneously rewrote the statute by interpreting it as the Estate requested—with its reference to a surviving spouse meaning a surviving spouse who is able to recover loss of consortium damages.

ARGUMENT

The common law holds that spouses take each other as they find each other and cannot marry into a loss of consortium cause of action. The Fourth District analyzed the Wrongful Death Act in *Kelly* and *Ripple* and correctly determined that it does not unequivocally abrogate that common law rule and permit spouses to marry into loss of consortium damages under the act. The Estate's efforts to argue otherwise are severely misguided.

The Estate frames the analysis incorrectly from the start, treating the matter as merely plain meaning interpretation, when the principal issue is whether the Wrongful Death Act abrogates the common law rule in actions under that act. The Estate also places great emphasis on the erroneous notion the Fourth District stands alone against "every court nationwide that has analyzed the same question," Ini. Br. at 1, and the Estate repeatedly declares, contrary to the record, that Defendants have argued that Ripple is not a surviving spouse under the Wrongful Death Act.

Defendants will present the correct analysis. They will demonstrate that the Legislature has not abrogated the marriage before injury rule in wrongful death actions. Defendants will also

show that the district court erred in utilizing estoppel as a supposed ground to rewrite section 768.21(3) and permit adult children to recover damages under that subsection unless a surviving spouse is able to recover loss of consortium damages. Ultimately, Defendants will demonstrate that this Court should approve the district court's ruling regarding the marriage before injury rule but quash the district court's rewrite of section 768.21(3).

Standard of Review

The questions presented in this proceeding are pure questions of law that involve statutory interpretation. Accordingly, this Court's standard of review is de novo. *E.g.*, *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 119 (Fla. 2021) ("This question is a pure question of law, which we review de novo."); *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021) ("The issue for our consideration involves statutory interpretation and is thus subject to de novo review.").

I. The Fourth District Correctly Ruled, in *Kelly* and *Ripple*, That the Wrongful Death Act Has Not Abrogated the Marriage Before Injury Rule.

A. Governing Principles of Statutory Interpretation & the Presumption against Changing the Common Law

In interpreting a statute, a court's task "is to give effect to the words that the legislature has employed in the statutory text." *Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Advisory Op. to Governor re Implementation of Amend. 4, the Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). "[T]he goal of interpretation is to arrive at a 'fair reading' of the text by 'determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.'" *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 947 (Fla. 2020) (quoting Scalia & Garner, *Reading Law* at 33).

This case focuses on the interplay of a legislative enactment and the common law. "[T]he common law can, and sometimes must,

inform the proper understanding of a statutory text." *C.N. v. I.G.C.*, 316 So. 3d 287, 290 (Fla. 2021).

"A basic rule of textual interpretation is that 'statutes will not be interpreted as changing the common law unless they effect the change with clarity.'" *Peoples Gas Sys. v. Posen Constr., Inc.*, 322 So. 3d 604, 611 (Fla. 2021) (quoting Scalia & Garner, *Reading Law* at 318). More particularly, "[i]t is a well-settled rule of Florida statutory construction that '[s]tatutes in derogation of the common law . . . will not be interpreted to displace the common law further than is clearly necessary.'" *Id.*, 322 So. 3d at 611 n.5 (quoting *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1048 (Fla. 2008)).

As this Court explained in *Essex*, "[a] statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." *Essex*, 985 So. 2d at 1048 (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977)); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1078 (Fla. 2001) ("[E]ven where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says

otherwise . . . ."); *Carlile*, 354 So. 2d at 364 ("Statutes . . . will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced."); *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) ("The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard."). The United States Supreme Court interprets federal law in the same manner. *See, e.g.*, *Fed. Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051, 1060–63 (2022) (holding the Foreign Intelligence Surveillance Act did not clearly abrogate the state secrets privilege).

In *Thornber*, this Court expounded on when it is "clearly necessary" to interpret a legislative text to displace a common law principle. The Court held that "[u]nless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *Thornber*, 568 So. 2d at 918. *See also, e.g.*, *C.N.*, 316 So. 3d at 291 (quoting same principle); *Townsend v. R.J. Reynolds Tobacco Co.*, 192 So. 3d 1223, 1231 (Fla. 2016)

(same); *Fla. Dep't of Health & Rehab. Servs. v. S.A.P.*, 835 So. 2d 1091, 1098 (Fla. 2002) (same).

The presumption against changes in the common law is among the stabilizing canons of statutory construction. *See* Scalia & Garner, *Reading Law* at 318. It can be in tension with the negative-implication canon. *See id.* at 319. As is always the case with statutory interpretation, the key remains to view the statute and common law rule at issue in context and arrive at a fair reading. *See, e.g.*, *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) ("It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a 'plain' or 'clear' meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute.").

B. The Marriage before Injury Common Law Rule

Under the common law, "a party must have been legally married to the injured person at the time of the injury in order to assert a claim for loss of consortium." *Tremblay v. Carter*, 390 So. 2d 816, 817 (Fla. 2d DCA 1980) (citing W. Prosser, Law of Torts § 124 (4th ed. 1971)); *see also, e.g.*, *Green v. A.C. (Am. Pharm. Co.)*, 935 P.2d

652, 655 (Wash. Ct. App. 1997) ("Courts in this country have unanimously held that a spouse can bring a loss of consortium action only when a marriage exists at the time of the tortious conduct and the resultant injury."); *cf. Stager v. Schneider*, 494 A.2d 1307, 1315 & n.9 (D.C. Ct. App. 1985) (noting that two exceptions to this unanimity were two federal district court decisions purporting to apply state law, which decisions were subsequently rejected by courts of those two states). In this context, "[c]onsortium includes not only sexual relations, but also services, comfort and companionship." *Tremblay*, 390 So. 2d at 817.

Two policy reasons support the common law rule: "(1) 'a person should not be permitted to marry a cause of action' and (2) 'one takes a spouse in the then existing state of health and thus assumes the risk of any deprivation resulting from prior disability.'" *Green*, 935 P.2d at 655 (quoting *Stager*, 494 A.2d at 1315). The rule has also been defended on grounds that "[n]ot every loss can be made compensable in money damages, and legal causation must terminate somewhere." *Tong v. Jocson*, 142 Cal. Rptr. 726, 727 (Cal. Ct. App. 1977) (quoting *Suter v. Leonard*, 120 Cal. Rptr. 110, 111 (Cal. Ct. App. 1975)).

In *Tremblay*, the Second District considered whether a plaintiff who married her spouse nine days before filing a loss of consortium suit could maintain that action when the accident causing his injuries occurred months earlier. *Tremblay*, 390 So. 2d at 816. The plaintiff asserted that the couple had been in an exclusive relationship and were discussing marriage at the time of the accident.

Writing for the Second District, then-Judge Grimes rejected that "emerging social trends" justified abandoning the common law rule, explaining that when a person receives an injury, "[b]rothers and sisters and even close friends are likely to be emotionally affected, but no one suggests that these persons have a cause of action." 390 So. 2d at 818. *Tremblay* held that "[t]here has to be a line drawn somewhere, and absent legislation it would be improvident for this court to extend it." *Id.* *Tremblay* thus declined to abandon the marriage before injury rule by judicial decree.

Fifteen years later, in *Fullerton v. Hospital Corporation of America*, 660 So. 2d 389 (Fla. 5th DCA 1995), the Fifth District addressed whether the judiciary should create an exception to the common law rule for latent injuries. The plaintiff's spouse in *Fullerton* experienced radiation exposures while working at a

hospital. Years later, the plaintiff and the spouse married, and years after the marriage, the spouse developed thyroid cancer. The plaintiff filed suit against the hospital for loss of consortium, claiming that the hospital wrongfully caused his wife's cancer through the radiation exposures that predated the marriage.

Fullerton affirmed the claim's dismissal based on the marriage before injury rule. The Fifth District held that Florida courts are required to follow the common law rule and rejected the plaintiff's request to create a latent injury exception. Like the Second District in *Tremblay*, the Fifth District expressly left questions of whether to modify the common law rule for the Legislature to determine. *Id.* at 391 ("In the absence of any statutory law on this point, Florida courts are required to follow the common-law rule.").

Thus, under the common law, a spouse who married an injured person after the injury occurred cannot bring a claim for loss of consortium damages based on that injury. To allow otherwise would contravene the notion that spouses take each other as they find them and improperly permit a spouse to marry into a loss of consortium cause of action.

C. The Wrongful Death Act

Under the common law, a person's right to sue for personal injuries terminated upon death, leading to "the anomaly that a tortfeasor who would normally be liable for damages caused by his tortious conduct would not be liable in situations where the damages were so severe as to result in death." *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983). Florida's modern Wrongful Death Act, sections 768.16–.26, Fla. Stat., remedied this "paradox" in 1972 by "creating an independent cause of action for the decedent's survivors." 445 So. 2d at 1012. The decedent's estate may bring the action for the benefit of the decedent's statutorily defined survivors, as well as for the benefit of the estate. § 768.20. *See also Sheffield*, 329 So. 3d at 121 ("[I]t is more appropriate to say that a personal representative brings a 'wrongful death claim . . . based on alleged negligence,' . . . or "a negligence-based wrongful-death cause of action,' . . . than to say that the personal representative prosecutes the decedent's cause of action.").

The Wrongful Death Act permits survivors to recover the value of lost support and services from the date of the decedent's injury to the date of death and future loss of support and services from the

date of death. § 768.21(1), Fla. Stat. The act defines survivors to mean the decedent's spouse, children, parents, and, under certain circumstances, blood relatives and adoptive brothers and sisters. § 768.18(1). The act also permits a surviving spouse to recover for loss of companionship and protection and for pain and suffering "from the date of injury." § 768.21(2).

As originally adopted, the act permitted the decedent's minor children to recover for lost companionship, instruction, and guidance, and for pain and suffering, also "from the date of injury." § 768.21(3), Fla. Stat. (1972). In 1990, the Legislature amended the act to permit the same recovery by "all children of the decedent if there is no surviving spouse," except in medical malpractice cases. *See* Ch. 90-14, § 2, Laws of Fla. (1990) (amending § 768.21(3), (8), Fla. Stat. (1990)). The medical malpractice exception remains in place today. § 768.21(8).

Since its enactment in 1972, the Wrongful Death Act has expressly recognized that defenses may be applicable to claims made on behalf of particular survivors. *See* § 768.20, Fla. Stat. (1972). Thus, the act provides that "[a] defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted

against the survivor, but shall not affect the recovery of any other survivor." § 768.20. Before the Legislature completely revamped the wrongful death act in 1972, the act's statutory predecessor similarly provided that a person entitled to recover in a wrongful death action may recover "such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; provided, that any person or persons to whom a right of action may survive under the provisions of this act shall recover such damages as by law such person or persons are entitled in their own right to recover . . . ." *See* § 768.02, Fla. Stat. (1971).

This Court has long recognized that legislative texts should be read in conjunction with the common law. Thus, for example, in *Nolan v. Moore*, 88 So. 601, 81 Fla. 594 (1920), the Court interpreted a predecessor wrongful death statute to incorporate the common law regarding respondeat superior, even though that doctrine was not mentioned in the statute. 88 So. at 605 ("To say now that in enacting the statute under consideration the Legislature had before them applicable established principles of the common law and drafted and enacted the statute in the light of such principles is to say no more than was said in this case because established principles of the

common law, not changed by statutes, are as we have seen as much a part of our system of jurisprudence as express statutory enactments.").

More recently, although nothing in the Wrongful Death Act states that an estate cannot pursue claims based on injuries that the decedent litigated to conclusion before death, and even though the statutory action is distinct from the decedent's right of action prior to death, this Court held in *Variety Children's Hospital* that "a judgment for or against the decedent in an action for his injuries commenced during his lifetime, or the compromise and release of such an action, will operate as a bar to any subsequent suit founded upon his death." 445 So. 2d at 1012 (quoting Prosser, Law of Torts, § 127). *Variety Children's Hospital* demonstrates that the common law regarding prior litigation can coexist with the Wrongful Death Act, even though the Act makes no mention of prior resolution of the decedent's claim while alive and the result is a complete defense to a claim under the act.

D. The Wrongful Death Act Has Not Clearly Abrogated the Marriage Before Injury Rule.

As the Fourth District held in *Kelly* and *Ripple*, the marriage before injury rule remains in effect and applies to the Estate's claims under the Wrongful Death Act. Under the analysis set forth in *Thornber* and other decisions discussed above, the act did not unequivocally change the common law rule, and the rule is not so repugnant to the act that the two cannot coexist. If anything, the act contemplates the rule's continued operation.

First, the Legislature has not defined the term "spouse" under the Wrongful Death Act. Had the Legislature intended to abrogate the marriage before injury rule in connection with Wrongful Death Act claims, the Legislature could have easily defined a spouse as someone married to the decedent at the time of death, regardless of whether the marriage predated or postdated the decedent's injury. The Legislature has never done so.

Second, the act permits a spouse to recover pain and suffering damages "from the date of injury." § 768.21(2). That language appears to presuppose that the spousal relationship existed on the

date of injury. Where the marriage postdates the injury, however, the spouse was not a spouse on the date of injury.

Third, the act expressly allows defendants to maintain defenses against individual survivors. § 768.20 ("A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, but shall not affect the recovery of any other survivor."). In this way, far from clearly abrogating the marriage before injury rule, the Legislature expressly contemplated that common law defenses against a survivor such as a spouse may be invoked in defense of claims under the act. Warren pled the rule as a defense in its answer, and the trial court resolved that defense on the pleadings, applying the ruling to all Defendants.

Fourth, the statutorily defined set of "survivors" under section 768.18(1)—spouses, children, parents, and certain blood relatives and adopted brothers and sisters—are all persons with a legal or blood relationship to the decedent. It would be a departure from that statutory framework if persons could recover loss of consortium damages for a period when no legal or blood relationship existed.

Fifth, there is no dispute that the Legislature has not abrogated or modified the marriage before injury rule in the context of common

law loss of consortium claims. *See* Ini. Br. at 49 ("[T]o date, common-law claims, including common-law loss-of-consortium claims, still operate in the exact same way they always have, and are still subject to the exact same common-law rules and limitations."). Thus, if the act is read to abrogate the marriage before injury rule in wrongful death actions, then a spouse who marries a person after that person is injured has no claim for loss of consortium unless and until the person dies from the injuries, at which point the spouse can recover loss of consortium damages "from the date of injury." That is nonsensical, if not absurd, and in all events it weighs against viewing the Wrongful Death Act as clearly abrogating the common law rule. *See Kelly*, 211 So. 3d at 346 ("Finally, it would make no sense to allow a spouse to recover consortium damages under the Wrongful Death Act simply because his or her spouse has died when that same spouse would be prohibited from recovering the same damage under a loss of consortium claim had his or her spouse survived. We are required to interpret the Wrongful Death Act to avoid absurd results such as this."); *cf. State v. Hackley*, 95 So. 3d 92, 95 (Fla. 2012) (explaining that, under certain circumstances, a statute should not be given a sterile literal interpretation that leads to absurd results).

Finally, the marriage before injury rule readily coexists with the Wrongful Death Act. The rule and the act do not require irreconcilable actions or otherwise operate in a manner where the latter is repugnant to the former. Rather, the rule affords defendants grounds to defend an estate's claim for a spouse's asserted loss of consortium damages where the underlying injury predated the marriage. This Court's decision in *Variety Children's Hospital* similarly allows prior litigation outcomes to dispose of entire wrongful death actions, and in *Florida Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964), this Court rejected that liability under the Hazardous Occupations Act, sections 769.01, et seq., was not subject to "recognized" common law exceptions. *Id.* at 297 ("Nor do we believe Chapter 769, F.S., the hazardous occupation statute, has the effect of automatically waiving recognized exceptions to the dangerous instrumentality or inherently dangerous work doctrines."); *see also, e.g.*, *Nolan*, 88 So. at 605–06 (interpreting predecessor wrongful death statute to incorporate use of respondeat superior based on incorporation from common law); *Dep't of Revenue ex rel. Soto v. Soto*, 28 So. 3d 171, 171 (Fla. 1st DCA 2010) (holding that statute governing child support should be read in light of common law

precedent limiting the type of gifts that can be credited against retroactive child support obligations).

Kelly and *Ripple* thus correctly held that while the Wrongful Death Act permits spouses to recover loss of consortium damages, the Wrongful Death Act does not clearly abrogate the marriage before injury rule. *Ripple*, 337 So. 3d at 57-58; *Kelly*, 211 So. 3d at 347; *see also Ripple*, 337 So. 3d at 60 (Gerber, J., concurring) ("[N]o language within the Wrongful Death Act abrogates or supersedes the common law prohibition against 'marrying into a cause of action' for loss of consortium."). In effect, the rule is incorporated into the act and stands firmly alongside it. *See Ripple*, 337 So. 3d at 54 ("Therefore, because the legislature did not explicitly and clearly overrule the common law limitation on loss of consortium when enacting the Wrongful Death Act, the common law marriage before injury rule was incorporated into the Act." (quoting *Kelly*, 211 So. 3d at 345)). *See also, e.g.*, *Variety Children's Hosp.*; *Fla. Power & Light*; *Nolan*; *Soto*.

E. The Estate's Arguments Fail to Show the Common Law Rule's Abrogation.

The Estate's Initial Brief avoids focusing on whether the Wrongful Death Act clearly abrogates the marriage before injury rule. The Estate instead begins its argument with a plain meaning discussion of the Wrongful Death Act's terms (Ini. Br. at 32-37) and various canons of interpretation that the Estate contends should control. *Id.* at 27, 37-44. Only then does the Estate finally address the presumption against changing the common law, at which point the Estate urges that this interpretive canon is somehow inapposite, with barely an effort to apply it. The Estate's arguments wholly miss their mark.

1. Misplaced Reliance on the Omitted-Case Canon

The Estate gives great attention to the omitted-case canon, as described by Justice Scalia and Bryan Garner in *Reading Law: The Interpretation of Legal Texts*. Ini. Br. at 37-41. The Estate relies on *R.R. v. New Life Community Church of CMA, Inc.*, 303 So. 3d 916 (Fla. 2020), which applied that canon and held that "[w]hen a 'statute purports to provide a comprehensive treatment of the issue it

addresses, judicial lawmaking is implicitly excluded.'" *Id.* (quoting Scalia & Garner, *Reading Law* at 96).

R.R. examined a judge-made exception that some courts had engrafted onto Florida's statutory law to delay the accrual of minors' causes of action. The courts that did so aimed to fill a gap in the Legislature's work, and correct a perceived unfairness in what would otherwise be the legislatively prescribed outcome, by creating an exception to the statutory framework regarding accrual. They did so despite section 95.031 expressly setting forth a general rule for accrual that controlled "except as provided" in statute.

This Court rejected such judicial lawmaking. The Court held that the comprehensive statutory framework for the accrual and tolling of statutory limitations periods "leaves no rule for supplemental common law accrual rules." *Id.* at 923.

The courts that recognized the judge-made accrual exception for minors did so to correct a perceived gap in the Legislature's statutory design. Their solution was to supplement the legislative scheme with what was nothing less than judicial legislation. Nothing of the sort has occurred here.

The marriage before injury rule is a common law rule that exists apart from the Wrongful Death Act. It is not a judicial invention created to fill a perceived gap in the act's statutory framework. Indeed, the omitted-case canon recognizes that the fact "a state legislature changes one rule of judge-made tort law does not suggest that the courts' power over the remainder of tort law has been eliminated." Scalia & Garner, *Reading Law* at 96. The exception, of course, is where "the statute purports to provide a comprehensive treatment of the issue it addresses, [and] judicial lawmaking is implicitly excluded." *Id.*

The Estate argues that the Wrongful Death Act falls within that exception, but it plainly does not. The Wrongful Death Act contains no language regarding spouses comparable to the "except as provided in" language discussed in *R.R.* To the contrary, the act expressly and broadly preserves defenses that can be asserted against specific survivors. § 768.20. *Cf. D.H. v. Adept Cmty. Svcs., Inc.*, 271 So. 3d 870, 886 (Fla. 2018) (Canady, dissenting) ("The accrual doctrine should not be manipulated when the Legislature has clearly pronounced what the exceptions are and are not.").

The defendant in *Variety Children's Hospital* defended a wrongful death claim on grounds it had already been sued by the decedent for the injuries at issue and the decedent's cause of action had already been satisfied. On appeal, the Third District reasoned that because the Wrongful Death Act creates a new and independent cause of action, a wrongful death claim cannot be barred by the decedent's prior judgment against the defendant. *See* 445 So. 2d at 1011.

This Court quashed that decision, holding that "a judgment for or against the decedent in an action for his injuries commenced during his lifetime, or the compromise and release of such an action, will operate as a bar to any subsequent suit founded upon his death." 445 So. 2d at 1012 (quoting W. Prosser, Law of Torts, § 127 (4th ed. 1971)); *see also id.* (citing with approval *Warren v. Cohen*, 363 So. 2d 129 (Fla. 3d DCA 1978), which applied common law principles regarding compromise and release to hold that a decedent's execution of a release for the injuries prior to death barred a wrongful death claim based on the same injuries). One dissenting justice would have permitted the wrongful death action to proceed. 445 So. 2d at 1013-15 (Adkins, J., dissenting).

Variety Children's Hospital demonstrates that the Wrongful Death Act is not a comprehensive statute that resolves all related matters by its text alone, leaving no room for common law principles to operate and obviating any analysis under the presumption against changes in the common law. Common law principles may operate, subject to the analysis that governs that specific issue.

Even if the omitted-case canon's focus is tightened, and "the issue" the statute addresses, *see* Scalia & Garner, *Reading Law* at 96, is asserted to be merely when spouses in particular can or cannot recover, the act cannot be said to provide a comprehensive treatment on the issue. In fact, the act does not treat that issue at all. It does not even define who is a spouse, much less comprehensively detail when spouses can and cannot recover.

Thus, the analysis of whether the Wrongful Death Act abrogates a particular common law rule cannot be pretermitted under the omitted-case canon by inaccurately labeling the Wrongful Death Act "comprehensive." The abrogation question should be analyzed under the precepts of the presumption against changes in the common law.

2. Misplaced Reliance on the Negative Implication Canon

Similarly, the Estate misplaces its reliance on the *expressio unius est exclusio alterius* canon, also known as the negative implication canon, which holds that the expression of one thing implies the exclusion of another. *See, e.g.*, *Advisory Op.*, 288 So. 3d at 1080 (defining canon); Scalia & Garner, *Reading Law* at 107 ("In English, it is known as the negative-implication canon."). This canon should be applied with great caution and only when the thing specified reasonably can be thought to be an expression of all that shares in the grant or prohibition involved. *Alachua Cnty. v. Watson*, 333 So. 3d 162, 172 (Fla. 2022); Scalia & Garner, *Reading Law* at 107.

Careful analysis confirms that the negative implication canon has no application in this case. The act specifies the categories of persons who qualify as survivors, § 768.18(1), and spouses are plainly included. The marriage before injury rule adds no new category of survivor. Nor does the rule add to or subtract from any limitations on a spouse's right to recover.

3. Misplaced Reliance on the Interpretive-Direction Canon

Finally, the Estate relies on section 768.17, which provides that the public policy of the state is to shift losses from the survivors to the wrongdoer when a wrongful death occurs and that the act "shall be liberally construed." § 768.17. Such interpretive direction language is of limited use, however, and cannot avoid the Court analyzing the act under the presumption against changes in the common law canon.

The terms of a statute control when interpreting the statutory language. *See Lab'y Corp.*, 339 So. 3d at 323 (holding that the court's task "is to give effect to the words that the legislature has employed in the statutory text"). Moreover, a legislative directive to construe a statute liberally "should be regarded as requiring a fair interpretation as opposed to a strict or crabbed one—which is what courts are supposed to provide anyway." Scalia & Garner, *Reading Law* at 233. Thus, section 768.17 does not obviate the need to consider the presumption against changes in the common law to resolve the abrogation question.

4. Improper Analysis of the Presumption against Changes in the Common Law

At the end of its argument on this point, the Estate finally addresses the presumption against changes in the common law. The Estate's primary contention, however, is that the canon has no application here. Ini. Br. at 46-50. The Estate argues that analyzing whether the common law has been displaced is relevant only when legislation and a common law principle occupy the same space—*i.e.*, govern the same subject matter. Ini. Br. at 46. The Estate argues they do not in this case, and the Estate accuses the Fourth District of fundamentally misunderstanding the relationship between the Wrongful Death Act and the common law. Ini. Br. at 47. It is the Estate, however, that misunderstands.

The precise question to be considered is whether the Wrongful Death Act abrogated the common law prohibition against marrying into loss of consortium causes of action. Case law presents an analysis to answer that question. *See Thornber*, 568 So. 2d at 918; *see also, e.g.*, *C.N.*, 316 So. 3d at 291; *Townsend*, 192 So. 3d at 1231; *Fla. Dep't of Health & Rehab. Servs.*, 835 So. 2d at 1098. That

analysis cannot be avoided on grounds the question need not be asked.

The Estate's reasoning is further flawed by its reliance on the erroneous notion that the common law and the Wrongful Death Act occupy two different "spaces." The Estate focuses on how a wrongful death claim is a new, independent cause of action, not a continuation of a common law claim, *see Sheffield*, 329 So. 3d at 120, which is correct. But the Estate then argues there is not "any overlap between these two sets of claims," Ini. Br. at 48, which is entirely incorrect.

A wrongful death action compensates survivors for their injuries. *Coates v. R.J. Reynolds Tobacco Co.*, 2023 WL 106899, at *4 (Fla. Jan. 5, 2023). Where a spouse can recover, the recovery includes the spouse's loss of consortium damages ***from the date of the decedent's injury***. *See* § 768.21(1), (2). In most if not all cases, the decedent's injury precedes the decedent's death, and thus the act permits recovery of damages that, at least prior to death, would be recoverable through a common law loss of consortium claim for the period between injury and death. *See, e.g.*, *ACandS, Inc. v. Redd*, 703 So. 2d 494, 494 (Fla. 3d DCA 1997) ("We are further persuaded that the legislature did not intend for a spouse's consortium claim to

survive an injured spouse's death from his or her injuries by the fact that the legislature has provided for wrongful death damages that are inclusive of a spouse's loss of consortium damages."); *see also Randall v. Walt Disney World Co.*, 140 So. 3d 1118 (Fla. 5th DCA 2014) (certifying conflict with *ACandS*'s holding that the death abates the loss of consortium claim, at least where the death may have been caused by something other than the decedent's injury). Such pre-death loss of consortium damages are the ***very damages*** that the marriage before injury rule bars where the marriage followed the injury.

As a result, the Estate cannot seriously contend that no overlap exists between a claim for wrongful death damages and a common law loss of consortium claim that derived from the decedent's injury. By Ripple's view of section 768.21(2), she can now recover loss of consortium damages for the time preceding Counter's death—the very damages that the marriage before injury rule prohibited her from seeking prior to his death. In fact, the rule's operation likely explains why Ripple was not a plaintiff in Counter's original complaint in this action. They married three weeks before he filed that complaint, but

the common law rule, as confirmed by *Tremblay*, *Fullerton*, and *Kelly*, precluded her from bringing a loss of consortium claim.

The Estate posits that the Fifth District's decision in *Domino's Pizza* examined the act's text in isolation, without analyzing the presumption against changes in the common law, because "there is no overlap between the statute and the common law, so there is no need to analyze whether the former displaces the latter." Ini. Br. at 47; *see also id.* ("This is, presumably, why the Fifth District did not analyze *Thornber* at all."). As demonstrated above, however, the Estate's premise fails. *Domino's Pizza* erred when it failed to analyze the act under the presumption against changes in the common law.

When the Estate finally addresses the merits of whether the Wrongful Death Act changed the marriage before injury rule, its arguments show why it tries so hard to avoid the analysis. The Estate first contends that the act unequivocally changed that common law rule because section 768.17 declares the act to be "remedial" and that its purpose is to shift the losses from a wrongful death from the survivors to the wrongdoer. Ini. Br. at 52. That contention is a non-sequitur. There is no dispute that the act alters the common law result that a wrongdoer who causes a personal injury is responsible

for the resulting harms unless the injury is so severe it results in death. But section 768.17 says nothing at all, much less anything unequivocal, about the marriage before injury common law rule.

The Estate next argues that the Wrongful Death Act is so repugnant to the marriage before injury rule that the two cannot coexist because the rule results in some spouses not being able to recover loss of consortium damages under the act. Ini. Br. at 53. Once again, the Estate's argument is a non-sequitur. As demonstrated above, in Point I.D., the act and the common law rule can readily coexist. When applicable, the rule simply precludes certain spouses from recovering loss of consortium damages under the act, just as it precludes the same spouses from recovering loss of consortium damages through a common law loss of consortium claim. No repugnancy exists. *See Kelly*, 211 So. 3d at 345 ("Further, there appears to be no reason why the common law requirement—that the injured spouse and the surviving spouse be married prior to the date of injury—cannot coexist with the Wrongful Death Act.").

5. Misplaced Reliance on Case Law from Outside Florida

Referencing a small set of decisions involving a mere five other states, the Initial Brief portrays the Fourth District as standing alone "nationwide" in its conclusion that the Wrongful Death Act did not abrogate the marriage before injury common law rule. Ini. Br. at 8-9. Notably, the Estate makes such arguments only in the fact section of its brief, not the argument section. Defendants will thus give only brief attention to why the Estate's characterizations are incorrect.

First, whether another state's statutes displace the marriage before injury common law rule inevitably turns on a multitude of factors that have no bearing on the correct application of Florida law in this case. For example, the Estate cites multiple decisions involving Louisiana law, but Louisiana is the nation's only civil law state—it does not even follow the common law tradition. The Estate also cites three cases involving New York law, but that state does not allow a spouse to recover loss of consortium damages in a wrongful death claim, so the cases Plaintiff cites necessarily addressed a different issue. *See, e.g.*, *Liff v. Schildkrout*, 49 N.Y.2d 622, 634 (1980) ("The Legislature, by including the pecuniary injury limitation

in its statutory scheme, clearly intended that damages for loss of consortium should not be recoverable in wrongful death actions.").

Also, the Estate's contention that the Fourth District stands alone "nationwide" is incorrect. In *Quirin v. Lorillard Tobacco Co.*, 2015 WL 128052 (E.D. Ill. Jan. 8, 2015), an Illinois federal court entered summary judgment against the representative of a decedent's estate on its claim for a spouse's loss of consortium damages because the spouse married the decedent after the decedent's alleged asbestos exposures. The court relied on the marriage before injury common law rule and applied it to preclude a loss of consortium claim under the Illinois Wrongful Death Act. That act expressly permits a personal representative to recover "damages for grief, sorrow, and mental suffering" of the surviving spouse. 740 Ill. Comp. Stat. 180/2 § 2(a).

F. The District Court Correctly Applied the Common Law Rule.

It remains only to apply the common law rule to Ripple's claim. There is no dispute that the alleged injuries in this case occurred long before Ripple married Counter. *See, e.g.*, *Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 129 (Fla. 2011) (holding that injury occurs

when asbestos fibers are inhaled and become embedded in the lungs without the person's knowledge or consent); *Kelly*, 211 So. 3d at 344 ("In the present case, the decedent's injury occurred when he was exposed to asbestos."); *Fullerton*, 660 So. 2d at 390-91 (holding that injury occurred when spouse who later developed cancer was allegedly exposed to harmful radiation). In fact, there is no dispute Ripple married Counter after his disease manifested and he received a terminal mesothelioma diagnosis.

This case is, therefore, the quintessential example of a concerted effort to marry into a loss of consortium cause of action. Counter admitted he knew he "wasn't going to be around much longer" and that he married Ripple "for legal issues." R 1630. Their knowing and intentional actions contravene the exact public policy that supports the marriage before injury rule. The trial court correctly ruled, and the Fourth District correctly affirmed, that the Estate's claim for Ripple's loss of consortium damages under the Wrongful Death Act fails as a matter of law.

Any other outcome should be at the Legislature's behest. Over a stretch of nearly 40 years, the courts in *Tremblay*, *Fullerton*, and *Kelly* all expressly deferred to the Legislature should it wish to alter

the common law rule. It has not done so. In that time, however, the Legislature amended the Wrongful Death Act to change the outcome in the situation seen in another case, *King v. Font*, 612 So. 2d 662 (Fla. 2d DCA 1993).

King held that the adult children in that case could not recover under section 768.21(3) following their father's allegedly wrongful death because a surviving spouse existed—their mother, who died 10 minutes after the father died, both having been in the same automobile accident. The Second District applied the act as written at the time and declined to interpret "surviving spouse" in a way that permitted the adult children to recover, noting that doing so "might have unexpected ramifications in other areas of the law." *Id.* at 664. The court also suggested that the Legislature consider revisiting the act. *Id.* at 663.

The Legislature later amended section 768.21(3) to provide that where spouses die within 30 days of each other from the same wrongful act or incident, each is considered to have been predeceased by the other. *See* Ch. 2002-44, § 1, Laws of Fla. (2002). The Legislature chose not to address the marriage before injury rule at that time. Nor has it done so since that time. Unless it chooses to

do so, the common law rule remains the law of Florida and should be enforced, regardless of whether loss of consortium damages are sought through a common law claim or a claim under the Wrongful Death Act.

II. The District Court Erred in Departing from the Wrongful Death Act's Text, and Defendants' Arguments, to Hold Counter's Adult Children May Recover Damages Under Section 768.21(3) Based on Judicial Estoppel.

Since the Second District decided *Tremblay* in 1980, Florida courts have emphasized that the legislative branch, not the judiciary, is the proper body to weigh and address the many policy implications surrounding the marriage before injury rule. In the decision below, however, the district court took policymaking into its own hands and became a lawmaker. The court employed a fiction to invoke judicial estoppel—an inapplicable concept the Estate had not argued—and avoid the Wrongful Death Act's plain language not just here but in all cases, holding that whenever a spouse cannot recover loss of consortium damages due to the marriage before injury rule, the decedent's adult children can recover under section 768.21(3). This Court should correct the district court's unauthorized rewrite of the statute.

A. The Statutory Text Precludes Counter's Adult Children from Recovering Damages under § 768.21(3).

The statutory language following the 1990 amendments is straightforward: "Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury." § 768.21(3), Fla. Stat. A later provision in the same statute further qualifies this language. Under subsection (8), "[t]he damages specified in subsection (3) shall not be recoverable by adult children . . . with respect to claims for medical negligence as defined by s. 766.106(1)." § 768.21(8). Thus, adult children can recover damages under section 768.21(3) only if the decedent is not survived by a spouse and the wrongful death claim is not based on medical negligence within the meaning of section 766.106(1).

There is no dispute that Counter was survived by a spouse—Ripple. There is also no dispute that the Estate's claim is not based on medical malpractice. Accordingly, by the statute's clear text, the Estate could seek damages under section 768.21(3) on behalf of

minor children who survived Counter but not adult children who survived him.

From the record, it appears Counter's only surviving children were adults. Thus, in light of Ripple's presence as Counter's surviving spouse, Counter's only children are adults who are not eligible to recover damages under section 768.21(3). No common law rule is implicated in this analysis.

B. To Avoid the Result Required by the Statutory Text, the District Court Employed a Fiction to Support Judicial Estoppel.

The district court was apparently troubled by Counter's adult children being unable to recover due to Ripple's presence as Counter's surviving spouse. To avoid that statutorily required result, the district court employed a fiction. The district court asserted that Defendants prevailed in the trial court on an argument that Ripple was not Counter's surviving spouse under the Wrongful Death Act. The district court then relied on judicial estoppel to bar Defendants from relying on Ripple's marriage to preclude Counter's adult children from recovering damages under section 768.21(3). But Defendants never made any such argument, and Ripple never asserted judicial estoppel.

As discussed at length in the fact statement above, at no point in the trial court or in the district court did Defendants argue that Ripple was not Counter's surviving spouse. To the contrary, Warren's answer expressly pled that Ripple was Counter's surviving spouse—she just could not recover loss of consortium damages because of when she and Counter married. Warren's motion for judgment on the pleadings asserted the same argument. The remaining Defendants joined that motion, and the trial court granted it based on when Counter and Ripple married. R 1728 ("The defendants' Motion For Partial Judgment On The Pleadings is GRANTED as it pertains to the consortium claims of the spouse as she was not married to decedent at the time of the exposure.").

The district court's decision did not identify any language by which Defendants argued that Ripple is not Counter's surviving spouse, for purposes of the Wrongful Death Act or otherwise. The district court twice pointed to Warren's motion for judgment on the pleadings as the supposed source of such an argument, *see* 337 So. 3d at 58-59, but nowhere in that motion can any such argument be found. *See* R 1657-63. Defendants have consistently argued, at all stages, that Ripple is Counter's surviving spouse, but under the

marriage before injury common law rule, she cannot recover loss of consortium damages.

In this Court, the Estate is apparently willing to indulge the district court's fiction. The Initial Brief repeatedly declares that Defendants argued Ripple was not Counter's surviving spouse under section 768.21. *See* Ini. Br. at 21, 63-64. Like the district court, however, the Estate never identifies any specific language to support that characterization.

The Estate's brief then goes further, declaring that the trial court embraced Defendants' supposed argument when it granted Warren's motion for judgment on the pleadings. The Estate expressly argues, "To reiterate, the trial court ruled that Mrs. Ripple is not a 'surviving spouse' within the meaning of section 768.21(2) . . . ." *Id.* at 62. The trial court made no such ruling. The trial court ruled that, under *Kelly*, Counter could not recover because "she was not married to decedent at the time of the exposure." R 1728.

Furthermore, before the district court ruled, the Estate had never argued judicial estoppel. The closest the Estate came to doing so was in its written opposition to Warren's motion for judgment on the pleadings, but even there the Estate never accused Warren (or

Defendants) of having argued that Ripple was not Counter's spouse under the Wrongful Death Act. The Estate argued that "Warren's Motion [wa]s an irreconcilable contradiction" because it asserted both that "Mrs. Counter" was not "eligible to recover for loss of consortium" and that her status as Counter's surviving spouse precluded the adult children from recovering under section 768.21(3). R 1719. The Estate claimed those two positions "cannot be harmonized." R 1719-20.

To its credit, when Warren later moved for summary judgment on the adult children's claim, the Estate made no argument that Defendants had taken inconsistent positions. *See* R 2244-45 (Estate's response). Likewise, when the case reached the district court, the Estate again made no argument that Defendants had taken inconsistent positions, and of course the Estate never mentioned estoppel. The Estate instead invoked the Wrongful Death Act's "remedial" nature and its liberal construction directive, *see* § 768.17, to argue that if Ripple was unable to recover loss of consortium then section 768.21(3) should be read to provide that only a spouse who is eligible to recover loss of consortium damages can preclude adult children from recovering under that subsection.

See 4DCA R 118-19 (Estate's 4DCA Initial Brief), 191-92 (Estate's 4DCA Reply Brief). The Estate's talk of judicial estoppel and Ripple not being a spouse under the act began only after the district court issued its decision in this case.

In all events, whether prompted by the Estate or not, the district court's use of estoppel was based on a fiction. Defendants never argued that Ripple was not Counter's spouse, for purposes of the Wrongful Death Act or otherwise.

C. The District Court Actually Engaged in Erroneous Statutory Interpretation.

A close reading of the district court decision shows that while much is said about Defendants having supposedly taken inconsistent positions in the same case, the district court's ruling regarding the adult children's claim for damages under section 768.21(3) actually turned on nothing more than Ripple's inability to seek loss of consortium damages. Specifically, in a holding that on its face applies to all cases going forward, the district court stated:

> As a matter of first impression, we agree with the estate that, ***if a spouse who had married the decedent after the decedent's injury is barred*** from recovering damages under section 768.21(2) of the Wrongful Death Act (per *Kelly*), ***then the decedent's surviving adult children may recover damages under section 768.21(3)*** of the

> Wrongful Death Act. To rule otherwise would contravene section 768.17, Florida Statutes (2012), providing, "It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat. (2015).

337 So. 3d at 59-60 (emphasis added). That generally applicable holding confirms that the district court was actually engaged in statutory interpretation. The district court effectively adopted Ripple's suggested construction of section 768.21(3)—reading the subsection's reference to a surviving spouse to include only surviving spouses who can recover loss of consortium damages—but disguised the rewrite with talk of estoppel to make the result appear less unfair to Defendants. The district court erred in rewriting the statute.

As the decisions in *Tremblay*, *Fullerton*, and *Kelly* stated, it is up to the Legislature to decide what role the marriage before injury rule should continue to play in Florida law. The role of the courts should be to apply the law as it stands, not to correct perceived gaps in the existing legislative framework.

In deciding that whenever a surviving spouse is barred from recovering loss of consortium damages, the decedent's adult children may recover under section 768.21(3), the district court's decision is not materially different from the improper accrual-delaying decisions

that this Court rejected in *R.R.* As in those decisions, the district court here set out to correct a perceived gap in the legislative design, when the court should simply have applied the law.

In addition, the view that either a surviving spouse or adult children must be able to recover pain and suffering damages in a wrongful death action is an inaccurate oversimplification. By the plain language of section 768.21(8), if the Estate based its claim on medical malpractice, rather than asbestos injuries, then Counter's adult children would not be permitted to seek damages under section 768.21(3) ***regardless*** of Ripple's marriage to Counter or the timing of that marriage. The adult children of persons killed by medical malpractice are surely not less worthy than the adult children of persons killed by other wrongs, and yet the former are never able to recover for their pain and suffering. At the same time, minor children can always recover damages under that subsection, regardless of when the marriage happened, whether a spouse survived, or what caused the allegedly wrongful death.

These are policy matters. They intersect with a host of other considerations, including the societal costs surrounding litigation and the problems of expanding liability. The Legislature makes such

determinations, as this Court explained in *R.R.* *See also, e.g.*, *King*, 612 So. 2d at 663-64 (refusing to depart from statutory language that, at the time, precluded recovery for the decedent's adult children under section 768.21(3) based on the existence of a surviving spouse, even though the decedent's spouse died just 10 minutes after decedent died, both having been in the same automobile accident).

It also bears emphasis that even if Ripple could not recover loss of consortium damages and Counter's adult children could not recover under section 768.21(3), the estate still had other damages claims in this case. The Estate pled claims for lost support, income, and services for the adult children under section 768.21(1), which claims are not affected by the existence of a surviving spouse. *See* R 1588 (¶¶ 53, 55). The Estate also pled claims for medical expenses, funeral expenses, and net accumulations. R 1587-88 (¶¶ 48-50). The Estate waived all of those claims to pursue an appeal.

Policy matters, including whether to retool the Wrongful Death Act, should be left to the Legislature. This Court should quash the portion of the district court's decision that rewrote the reference to a surviving spouse in section 768.21(3) to mean a surviving spouse

who can recover loss of consortium damages. The statute should be interpreted as it is written.

CONCLUSION

For all of the foregoing reasons, the Court should approve the district court's decision to the extent it held that the Wrongful Death Act has not abrogated the marriage before injury rule. Under the rule, Ripple cannot seek loss of consortium damages under the act due to the timing of her marriage to Counter. The Court should disapprove the Fifth District's contrary decision in *Domino's Pizza*.

The Court should also quash the district court's decision to the extent it rewrote section 768.21(3) and held that the spouse referenced in that subsection is a spouse who can recover loss of consortium damages. Ripple is Counter's surviving spouse, and that fact precludes Counter's adult children from seeking damages under section 768.21(3).

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I hereby certify that on February 22, 2023, a copy of this document was filed through the Florida Courts e-Filing Portal and thereby served on all counsel of record, including:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable font and word count requirements set forth in the Florida Rules of Appellate Procedure.

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