SUPREME COURT
STATE OF FLORIDA

No. SC22-597
L.T. 4D20-1939

JENNIFER RIPPLE, ETC.
Petitioner,

v.

CBS CORPORATION, ET AL.,
Respondents.

PETITIONER'S INITIAL BRIEF

Mathew D. Gutierrez, Esq.
THE FERRARO LAW FIRM, P.A.
600 Brickell Ave., Suite 3800
Miami, FL 33131
mgutierrez@ferrarolaw.com

Counsel for Petitioner

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INTRODUCTION

This Court has accepted jurisdiction to resolve a conflict between the Fourth and the Fifth Districts regarding whether the common-law marriage-before-injury rule applies to statutory claims under the Wrongful Death Act ("the Act"). But, in reality, this is not just a conflict between two Florida courts. Rather, the Fourth District stands alone as the only court "in the history of American jurisprudence" to conclude that the common-law marriage-before-injury rule governs a statutory claim under a wrongful death statute whose plain text does not condition recovery on marriage before injury. *See Kelly v. Georgia-Pacific, LLC*, 211 So. 3d 340, 349 (Fla 4th DCA 2017) (Carole, J., dissenting). The Fourth District's novel position has been unanimously rejected by *every court nationwide* that has analyzed this same question, including, most recently, the Fifth District. The conflict presented in this case, therefore, is really between the Fourth District and every other jurisdiction in the country that has addressed this issue.

It is no mystery why the Fourth District stands alone. Its decision to engraft a common-law exception onto the unambiguous text of the Wrongful Death Act amounts to a rewriting of the statute

and a violation of the separation of powers. The plain language of the Wrongful Death Act does not condition a "surviving spouse's" recovery on marriage before injury. It authorizes, without limitation, the decedent's "surviving spouse" to recover specified damages. While the Legislature placed detailed limitations and conditions on other categories of survivors, it placed no limitations or conditions on "surviving spouses."

As this Court recently explained, "[w]hen a 'statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded'" such that the statute "leaves no room for supplemental common law . . . rules." *R.R. v. New Life Community Church of CMA, Inc.*, 303 So. 3d 916, 923 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96 (2012)). "'To supply omissions" from the common law onto a comprehensive statute, the Court explained, "transcends the judicial function.'" That is exactly what the Fourth District did in this case.

For the reasons that follow, this Court should reverse.

THE LEGAL AND FACTUAL BACKGROUND

I. THE COMMON LAW AND THE WRONGFUL DEATH ACT

To analyze this appeal, it is first necessary to understand a brief history of the common law and the Wrongful Death Act.

A. The Common Law

The "common law" is law "developed by judges." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 4 (1997). At[1] common law, in the absence of legislation, the judiciary assumed the power "to *make* the law." *Id.* at 6 (emphasis in original). Common-law judges, therefore, enjoyed wide latitude "to devise" whatever they deemed the "best" and most "intelligent" "rule of law for the case at hand." *Id.* at 6-9.[2]

In Florida, common-law judges devised two pertinent kinds of claims that are available when a person is "injured" by a tortfeasor but does not die from that injury:

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[1] Many authorities refer to the common law as if it were a place, preceding the term with the preposition "at." *Garner's Dictionary of Legal Usage* 181 (3rd Ed. 2009). The legal idiom "at common law" is "used to introduce statements of common-law doctrine . . . ." *Id.*

[2] In this regard, Justice Scalia likened common-law judges to "kings." *Id.* at 7.

(1) a "personal injury" claim by the injured person (e.g., a negligence or strict liability action), which entitles the injured person to recover for personal losses caused by the injury; and

(2) a "derivative" loss-of-consortium claim by the injured person's spouse, which entitles the spouse to recover for loss of "the company, cooperation and aid of the other in every conjugal relation," including "that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage."

6 Fla. Prac., *Personal Injury & Wrongful Death Actions* § 17:2 (2021-2022); *ACandS, Inc. v. Redd*, 703 So. 2d 492, 493-94 (Fla. 3d DCA 1997); *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971).

After devising these causes of action, the Florida judiciary also devised a rule—commonly referred to as the marriage-before-injury rule—that limited the class of spouses who are entitled to pursue a common-law loss-of-consortium claim. Under the so-called marriage-before-injury rule, a spouse may only pursue a common-law loss-of-consortium claim if he or she married the injured person *before* the injury occurred. *Tremblay v. Carter*, 390 So. 2d 816, 817 (Fla. 2d DCA

1980). In crafting this rule, the judiciary's policy objective was to prevent someone from "marrying into" a common-law loss-of-consortium claim. *Id.*

The Florida judiciary adopted one other limitation that is critical to understanding the certified question. Specifically, Florida courts ruled that common-law personal-injury and loss-of-consortium claims are only valid until the injured person dies, at which point these claims extinguish as a matter of law. *ACandS, Inc.*, 703 So. 2d at 494. "The tort of wrongful death," moreover, "did not exist at common law." *Kelly*, 211 So. 3d at 342. Thus, under the common law (before the legislature enacted the Wrongful Death Act), an injured person's death left his or her survivors without recourse, creating an "anomaly" whereby tortfeasors were able to "evad[e] liability" when their "misconduct result[ed] in death." *Id.* at 342-43. This, in turn, placed the full financial burden of the death on the survivors. *Id.*

B. The Wrongful Death Act

To "remed[y]" the common-law "anomaly" whereby a victim's death enabled tortfeasors to evade liability, and to "shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoing." § 768.17, Fla. Stat., the Legislature

enacted the Wrongful Death Act. The Wrongful Death Act provides a "separate and independent cause of action" that accrues when an injured person dies—the precise moment when common-law claims extinguish. *Kelly*, 211 So. 3d at 342. Section 768.19 of the Wrongful Death Act authorizes a decedent's estate to pursue a wrongful death claim "[w]hen the death of a person is caused by the wrongful act" of "any person . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued . . . ." This provision further specifies that the estate shall be authorized to "damages as specified in this act." *Id.*

Section 768.21(1), in turn, authorizes each of the decedent's "survivors" to recover economic damages for "lost support and services from the date of the injury," and section 768.21(2) specifically authorizes the decedent's "surviving spouse" to recover noneconomic damages "for the loss of the decedent's companionship and protection and for mental pain and suffering from the date of the injury." This latter category of statutory damages—for a "surviving spouse's" "mental pain and suffering"—was not available to a spouse in a common-law loss-of-consortium claim under *any* circumstance, such that the Wrongful Death Act created an entirely new category of

damages available to a "surviving spouse." *Philip Morris USA, Inc. v. Rintoul*, 342 So. 3d 656, 675 (Fla. 4th DCA 2022) (Warner, J. dissenting). And critically, the statute's plain text does not condition a "surviving spouse's" recovery, in any respect, on marriage before injury.

The Legislature also contemplated the possibility that a decedent would not have a "surviving spouse." To ensure that such a happenstance would not enable tortfeasors to evade liability for noneconomic damages, section 768.21(3) provides that "if there is no surviving spouse," then surviving children aged twenty-five years or older [3] may recover for their loss of parental companionship, instruction, and guidance, and for their mental pain and suffering. This provision also provides that, in all events, surviving minor children may recover such damages. *Id.*

[3] The statute defines "minor children" as "children under 25 years of age. . . ." § 767.18(2)

II. THE CONFLICTING DECISIONS PROMPTING THIS APPEAL

A. Until 2017, No Court Had Ever Held that the Common-Law Marriage-Before-Injury Rule Applies to Statutory Wrongful Death Claims

In Florida, the common-law marriage-before-injury rule dates back more than sixty years, *Tremblay*, 390 So. 2d at 817[4]. Yet, until 2017, no Florida court had *ever* applied the common-law marriage-before-injury rule to a statutory claim under the Wrongful Death Act. Meanwhile, *every* court nationwide that analyzed the certified question *unanimously rejected* the contention that the common-law marriage-before-injury rule applies to statutory claims under wrongful death statutes whose plain text does not condition recovery on marriage before injury. *Jack v. Borg-Warner Morse Tec, LLC*, 2018 WL 4409800, at *22 (S.D. Wash. Sept. 17, 2018); *Corley v. State Dep't of Health & Hosp.*, 749 So. 2d 926, 941-42 (La. Ct. App. 1999); *Devine v. Blanchard Med. Assoc., Inc.*, 725 N.E.2d 366, 369-70 (Ohio Ct. Com. Pl. 1999); *Aldredge v. Whitney*, 591 So. 2d 1201, 1203-05 (La. Ct. App. 1991); *DuBois v. Cmty. Hosp.*, 150 A.D.2d 893, 893-94 (N.Y. Ct. App. 1989); *Walsh v. Armstrong World Indus., Inc.*, 700 F. Supp.

[4] *Tremblay* noted that, in 1961, the rule was applied in *Parham v. Kohler*, 134 So 2d 274 (Fla. 3d DCA 1961). *Id.*

783, 785-87 (S.D.N.Y. 1988); *Gross v. Elec. Traction*, 36 A. 424 (Pa. 1987); *Lovett v. Garvin*, 208 Se. 2d 838, 839-40 (Ga. 1974); *Radley v. Leray Paper Co.*, 108 N.E. 86, 86-87 (N.Y. 1915).

B. The Fourth District's Decision in *Kelly v. Georgia-Pacific, LLC*

In 2017, the Fourth District ended the nationwide unanimity and became the only court "in the history of American jurisprudence" to conclude that the common-law marriage-before-injury rule applies to a statutory claim under a wrongful death statute whose plain text does not condition recovery on marriage before injury. The Fourth District reached this conclusion in *Kelly v. Georgia-Pacific, LLC*, which ultimately precipitated this appeal. *Kelly* is therefore worthy of careful discussion.

In 1973 and 1974, John Kelly worked a part-time construction job during his summer breaks in high school and was unknowingly exposed to asbestos in the process. *Kelly*, 211 So. 3d at 342. In 1976, two years after his last asbestos exposure, Mr. Kelly married his high school sweetheart, Janis Kelly. *Id.* When they married, neither Mr. Kelly nor Mrs. Kelly had any idea that Mr. Kelly had been exposed to asbestos, and Mr. Kelly had not shown any symptoms of disease. Nor

did he for another thirty-eight years when, in June 2014, he was diagnosed with mesothelioma, an incurable and terminal cancer. *Id.*

On September 17, 2014, Mr. and Mrs. Kelly filed a lawsuit. Mr. Kelly pursued, in pertinent part, common-law personal-injury claims for negligence and strict liability, and Mrs. Kelly pursued loss-of-consortium damages. On August 19, 2015, during the litigation, Mr. Kelly died of mesothelioma. *Id.* On September 14, 2014, Mrs. Kelly, as personal representative of Mr. Kelly's estate, amended the complaint to assert a statutory claim under the Wrongful Death Act, seeking, in pertinent part, damages as Mr. Kelly's "surviving spouse" under section 768.21(1) & (2). *Id.*

The defendants filed a motion to dismiss, arguing that the common-law marriage-before-injury rule applies to statutory claims under the Wrongful Death Act. On this basis, the defendants contended that Mrs. Kelly was ineligible to recover as a "surviving spouse" because "she was not married to Mr. Kelly at the time of his alleged injury," which the defendants argued occurred "in 1973 and 1974" when Mr. Kelly was *unknowingly exposed* to asbestos (rather than when his injury actually manifested itself forty years later). *Id.*

The trial court agreed and entered an order dismissing Mrs. Kelly's claim for damages as a "surviving spouse." *Id.*

In a split decision, the Fourth District affirmed. The *Kelly* majority determined that statute's plain text must be deemed to incorporate—by unwritten implication—the common-law marriage-before-injury rule. *Id.* at 344-45. It began its analysis by noting that a "statute will not displace the common law unless the legislature expressly indicates an intention to do so." *Id.* at 345 (quotation marks and citation omitted). Even though a wrongful-death claim is entirely "separate" and "independent" from a common-law claim, the *Kelly* majority assumed that common-law limitations on common-law loss-of-consortium damages, including the marriage-before-injury rule, apply to wrongful-death claims unless the Wrongful Death Act "superseded" these limitations. *Id.* at 342, 345.

The test for determining whether a statute "supersedes" the common law is set forth in *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990), which holds 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." *Id.* at 345. The

Kelly majority concluded that the Wrongful Death Act did not supersede the common-law marriage-before-injury rule, because it did not expressly say so, and because there is "no reason why the common law" rule "cannot coexist with the Wrongful Death Act," since it "merely limits the circumstances for when the surviving spouse may recover 'consortium-type' damages under the wrongful death statute . . . ." 211 So. 3d at 343-46. On these grounds, the *Kelly* majority held that the common-law marriage-before-injury rule applies to the Wrongful Death Act.

The *Kelly* majority found that this holding was consistent with the Legislature's (unexpressed) intent, reasoning that even though the Wrongful Death Act's plain text does not *expressly* condition a surviving spouse's recovery on marriage before injury, the text shows that the Legislature "anticipated" that the "surviving spouse" would have been married to the decedent before the decedent's injury occurred. In support, the majority noted that, under the Wrongful Death Act, the term "survivors is limited to familial relationships," and damages are "calculated from the date of the "injury." *Id.* at 345-46. From these two premises, the majority concluded that the

Legislature did not "intend" for a surviving spouse to recover damages dating back to an injury that preceded the marriage. *Id.*

Lastly, the majority articulated an "absurdity" rationale, opining that "it would make no sense" to allow a spouse to recover consortium-type damages under the Wrongful Death Act "when that same spouse would be prohibited" at the common law "from recovering the same damages under a loss of consortium claim had his or her spouse survived." *Id.* at 346.

Judge Carole Taylor published a strongly-worded dissent. She began by noting that "no other appellate court in the history of American jurisprudence has come to the conclusion reached by the majority." *Id.* at 349. Unlike the majority, Judge Taylor employed a textualist analysis, emphasizing that because "marriage *at the time of injury* is not a necessary element of the cause of action" under the language of the statute, applying the common-law marriage-before-injury rule to a wrongful death claim "would require us to rewrite the Wrongful Death Act." *Id.* at 347.

Judge Taylor, moreover, disagreed with the majority's *Thornber* analysis, finding that the Wrongful Death Act did "supersede[] the common law" in the sense that it was enacted specifically to "remedy"

the anomalous effects of the common law, and because it "is repugnant" to the common-law marriage-before-injury rule, which, if applied to statutory wrongful death claims, would eliminate an entire category of "surviving spouses" otherwise eligible to recover under the statute's plain text. *Id.* at 347-48. For this reason, she concluded, the two rules could not "coexist" within the meaning of *Thornber*. *Id.*

In addition, Judge Taylor rejected the majority's finding that the statute's text shows that the Legislature "anticipated" that the surviving spouse would have been married to the decedent before the injury, reasoning that the reference to the "the date of injury" in the damages provision "does not provide a limitation as to ***who*** may recover, but rather indicates ***what*** a surviving spouse may recover." *Id.* at 349 (emphasis added).[5]

Finally, Judge Taylor determined the majority's "absurdity" rationale was incorrect because the term "survivors" is "unambiguous" and "[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart

[5] All emphases are added unless otherwise stated.

from the plain meaning of the language which is free from ambiguity." *Id.* (citation omitted).

C. The Fifth District's Decision in *Domino's Pizza, LLC v. Wiederhold*

Following *Kelly*, the Fifth District issued a directly contrary decision in *Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212 (Fla. 5th DCA 2018). *Domino's* presented a similar sequence of events: In the span of roughly one year, a victim was injured, filed a common-law personal-injury lawsuit, married his girlfriend, and then died during the litigation. *Id.* at 216-17. After the victim died, his surviving spouse, as personal representative of his estate, amended the complaint to pursue a statutory wrongful-death claim, seeking damages as the victim's "surviving spouse." *Id.*

The defendants filed motions for summary judgment invoking the common-law marriage-before-injury rule, arguing that the plaintiff was not eligible to recover as the victim's "surviving spouse" because she and her husband "were not married at the time of the injury." *Id.* The trial court rejected the defendants' argument and the case proceeded to trial. *Id.* Ultimately, a jury entered a verdict in favor

of the surviving spouse, awarding her, in pertinent part, statutory damages under section 768.21(2). *Id.*

On appeal, the question presented was identical to the one in *Kelly*: Does the common-law marriage-before-injury rule bar a surviving spouse from recovering under the Wrongful Death Act if he or she was not married to the decedent at the time of the injury?

In a unanimous decision, the Fifth District concluded that the common-law marriage-before-injury rule does not apply to statutory claims under the Wrongful Death Act. In reaching this conclusion, the Fifth District did not conduct a *Thornber* analysis, presumably recognizing there is no need to analyze whether the Wrongful Death Act "displaces" the common-law marriage-before-injury rule, since a wrongful death claim exists independently of a common law claim. Instead, the Fifth District employed a textualist analysis.

The Fifth District noted that although the statute does not specifically define the term "surviving spouse," "that alone does not render the term unclear or ambiguous if the common and ordinary meaning leads to clear and unambiguous results." *Id.* at 219. To discern the "common and ordinary meaning" of "surviving spouse," the Fifth District turned to the dictionary, which defines the term

"survivor" as "'a person who outlives his or her husband or wife.'" *Id.* (quoting *Survivor*, Black's Law Dictionary (9th ed. 2009)). By extension, the Fifth District reasoned, "the common and ordinary meaning of a 'surviving spouse' is a married person who outlives his or her husband or wife." *Id.* at 219. Because "[t]he statute defines 'survivors' as including 'the decedent's spouse' without any other limitation," such as a marriage-before-injury condition, the Fifth District concluded that "[i]t would be inappropriate . . . to read any more into [the statutory definition] than what is plainly there." *Id.* (citation omitted).

Moreover, based on the common and ordinary meaning of "survivor," the Fifth District rejected the related contention that one's status as a "surviving spouse" must be determined on the date of the injury, rather than on the date of the death, because "one cannot be a survivor" before his or her spouse dies. *Id.* In doing so, the Fifth District noted that "if, as posited by the *Kelly* majority, survivorship is determined at the time of injury, then children born or adopted by the decedent after the date of injury would not be considered survivors" and "a spouse who divorces a decedent after the date of injury would be considered a survivor." *Id.* at 220. "This would be

contrary to established precedent holding that such determinations are made at the time of the decedent's death." *Id.*

Finally, the Fifth District explained that it was "unconvinc[ed]" by the *Kelly* majority's conclusion that the Legislature "anticipated" a "surviving spouse" would have been married to the decedent prior to the injury, simply because the definition of "survivors" is limited to "familial relationships" or because damages are calculated from the date of the "injury." *Id.* at 220-21. The Fifth District: (1) reasoned that "although the definition of 'survivors' is limited to familial relationships, nothing in that definition limits those terms to familial relationships *existing at the time of injury*; and (2) "agree[d] with the *Kelly* dissent that the damages provisions do not limit who may recover, but rather, only limits what a survivor may recover." *Id.*

The Fifth District certified "express and direct conflict with *Kelly*." *Id.* However, the defendants in *Domino's* did not pursue an appeal to the Supreme Court of Florida, leaving an active conflict between the Fourth and Fifth Districts, which led to this appeal.[6]

[6] After *Domino's*, the Western District of Washington likewise rejected the *Kelly* decision. *Jack*, 2018 WL 4409800, at *22.

D. This Case: The Fourth District Reaffirms its Commitment to *Kelly*

The facts germane to the certified question are not in dispute. From the 1950s through the 1990s, Richard Counter, the decedent, was exposed to "asbestos," a toxic substance that, as explained above, causes mesothelioma, a rare form of incurable cancer in the lining of the lungs. R. 1246, 1248, 1462-69; *W.R. Grace & Co. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 2d DCA 1994).

On May 22, 2015, Mr. Counter was diagnosed with mesothelioma. R. 1446, 2244. On July 4, 2015, Mr. Counter married Mrs. Ripple, his girlfriend of thirty-four years. 1131-32, 1157, 1162, 1238, 1446, 2244. On July 23, 2015, Mr. Counter filed a common-law personal-injury action alleging that the defendants [7] were negligent and strictly liable for manufacturing, selling, or distributing asbestos-containing products that caused his mesothelioma. R. 1-

[7] The defendants here include CBS Corporation, General Electric Company, The Goodyear Tire & Rubber Company, John Crane, Inc., and Warren Pumps, LLC (collectively, "Defendants"),

54. On November 1, 2015, Mr. Counter died from mesothelioma. R. 924, 949, 1446.[8]

On April 11, 2017, Mrs. Ripple, as personal representative of Mr. Counter's estate, amended the complaint to replace the common-law personal-injury claims with a statutory claim under the Wrongful Death Act. R. 1446-75. In the operative complaint, Mrs. Ripple sought, in pertinent part, damages as Mr. Counter's "surviving spouse" under section 768.21(1) & (2). R. 1447, 1459-60. Alternatively, Mrs. Ripple sought damages for Mr. Counter's surviving adult children ("the Surviving Adult Children") under section 768.21(3). R. 1447, 1460. Mrs. Ripple made this latter request "in the alternative" recognizing that section 768.21(3) only authorizes surviving adult children to recover such damages "if there is no surviving spouse."[9]

On May 23, 2017, Defendants filed a motion for judgment on the pleadings, advancing two arguments. First, Defendants argued,

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[8] The latency period between exposure to asbestos and the onset of mesothelioma is typically between 20 and 40 years. *Williams v. Am. Optical Corp.*, 985 So. 2d 23, 30 (Fla. 4th DCA 2008).

[9] Mrs. Ripple also sought, in the alternative, damages for the Surviving Adult Children under section 768.21(1) for loss of the decedent's support and services. R. 1460.

pursuant to *Kelly*, that Mrs. Ripple was not a "surviving spouse" eligible to recover under section 768.21(2) because she "and Mr. Counter were not married at the time of Mr. Counter's alleged exposure to asbestos . . . ." R. 1657-63.[10] Second, Defendants argued that Mrs. Ripple *was* a "surviving spouse" within the meaning of section 768.21(3), such that her existence precluded Mr. Counter's adult children from recovering. R. 1661-62.

On October 31, 2018, Mrs. Ripple filed a response contending that *Kelly* was wrongly decided and, for the reasons explained in *Domino's*, asking the trial court to conclude that the common-law marriage-before-injury rule does not bar her from recovering as a "surviving spouse" under the Wrongful Death Act. R. 1718-19, 1722-23. Mrs. Ripple further argued that Defendants' contention with respect to the Surviving Adult Children was an "irreconcilable contradiction," because it cannot be the case that Mrs. Ripple is Mr. Counter's "surviving spouse" under section 768.21(3) if she is not his "surviving spouse" under section 768.21(2). R. 1719, 1723-24. Thus,

[10] The motion was filed by Defendant Warren Pumps, LLC. The remaining defendants filed notices of joinder in the motion. R. 1664-65, 1694-95, 1711-14, 1726-27.

Mrs. Ripple argued that if the trial court granted Defendants' motion as to *her* claim as a "surviving spouse," it should deny the motion as to the Surviving Adult Children. R. 1719, 1723-24.

On December 4, 2018, the trial court conducted a hearing on Defendants' motion for judgment on the pleadings. S.R. 1-24. On January 26, 2019, the trial court granted the motion as to Mrs. Ripple, finding that, under *Kelly*, she was barred from recovering as a "surviving spouse" because she "was not married to decedent at the time of the exposure." R. 1728. The trial court denied the motion as to the Surviving Adult Children. R. 1728.

On June 2, 2020, Defendants filed a motion for summary judgment as to the Surviving Adult Children, again arguing that because "Mr. Counter is survived by his wife," his Surviving Adult Children are precluded from recovering. R. 2074-75. On June 19, 2020, Mrs. Ripple filed a response again asking the trial court not to accept Defendants' irreconcilable contradiction. R. 2244-56. Doing so, Mrs. Ripple noted, would preclude *all* of Mr. Counter's survivors from recovering noneconomic damages, which is what the Wrongful Death Act was enacted to prevent. R. 2245.

On June 22, 2020, the trial court conducted a hearing on Defendants' motion for summary judgment. S.R. 90-97. Later that same day, the trial court entered an order granting it, ruling that because "there is a surviving spouse, albeit [one] . . . who is herself barred from recovery pursuant to *Kelly*," Mr. Counter's adult children were also barred from recovering. R. 2257.

On July 30, 2020, the trial court entered final judgment pursuant to the foregoing orders. R. 2271-74. Mrs. Ripple timely appealed to the Fourth District. R. 2275-90.

On March 30, 2022, the Fourth District affirmed the trial court's ruling that the common-law marriage-before-injury rules applies to statutory claims under the Wrongful Death Act and, therefore, that Mrs. Ripple is not eligible to recover as a "surviving spouse" under the statute. *Ripple v. CBS Corp.*, 337 So. 3d 45 (Fla. 4th DCA 2022). The Fourth District explained that it "favor[ed] [its] reasoning in *Kelly* over the Fifth District's reasoning in *Domino's*, because in *Domino's*, the Fifth District neither mentioned *Thornber* nor conducted the required *Thornber* analysis" to determine whether the Wrongful Death Act supersedes the common-law marriage-before-injury rule. *Id.* at 57-58. According to the Fourth District, "[t]hat approach

overlooked the principle . . . that statutes in derogation of the common law 'will not be interpreted to displace the common law further than is clearly necessary." *Id.* Based on this, the Fourth District "certif[ied] conflict" to this Court. *Id.*

The Fourth District, however, reversed the entry of judgment against the Surviving Adult Children, concluding that the trial court erred in determining that "the decedent's wife was his 'surviving spouse' under section 768.21(3)" while also finding that she "was not his 'surviving spouse' under section 768.21(2) . . . ." *Id.* The Fourth District agreed that this was an "irreconcilable contradiction," which the trial court could not harmonize merely by "describing [Mrs. Ripple] as [Mr. Counter's] 'surviving spouse, albeit a spouse who is herself barred from recovery pursuant to *Kelly*.'" *Id.*

In reaching this conclusion, the Fourth District relied on "the doctrine of judicial estoppel," which "'prevent[s] litigants from taking totally inconsistent positions in separate judicial . . . proceedings," *Id.* (quoting *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001)). The Fourth District acknowledged that this case did "not fit squarely within" this Court's description of that doctrine "because here the defendants took inconsistent positions . . . within a single

action or proceeding, rather than in separate actions or proceedings." *Id.* at 59. The Fourth District, however, "consider[ed] that distinction to be insignificant in this case, because the prejudicial effect is the same," and cited a case from the Supreme Court of the United States authorizing application of the doctrine of judicial estoppel when a party asserts inconsistent positions in the same case, *see id.* (citing *Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

E. The Fourth District's Decision in *Philip Morris USA, Inc. v. Rintoul*

After publishing its opinion in this case, the Fourth District issued a split decision in *Philip Morris USA, Inc. v. Rintoul*, 342 So. 3d 656 (Fla. 4th DCA 2022), again reaffirming its commitment to *Kelly* and certifying conflict with *Domino's*. *Id.* at 669, 670. Judge Martha Warner, however, issued a dissent, concluding that the *Kelly* majority opinion was incorrect and explaining that she "would adopt . . . Judge Taylor's dissent in *Kelly*." *Id.* at 674. Like Judge Taylor, Judge Warner's dissent focused on the text of the statute, concluding that "limit[ing] the spouse's damages because of the date of the marriage adds qualifications to the statutory language not present within its terms." *Id.* at 675. "It is within the Legislature's prerogative," she

continued, "to set the elements of a cause of action," such that "[i]f the Legislature intended to bar recovery for spouses who did not marry the decedent prior to the injury, even though the spouses were married at the date the cause of action accrued, i.e. the death, let the Legislature say so." *Id.* at 676. Accordingly, she reasoned, under the doctrine of the separation of powers, "[i]t is not the place of the judiciary to disregard the plain language of the Act or to add words to alter its express purpose." *Id.*

Judge Warner further found the *Kelly* majority's "reliance on *Thornber* to be misplaced." *Id.* at 675. She explained that "[t]he statute in *Thornber* acted on an existing common law principle, and the supreme court found that both the common law and the statute could co-exist, because the statute did not expressly exclude the common law." *Id.* This is in "[c]ontrast" to "the Wrongful Death Act," she continued, which "created a cause of action where no cause of action at common law existed," such that, unlike the statute in *Thornber*, it "replaced" or "repudiated" the common law 'completely'" in terms of the effect of an injured person's death. *Id.*

Finally, Judge Warner noted that *Kelly* is contrary to the stated purpose of the Wrongful Death Act, since, in *Rintoul*, "[a]pplication of

the marriage before injury rule to the Act prevents cost shifting to the wrongdoer as intended by the Legislature and allows a wrongdoer to evade liability." *Id.* at 676.

SUMMARY OF ARGUMENT

The plain language of the Wrongful Death Act does not condition a "surviving spouse's" recovery on marriage before injury. It authorizes, without limitation, the decedent's "surviving spouse" to recover under section 768.21(1)-(2). Because the term "surviving spouse" is unambiguous, and does not depend on marriage before injury, Mrs. Ripple is clearly Mr. Counter's "surviving spouse" within the meaning of the text.

This is confirmed by the pertinent interpretive canons and textual clues. "When a 'statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded'" and the statute "leaves no room for supplemental common law . . . rules." *R.R.*, 303 So. 3d at 923 (quoting Scalia & Garner, *supra*, *at* 96). The Wrongful Death Act is comprehensive and, through detailed provisions and stipulations, places numerous limitations and conditions on various categories of statutory "survivors" specifying who may recover and under what conditions. The statute,

however, places no limitations or conditions on "surviving spouses." Under *R.R.*, the statute's comprehensiveness leaves no room for supplemental common law rules.

The same is true under the *expressio unius* canon. The statute's inclusion of detailed limitations and conditions on numerous categories of "survivors," and omission of any limitations or conditions on "the surviving spouse," implies the exclusion of any limitations and conditions on "the surviving spouse."

The Fourth District's holding contravenes the Legislature's mandate to liberally construe the statute to effectuate its remedial purpose of shifting the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. The Fourth District's strict, rather than liberal, construction frustrates, rather than effectuates, the statute's remedial purpose.

The canons of construction and textual clues cited by the Fourth District do not support its holding. The Fourth District reliance on *Thornber's* presumption against a change in the common law was misplaced. Mrs. Ripple's ability to recover as a "surviving spouse" under the Wrongful Death Act does not depend on the conclusion that the statute changes anything about the common-law

marriage-before-injury rule. The rule simply does not apply, because it governs common-law loss-of-consortium claims, which are "separate and independent" from a statutory claim for wrongful death. The Fourth District's assumption that the limitations that govern common-law claims automatically govern wrongful-death claims unless the Wrongful Death Act changed them was erroneous.

Even if the *Thornber* presumption was applicable, the Fourth District misapplied it because the statute meets both *Thornber* tests. As to the first *Thornber* test, the statute states, unequivocally, that it is "remedial" in nature. By definition, a remedial statute is designed to correct an existing law or to give a party a remedy for a wrong where he had none before. By doing just that, the statute "changed" the outcome of death at common law, in satisfaction of the first *Thornber* test.

The second *Thornber* test is also satisfied. The Wrongful Death Act is so repugnant to the common-law marriage-before injury rule that the two cannot coexist because while the statute authorizes, without limitation, any "surviving spouse" to recover damages under section 768.21(2), the common-law rule precludes an entire category of "surviving spouses" from recovering such damages.

The Fourth District's reliance on the "absurdity doctrine" was also misplaced. It concluded that it would be absurd "to allow a spouse to recover consortium damages under . . . when that same spouse would be prohibited from recovering the same damage under a loss of consortium claim had his or her spouse survived." But the result makes perfect sense in light of the Legislature's stated public policy goal of remedying the anomaly of the common law by shifting the losses resulting from the survivors of the decedent to the wrongdoer. The very purpose of the statute was to create an avenue for relief that did not exist at common law. In any event, this is not the kind of "absurdity" that justifies changing unambiguous text. The absurdity must consist of a disposition that no reasonable person could intend; in other words, it must be one where the absurdity is so monstrous that all mankind would, without hesitation, unite in rejecting the application. Here, quite the opposite is true: every court in the country, other than the Fourth District, has **accepted** the very outcome that the *Kelly* decision labels absurd. Finally, the Fourth District's absurdity rationale was erroneous because it was not intended to correct any "technical or ministerial error," but rather to make the statute more reasonable (in the Fourth District's view).

The Fourth District also erred in concluding that the Legislature "anticipated" that the "surviving spouse" would have been married to the decedent before the decedent's injury. The fact that the term "survivors" is limited to familial relationships, and that damages are calculated "from the date of the injury" does not evidence such anticipation. Nothing in the statute limits survivorship to familial relationships at the time of injury, and the damages provision does not provide a limitation as to who may recover, but rather indicates what a surviving spouse may recover.

Finally, the Fourth District's holding is unconstitutional. Its decision to engraft the common-law marriage-before-injury rule onto the unambiguous and comprehensive statutory text of the Wrongful Death Act violates the constitutional separation of powers.

If the Court affirms the Fourth District's conclusion that Mrs. Ripple is not a "surviving spouse" under sections 768.21(1) & (2), then it should also affirm the Fourth District's conclusion that Mrs. Ripple is Not a "surviving spouse" under section 768.21(3), such that Mr. Counter's Surviving Adult Children may recover.

STANDARD OF REVIEW

The standard of review applicable to orders granting motions for judgment as a matter of law based on pure legal questions and statutory construction is *de novo*. *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 666 (Fla. 2015); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); *Miller v. Finizio & Finizio, P.A.*, 226 So. 3d 979, 982 (Fla. 4th DCA 2017).

ARGUMENT

I. THE FOURTH DISTRICT ERRED IN CONCLUDING THAT THE COMMON-LAW MARRIAGE-BEFORE-INJURY RULE APPLIES TO STATUTORY WRONGFUL DEATH CLAIMS

"In our adversarial system, one side—the side with a bad argument—has an incentive to urge departure from (or distortion of) text." Scalia & Garner, *supra*, at 10. That is exactly what Defendants urge here, asking the Court to depart from, or distort, the unambiguous text of the Wrongful Death Act to add an unwritten common-law limitation. The common-law limitation does not apply, and the Fourth District's decision to the contrary was erroneous.

"The plain meaning of the statute is always the starting point in statutory interpretation." *Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022) (internal citation and quotation marks omitted). In

resolving a dispute over the meaning of a statute, a court must "'afford the law's terms their ordinary meaning at the time [the Legislature] adopted them.'" *Id.* (quoting *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1480 (2021)). If the text of a statute is clear and unambiguous, the Court is dutybound to apply its plain meaning. *State v. J.A.R.*, 318 So. 3d 1256, 1258 (Fla. 2021); *see also Richards v. State*, 288 So. 3d 574, 576 (Fla. 2020).

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," with reference to "'all the textual and structural clues' bearing on that meaning," *Alachua County*, 333 So. 3d at 169 (quoting *Niz-Chavez*, 141 S.Ct. at 1480), and "the traditional canons of statutory interpretation," *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022). "When exhausting those clues enables" the court "to resolve the interpretive question" before it, the court's "'sole function' is to apply the law as [it] finds it." *Alachua County*, 333 So. 3d at 169 (quoting *Niz-Chavez*, 141 S.Ct. at 1480); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (Thomas, J.) ("When the words of a statute are unambiguous, then, this first canon is also

the last: 'judicial inquiry is complete.'") (citation omitted).

A. The Plain Language of the Statute Does Not Condition Recovery on Marriage Before Injury

The language of the Wrongful Death Act unambiguously does not condition a "surviving spouse's" recovery on marriage before injury. In fact, unlike other categories of survivors,[11] the language of the statute does not place **any** conditions or limitations on the ability of a "surviving spouse" to recover. Instead, it plainly authorizes: (1) "[e]ach survivor" to recover the damages authorized by section 768.21(1); and (2) "[t]he surviving spouse" to recover the damages authorized by section 768.21(2):

> (1) **Each survivor** may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. . . .
> (2) **The surviving spouse** may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

§ 768.21 (1)–(2), Fla. Stat.

[11] As further explained below, the Wrongful Death Act places numerous limitations and conditions on other categories of "survivors." §§ 768.18(1)-(2) & 768.21(3), Fla. Stats.

Thus, if Mrs. Ripple is a "survivor" within the meaning of section 768.21(1) and a "surviving spouse" within the meaning of section 768.21(2), she may recover under these provisions. The interpretive inquiry, therefore, is whether Mrs. Ripple is a "survivor" or "surviving spouse" within the meaning of these provisions, even though she married Mr. Counter after he was injured. Based on the common and ordinary meaning of the terms "survivor" and "surviving spouse," the answer is clearly yes.

The terms "survivor" and "surviving spouse" are unambiguous, and neither of them depends on marriage before injury. The Wrongful Death Act specifically defines the term "survivor" as including, among others, the decedent's "spouse." § 768.18(1), Fla. Stat. And while the statute does not specifically define the term "surviving spouse," "that alone does not render the term unclear or ambiguous . . . ." *Domino's*, 248 So. 3d at 219. As this Court recently explained, "[w]hen a contested term is undefined in statute or by our cases, [the Court] presume[s] that the term bears its ordinary meaning at the time of enactment, taking into consideration the context in which the word appears," and "look[s] to dictionaries for the best evidence of that ordinary meaning." *Conage*, 346 So. 3d at 599.

The term "survivor" is defined in Black's Law Dictionary as "[s]omeone who outlives another," *Survivor*, *Black's Law Dictionary* (11th ed. 2019), and the term "surviving spouse" is defined in Black's Law Dictionary as "[a] spouse who outlives another spouse," *Spouse*, *Black's Law Dictionary* (11th ed. 2019). Other dictionaries are uniformly in accord, and none of them mentions the *timing* of the marriage or whether it occurred before an injury in defining these terms. *See Surviving Widow*, *Garner's Dictionary of Legal Usage* (3rd ed. 2009) (defining "surviving widow" as "a spouse who outlives the other"); *Survive*, *Merriam-Webster's Online Dictionary* (2022) (defining transitive verb "survive" as "to remain alive after the death of" and citing, as an example, "he is survived by his wife"); *Survivor*, *Cambridge Dictionary* (2022) (defining "[a] person's survivors" as "the members of his or her family who continue to live after he or she has died"). "By extension," therefore, "the common and ordinary meaning of a 'surviving spouse' is a married person who outlives his or her husband or wife," *Domino's*, 248 So. 3d at 219, irrespective of whether they married before or after the decedent was injured. *See also Conage v. U.S.*, 346 So. 3d 594, 599 (Fla. 2022) (holding

"ordinary meaning" established where "dictionaries are essentially uniform in how they define" a word).

Based on this common and ordinary meaning, Mrs. Ripple is clearly Mr. Counter's "survivor" and "surviving spouse" within the meaning of sections 768.21(1) & (2) because she "outlived" Mr. Counter. Because the language of the statute unambiguously authorizes Mrs. Ripple to recover as Mr. Counter's "surviving spouse," it correspondingly does not support application of the common-law marriage-before-injury rule.

B. The Pertinent Interpretive Canons Confirm that Marriage Before Injury is Not an Unwritten Requirement

1. The Omitted-Case Canon

The Fourth District's decision to engraft the common-law marriage-before-injury rule onto the Wrongful Death Act violates the "[o]mitted-[c]ase canon," which provides that "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered." Scalia & Garner, *supra*, at 96; *see R.R.*, 303 So. 3d at 923 (applying omitted-case canon). Under this canon, "'[i]t is not [a judge's] function or within his [or her] power to enlarge or improve

or change the law,' **[n]or should the judge elaborate unprovided-for exceptions to a text**" because, "'if the [Legislature] had intended to provide additional exceptions, it would have done so in clear language.'" Scalia & Garner, *supra*, at 93 (citations omitted); *see also D.H. v. Adept Community Services, Inc.*, 271 So. 3d 870, 886 (Fla. 2018) (Canady, J., dissenting) ("The accrual doctrine should not be manipulated when the Legislature has clearly pronounced what the exceptions are and are not.").

Recently, this Court applied the omitted-case canon in analyzing whether the judiciary could engraft a common-law rule onto the statutory framework governing limitations periods. *R.R.*, 303 So. 3d at 918. There, this Court held that "[w]hen a 'statute purports to provide a comprehensive treatment of the issue it addresses, **judicial lawmaking is implicitly excluded**.'" *Id.* at 923 (quoting Scalia & Garner, *supra*, at 96). A "statutory framework" that is "comprehensive," this Court explained, "**leaves no room for supplemental common law** . . . rules," and "'[t]o supply omissions" from the common law onto a comprehensive statute "transcends the judicial function'" because it results in the Court "rewriting . . . and, in fact, obliterating the statute." *Id.*

That is exactly what the Fourth District did below. The Wrongful Death Act is a "comprehensive" statute, *Greenfield v. Daniels*, 51 So. 3d 421, 427 (Fla. 2010), and it has undergone "comprehensive" revisions by the Legislature, *Wilcox v. Leverock*, 548 So. 2d 1116, 1117 (Fla. 1989).[12] The statute, which the Legislature has amended twelve times[13] since 1972 (most recently on May 18, 2020), contains eleven separate sections, and dozens of subsections, specifying at length "who may recover . . . as well as what they can recover" through "detailed provisions, including definitions and detailed stipulations for the recovery of damages." *Enterprise Leasing Co. v. Sosa*, 907 So. 2d 1239, 1241 (Fla. 3d DCA 2005).

In these "detailed provisions" and "stipulations," the Legislature has meticulously placed numerous limitations and conditions on

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[12] Indeed, the Wrongful Death Act constitutes the *sole* body of law authorizing a claim for wrongful death; as explained above, such a claim is entirely a "creature of statute, unknown to the common law." *Stern v. Miller*, 348 So. 2d 303, 304–05 (Fla. 1977).

[13] Laws 1972, c. 72-35, § 1; Laws 1977, c. 77-121, § 66; Laws 1977, c. 77-468, § 40; Laws 1981, c. 81-183, § 2; Laws 1985, c. 85-260, § 1; Laws 1989, c. 89-61, § 3;Laws 1990, c. 90-14, § 2; Amended by Laws 1997, c. 97-102, § 1169, eff. July 1, 1997; Laws 2002, c. 2002-44, § 1, eff. April 16, 2002; Laws 2003, c. 2003-1, § 105, eff. July 1, 2003; Laws 2003, c. 2003-416, § 66, eff. Sept. 15, 2003; Laws 2020, c. 2020-2, § 163, eff. May 18, 2020.

various categories of statutory "survivors," including "blood relatives," "adoptive brothers and sisters," "child[ren] born out of wedlock," and "children" aged twenty-five years or older—**but none on surviving spouses**. § 768.18(1)-(2) & 768.21(3), Fla. Stat. "[B]lood relatives" and "adoptive brothers and sisters," for example, only qualify as "survivors" under the statute if they were "partly or wholly dependent on the decedent," § 768.18(1), Fla. Stat. A "child born out of wedlock," moreover, only qualifies as a "survivor" under the statute if he or she was born "out of wedlock of a mother" rather than "of a father," unless "the father has recognized a responsibility for the child's support." § 768.18(1), Fla. Stat. And "children" aged twenty-five years or older may only recover under section 768.21(3) "if there is no surviving spouse." §§ 766.18(2) & 768.21(3), Fla. Stat.

Despite enacting a "comprehensive statute" that meticulously places limitations and conditions on "blood relatives," "adoptive brothers and sisters," "child[ren] born out of wedlock," and "children" aged twenty-five years or older, the Legislature placed **no** limitations or conditions on the ability of "the surviving spouse" to recover. Because the Wrongful Death Act "'provide[s] a comprehensive treatment" of wrongful death claims and the survivors entitled to

pursue them, and does not condition a surviving spouse's recover on marriage before injury, the omitted-case canon instructs that "**judicial lawmaking**" on this issue "**is implicitly excluded**.'" *See R.R.*, 303 So. 3d at 923 (quoting Scalia & Garner, *supra*, at 96). In other words, the statute's comprehensiveness "**leaves no room for supplemental common law** . . . rules," and "'[t]o supply" an "omission[] from the common law onto" this "comprehensive statute 'transcends the judicial function.'" *Id.*; *see also Rintoul*, 342 So. 3d at 676 ("If the Legislature intended to bar recovery for spouses who did not marry the decedent prior to the injury, even though the spouses were married at the date the cause of action accrued, *i.e.* the death, let the Legislature say so. It is not the place of the judiciary to disregard the plain language of the Act or to add words to alter its express purpose.").

2. The *Expressio-Unius* Canon

The Fourth District's decision also contravenes the *expressio-unius* (or negative-implication) canon, which is related to, and can be

applied in conjunction with, the omitted-case canon.[14] The *expressio unius* canon instructs that "[t]he expression of one thing implies the exclusion of others . . . ." Scalia & Garner, *supra*, at 107. "The more specific the enumeration, the greater the force . . . the canon" carries, such that:

> [i]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation.

Id. (quoting Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983)).

Here, under the *expressio unius* canon, the Legislature's meticulous expression of detailed limitations and conditions on numerous categories of "survivors," and decision not to place any limitations or conditions on "the surviving spouse," implies the exclusion of any limitations and conditions on "the surviving spouse." The judiciary "cannot supply" the "particular which is omitted from

[14] *See In re: Final Report of the 20th Statewide Grand Jury*, 343 So. 3d 584, 593 (Fla. 4th DCA 2022); *In re: AGV Partners, Inc.*, 642 B.R. 871, 879 (M.D. Fla. 2022).

the particulars," i.e., the common-law marriage-before-injury rule, because "that would amount to legislation." *See id.*

3. Statutorily-Mandated Liberal Construction

The Fourth District's holding also contravenes the Legislature's mandate instructing the judiciary to "liberally construe" the statute to effectuate its "remedial" purpose of "shift[ing] the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat. Here, such a "liberal" construction requires the term "surviving spouse" to be construed consistently with its plain meaning, rather than as including an unwritten common-law marriage-before-injury rule. Otherwise, its remedial purpose—to compensate survivors—would be frustrated.

The legislative mandate is consistent with the textualist principle that "the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose." Scalia & Garner, *supra*, at 56. For textualists to apply this canon, however, "four limitations" must be satisfied. *Id.* Here, all four limitations are satisfied. *Id.* First, "the purpose" is "derived from the text" of the statute, "not from extrinsic sources such as legislative history or an assumption about the legal

drafter's desires." *Id.; see* 768.17, Fla. Stat. (stating "[i]t 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. Sections 768.16-768.26 are remedial and shall be liberally construed."). Second and third, "the purpose" is "defined precisely" and "described . . . concretely" rather than "abstractly." Scalia & Garner, *supra*, at 56. And fourth, the "purpose" is not being "used to contradict text or to supplement it," but rather to apply it plainly. *Id.*

Accordingly, liberally construing the statute to effectuate its remedial purpose is permissible, and the Fourth District's holding contravenes that legislativel mandate. *See R.R.*, 303 So. 3d at 924 ("Going outside the statutory framework for accrual would have been enough on its own to doom the Third and Fourth Districts' judge-made accrual rule. But we must also observe that the rule directly conflicts with the Legislature's express policy preference on how best to address the issue . . . .").

C. The Interpretive Canons Cited by the Fourth District Do Not Support its Holding

In reaching a contrary conclusion, the Fourth District referenced two canons of construction (the presumption that a

statute does not change the common law and the absurdity doctrine) and one textual clue (the fact that damages are calculated "from the date of the injury"). The Fourth District's analysis, however, was erroneous and contrary to the canons discussed above.

1. *Thornber*'s Presumption Against Change in Common Law

In *Kelly*, the Fourth District began by invoking a canon which instructs there is a presumption that a "'statute will not *displace* the common law unless the legislature expressly indicates an intention to do so.'" *Kelly*, 211 So. 3d at 345 (citation omitted); *see also* Scalia & Garner, *supra*, at 318 (referring to this canon as a "[p]resumption [a]gainst [c]hange in [c]ommon [l]aw"). Florida courts apply this canon under a framework set forth in *Thornber*, which holds 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." 568 So. 2d at 918.

The Fourth District's assumption that this canon governs the question presented was the foundational premise of its analysis. As

explained below, however, the canon does not apply and, even if it does, the Fourth District applied it erroneously.

a. The Canon Applied in Thornber is Not Germane to the Analysis Here

The canon espoused in *Thornber* embodies the textualist principle that "[a] fair construction ordinarily disfavors implied change." Scalia & Garner, *supra*, at 318. But Mrs. Ripple's ability to recover as a "surviving spouse" under the Wrongful Death Act does not depend on the conclusion that the statute implicitly changes anything about the common-law marriage-before-injury rule. The rule simply does not apply. An analysis of whether a statute "displaces" the common law assumes that the statute and the common law occupy "the same space," i.e., govern the same subject matter. Here, they do not.

As Judge Warner explained in her dissent, "[t]he statute in *Thornber* **acted on an existing common law principle**, and the supreme court found that both the common law and the statute could co-exist, because the statute did not expressly exclude the common law." *Rintoul*, 342 So. 3d at 675. This is in "[c]ontrast" to "the Wrongful Death Act," she continued, which "created a cause of

action **where no cause of action at common law existed**." *Id.* Thus, unlike in *Thornber*, there is no overlap between the statute and the common law, so there is no need to analyze whether the former displaces the latter. The Fourth District's "reliance on *Thornber* [was] misplaced." *Id.* This is, presumably, why the Fifth District did not analyze *Thornber* at all.

The Fourth District's ruling to the contrary represents a fundamental misunderstanding of the relationship between the Wrongful Death Act and the common law. Implicit in the Fourth District's analysis is the assumption that, although the two claims are "distinct," a wrongful death claim is, in effect, simply a *continuation* of a common-law personal injury claim, or that there is some *overlap* between them, and for *this* reason, the common-law rules and limitations that govern common-law claims automatically govern wrongful death claims unless the statute "changes," "displaces," or "supersedes" them. The structure of the Wrongful Death Act confirms that this assumption is incorrect.

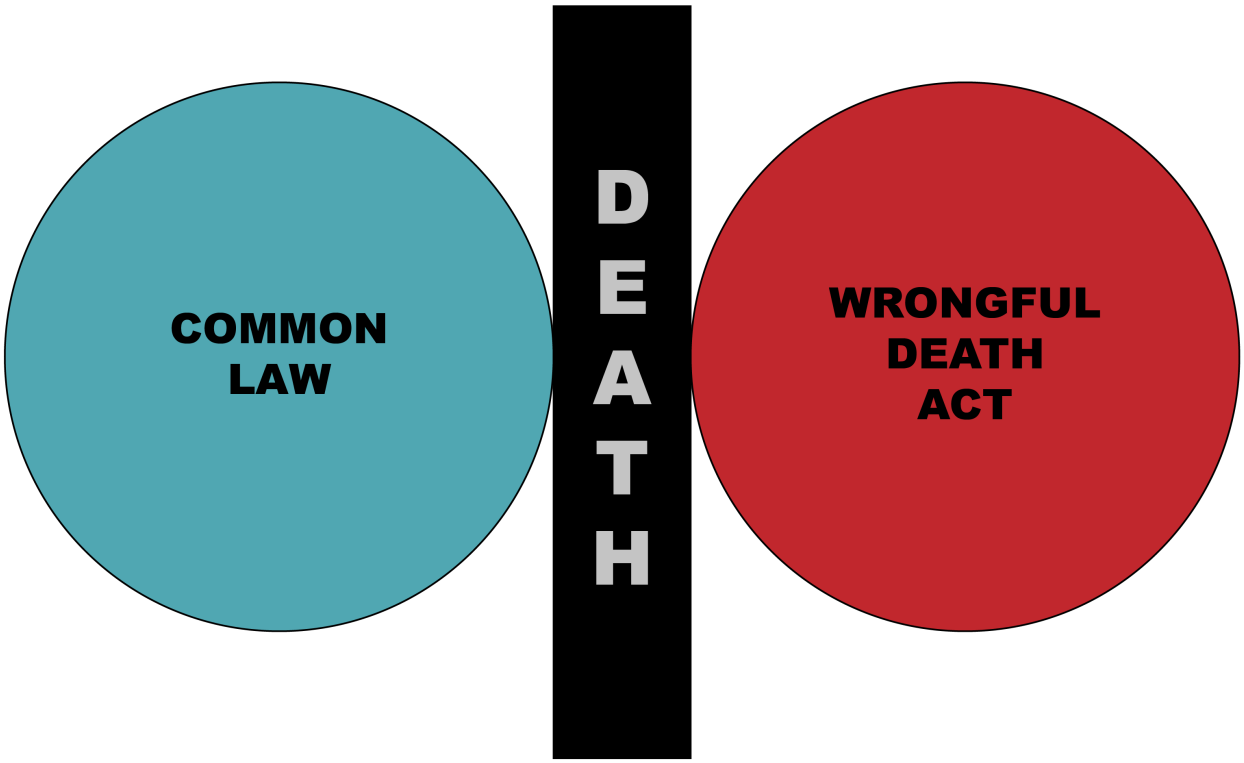
"[A] wrongful death action is *not* a continuation of a personal injury action." *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 120 (Fla. 2021) (emphasis in original). It is a "creature of statute,

unknown to the common law," *Stern v. Miller*, 348 So. 2d 303, 304–05 (Fla. 1977), and thus constitutes a "separate and independent cause of action." *Kelly*, 211 So. 3d at 342.; *see also Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109, 111 (Fla. 2002) ("[T]his Court has long characterized the Act as creating a new and distinct right of action from the right of action the decedent had prior to death."). It expressly states that it authorizes survivors to recover "damages as specified in th[e] act," § 768.19, Fla. Stat., *not* as specified in the common law. *See R.R.*, 303 So. 3d at 921 (holding court erred in engrafting common-law rule onto comprehensive statutory framework in part because the statute stated the statutory rules applied "'except as provided in' statute"); *Hess v. Hess*, 758 So. 2d 1203, 1204 (Fla. 4th DCA 2000) (holding cause of action for wrongful death is "created and limited" by the Wrongful Death Act).

Nor is there any overlap between these two sets of distinct claims. A wrongful death claim accrues when an injured person dies, which is the precise moment when common-law claims extinguish. The two sets of claims govern entirely distinct subject matters. The common law was crafted by the judiciary to govern claims for a living person's injury, and the Wrongful Death Act was crafted by the

Legislature to govern claims for an injured person's death. "[A] wrongful death action involves 'its own limitations period," *Sheffield*, 329 So. 3d at 120, "its own panoply of remedies," *id.*, and its own categories of statutorily-defined survivors, subject to meticulously detailed statutory exceptions crafted by the legislature (as further explained below)—***all* of which are distinct from the common law**, where, upon a victim's death, *nobody* could recover *anything.*[15] The Wrongful Death Act, moreover, does not purport to change anything about how the common law governs common-law claims prior to an injured person's death—the statute only applies after a victim dies, when the common law is no longer of any effect. Indeed, to 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.

[15] In addition, at common law, a spouse's "right of action" for loss of consortium "is a derivative right," *Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971), whereas under the Wrongful Death Act, it is "a direct action, not a derivative action." And the Wrongful Death Act "allows the spouse to recover not only loss of consortium but also for pain and suffering, an element of damage not allowed under common law." *Rintoul*, 342 So. 3d at 675.



Because there is neither continuity nor overlap between the Wrongful Death Act and the common law, the Fourth District's assumption that common-law rules automatically govern wrongful death claims unless the statute "changed," "displaced," or "superseded" them was erroneous. These claims exist independently of each other, such that the common-law marriage-before-injury rule simply does not apply.

b. If the Canon Recognized in Thornber Applies, the Fourth District Misapplied It

There is another way to analyze the relationship between the Wrongful Death Act and the common law. The Court can conclude

that the Wrongful Death Act affects the outcome of an injured person's death at common-law, i.e., the extinguishment of all claims associated with the injury, by giving life to a new statutory wrongful-death claim, and that this merits analysis under *Thornber*. Mrs. Ripple disagrees with this reading because, in reality, the passage of the statute did not change anything about the common law itself. Indeed, despite the enactment of the Wrongful Death Act, the common-law claims associated with an injury *still* extinguish when an injured person dies. It is a new statutory (not common-law) claim that comes alive. The common law remains entirely intact.

But if the Court disagrees, and determines that the statute's effect on the outcome of death at common law merits broader analysis under *Thornber*, then Mrs. Ripple submits that the Fourth District's *Thornber* analysis was erroneous.

As explained above, under *Thornber*, a "statute will not be held to have changed the common law" unless the statute: (1) "unequivocally states that it changes the common law"; or (2) "is so repugnant to the common law that the two cannot coexist." *Thornber*, 568 So. 2d at 918. For the reasons articulated in Judge Taylor's

dissent, "the Wrongful Death Act meets both tests of *Thornber*." *Kelly*, 211 So. 3d at 348.

As to the first *Thornber* test, the statute states, unequivocally, that it is "remedial" in nature with respect to the outcome of death at common law, and is designed to "shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat. "By definition, a remedial statute is 'designed to correct an existing law' or to give a party a 'remedy for a wrong, where he had none, or a different one, before.'" *Kelly*, 211 So. 3d at 347-48. By unequivocally expressing an intent to "correct" the outcome of an injured person's death at common law, and creating a new remedy that did not exist at common law, the Wrongful Death Act obviously "changed" the outcome of death at common law. Thus, the first *Thornber* test is satisfied.

The second *Thornber* test is also satisfied. In applying the second *Thornber* test, Judge Taylor correctly concluded the "Act is so repugnant to the common law rule . . . that the two cannot coexist" because while the statute authorizes, without limitation, any "surviving spouse" to recover damages under section 768.21(2), the

common-law rule precludes an entire category of "surviving spouses" from recovering such damages:

> The Wrongful Death Act sets forth the exclusive list of individuals who are entitled to recover damages as statutorily-designated "survivors." It follows that the Wrongful Death Act is repugnant to any common law rule that would effectively modify the definition of the term "survivors" under the Act. Stated another way, applying the common law requirements of a consortium claim to a wrongful death claim would alter the category of "survivors" that may recover damages under the Wrongful Death Act, thereby limiting the class of "survivors" in a way that was not authorized by the Legislature. . . .

Kelly, 211 So. 3d at 348. In other words, the statute's authorization of **all surviving spouses to recover** damages under section 768.21(2) cannot "coexist" with a common law rule **precluding an entire category of surviving spouses from recovering** such damages.

Below, Defendants maintained that the two rules can "readily coexist" if the common-law rule is simply characterized as an "exception" to the statute. But that is just another way of conceding that the two rules are logically incompatible and cannot coexist. An incompatibility between a common-law rule and a statute cannot be reconciled, as Defendants suggest, by simply characterizing the

former as an "exception" to the latter, particularly where Defendants offer no limiting principle. If it were otherwise, *any* two contradictory rules could be found to "coexist," which would render the second *Thornber* test a nullity. Because the two rules at issue here cannot coexist, the second *Thornber* test is likewise satisfied, and the Fourth District's application of the *Thornber* test was erroneous.

2. The Absurdity Doctrine

As further support for its decision, the Fourth District invoked the "absurdity doctrine," which instructs that "[a] provision may either be disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." Scalia & Garner, *supra*, at 234. In its absurdity analysis, the Fourth District found that "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." *Kelly*, 211 So. 3d at 346. According to the Fourth District, it was "required to interpret the Wrongful Death Act to avoid absurd results such as this." *Id.*

This was erroneous for two reasons. First, the fact that the "result" highlighted by *Kelly* "makes no sense" to the Fourth District only underscores the tension between the judiciary's public policy objectives and the Legislature's. To be clear, the "result" highlighted in *Kelly* makes *perfect* sense in light of the **Legislature's** stated public policy goal of "remedy[ing]" the "anomaly" of the common-law—where a victim's death enabled his tortfeasors to evade liability—by "shift[ing] the losses resulting . . . from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat.

Here, if, as the Fourth District posited, the victim had "survived," then his tortfeasors would not have been able to evade common-law liability, because the victim would have been able to pursue common-law claims against them. But when the victim died, all common-law remedies died with him. The very purpose of the statute was to create an avenue for relief **that did not exist at common law**. Thus, allowing the victim's "surviving spouse" to recover damages under the statute, even though she would not have been able to recover under the common law, accomplishes **exactly** what the Legislature intended: it prevents the tortfeasors from

evading liability and shifts the losses from the survivors to the tortfeasors.

Second, the fact that the "result" "makes no sense" to the Fourth District is not the kind of "absurdity" that justifies changing unambiguous text. "[J]udicial revision of public and private texts" is not permissible "to make them (in the judge's view) more reasonable." Scalia & Garner, *supra*, at 237; *see also Shim v. Buechel*, 339 So. 3d 315, 317 (Fla. 2022) ("[W]hen determining the meaning of a statute, courts do not reach policy considerations where the statute's meaning is clear."); *Nassau County v. Willis*, 41 So. 3d 270 (Fla. 1st DCA 2010) ("Courts may only legitimately rely on the 'absurdity doctrine' without running afoul of the separation of powers where "applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that [the legislative body] could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.").

Applying the absurdity doctrine is only permissible if "two limiting conditions" are satisfied. Scalia & Garner, *supra*, at 237. First, "[t]he absurdity must consist of a disposition that no reasonable person could intend"; in other words, "'it must be one . .

. where the absurdity is so monstrous that all mankind would, without hesitation, unite in rejecting the application.'" Scalia & Garner, *supra*, at 237 (citation omitted); *see also Maddox v. State*, 923 So. 2d 442, 452 (Fla. 2006) (Cantero, J., dissenting) ("The absurdity doctrine should be reserved for cases where applying the plain meaning would border on irrationality. Only then can we be sure that a textual interpretation would yield 'an absurd result totally incongruous with the will of the people.").

Here, quite the opposite is true: "all mankind" has actually united in **accepting** the very outcome that the *Kelly* decision labels absurd—other than the Fourth District. Indeed, as explained above, every court in the country that has addressed the question presented, other than the Fourth District, has held that the common-law marriage-before-injury rule does not apply to a claim under a wrongful death statute whose plain text does not condition recovery on marriage before injury. It cannot be the case, therefore, that "no reasonable person could intend" that conclusion. Accordingly, the absurdity doctrine's first condition is not satisfied.

Neither is the second. The second condition is that "[t]he absurdity must be reparable by changing or supplying a particular

word or phrase whose inclusion or omission was obviously a technical or ministerial error (e.g., *losing party* instead of *winning party*)." Scalia & Garner, *supra*, at 238. "The doctrine," however, "does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." *Id.*; *see also Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1446 n.13 (2020) (Scalia, J.) ("The possible existence of a few outlier instances does not prove [that an] interpretation is absurd. Congress may well have accepted such anomalies as the price for" accomplishing its objective.).

Here, the Fourth District engrafted text on to the Wrongful Death Act not to correct any "technical or ministerial error," but because it believed the result "makes no sense" from a policy perspective. This is precisely the sort of judicial lawmaking that is impermissible under the absurdity doctrine.

For these reasons, the Fourth District's reliance on the absurdity doctrine was erroneous.

3. The Date from Which Damages are Calculated

The Fourth District also erred in concluding that the Legislature "anticipated" that the "surviving spouse" would have been married

to the decedent before the decedent's injury. *Kelly*, 211 So. 3d at 345-46. The fact that the term "survivors is limited to familial relationships," and that damages are calculated "from the date of the injury" does not evidence such anticipation. As explained in Judge Taylor's dissent in *Kelly* and in the Fifth District's *Domino's* decision, nothing in the statute limits survivorship to familial relationships *at the time of injury*, and the reference to the "the date of injury" in the damages provision "does not provide a limitation as to who may recover, but rather indicates what a surviving spouse may recover." The Fourth District's reliance on this "textual clue" was misplaced.

D. The Fourth District's Holding Violates the Constitutional Separation of Powers

Finally, and perhaps most importantly, the Fourth District's holding is unconstitutional. Its decision to engraft the common-law marriage-before-injury rule onto the unambiguous and comprehensive statutory text of the Wrongful Death Act violates the strict separation of powers mandated by our Constitution. As James Madison warned, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton

Rossiter ed., 2003). To prevent such an accumulation, Article 2, Section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches" and "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Under this provision, the judiciary is "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications" because "[t]o do so would be an abrogation of legislative power." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). Thus, "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (quotation omitted).

For the reasons explained above, the Fourth District construed the unambiguous text of the comprehensive Wrongful Death Act in a manner that modified and limited its express terms or its reasonable

and obvious implications. This was a violation of the separation of powers. *See R.R.*, 303 So. 3d at 918 (holding that engrafting a common-law rule onto an unambiguous and comprehensive statute was a violation of "the separation of powers" and contrary to "the proper role of courts in applying statutes"); *see also Enterprise Leasing Co.*, 907 So. 2d at 1241-42 ("The Wrongful Death Act . . . contains detailed provisions, including definitions and detailed stipulations for the recovery of damages. **To engraft an exception for illegal immigrants would be to encroach on the legislature's turf**. . . . The legislature of course could make such a policy decision. We will not."); *Nassau Cnty. v. Willis*, 41 So. 3d 270, 279 (Fla. 1st DCA 2010) ("When inappropriately utilized, the absurdity doctrine allows courts to substitute their judgment of how legislation *should* read, rather than how it *does* read, in violation of the separation of powers enshrined in Article II, section 3 of the Florida Constitution.").

E. Conclusion

For these reasons, the Fourth District's decision to engraft a common-law marriage-before-injury rule onto the unambiguous and comprehensive statutory text should be reversed.

II. IF THE COURT AFFIRMS THE FOURTH DISTRICT'S CONCLUSION THAT MRS. RIPPLE IS NOT A "SURVIVING SPOUSE" UNDER SECTIONS 768.21(1) & (2), THEN IT SHOULD ALSO AFFIRM THE FOURTH DISTRICT'S CONCLUSION THAT MRS. RIPPLE IS NOT A "SURVIVING SPOUSE" UNDER SECTION 768.21(3)

In its brief on jurisdiction, Defendants state that they intend to challenge the Fourth District's ruling regarding the Surviving Adult Children. In case Defendants do so, and this Court agrees to review this uncertified question, Mrs. Ripple will briefly address it here. To reiterate, the trial court ruled that Mrs. Ripple is not a "surviving spouse" within the meaning of section 768.21(2) but is a "surviving spouse" within the meaning of section 768.21(3), and that her status as a "surviving spouse" under the latter provision precludes the Surviving Adult Children from recovering. For the reasons that follow, the Fourth District's reversal of this "irreconcilable contradiction" was manifestly correct.

A. Judicial Estoppel

The Fourth District's conclusion was correct under the doctrine of "judicial estoppel," which is "an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial . . . proceedings." *Blumberg v. USAA Cas. Ins. Co.*,

790 So. 2d 1061, 1066 (Fla. 2001). Under this doctrine:

> A claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.
>
> In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved.

Id.

Here, as the Fourth District noted, the defendants successfully took the position in their motion for judgment on the pleadings "that the decedent's wife was not his 'surviving spouse' under section 768.21(2)" because she was not married to him when he was injured. *Ripple*, 337 So. 3d at 59. "Yet in the defendants' later-filed motion for summary judgment on the decedent's adult children's damages claim, the defendants took the totally inconsistent position that the decedent's wife was his 'surviving spouse' under section 768.21(3)," which allowed them "to successfully maintain that the decedent's adult children were not entitled to recover damages under section 768.21(3) of the Act either." *Id.* Defendants' positions were clearly

inconsistent, and the parties were the same each time Defendants asserted them.

Defendants appear to disagree with the Fourth District's application of judicial estoppel because the inconsistent positions they advanced were "within a single action or proceeding, rather than in *separate* proceedings." The Fourth District, however, found this "distinction to be insignificant in this case, because the prejudicial effect is the same." *Id.* Indeed, the doctrine of judicial estoppel is "equitable" in nature and designed to prevent a party from doing exactly what Defendants did here: taking clearly contradictory positions against the same party, and prevailing as a result. If anything, such conduct is even *more* unjust where it occurs in the *same* action or proceeding. That is why, as the Fourth District noted, the Supreme Court of the United States authorizes application of the doctrine when the inconsistent positions are asserted **in the same case**. *Id.* (citing *Hampshire*, 532 U.S. at 749). Indeed, other Florida appellate courts have also held that the doctrine applies to inconsistent positions taken in the same case. *See*, *e.g.*, *Whittingham v. HSBC Bank USA*, 275 So. 3d 850, 852 (Fla. 5th DCA 2019) ("Judicial estoppel provides that '[o]ne who assumes a particular

position or theory in a case is judicially estopped **in a later phase of that same case**, or in another case, from asserting any other or inconsistent position toward the same parties and subject matter.'") (internal citation and quotation omitted). There is no principled reason to reach a contrary conclusion. The Fourth District's holding was correct.

B. The Interpretive Canons

The Fourth District's holding was also correct under the canons of construction. First, it complies with the presumption-of-consistent-usage canon, which instructs that "'[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.'" Scalia & Garner, *supra*, at 170. Here, if the Court agrees that the term "surviving spouse" in section 768.21(2) is limited to a surviving spouse who married the decedent before the decedent was injured, then it should presume that these identical words in the very next section "are intended to have the same meaning."

There is no basis to overcome this presumption. Indeed, the provision *only* makes sense if it is read this way. Section 768.21(3) grants a statutory right to recover noneconomic damages to **either** a

"surviving spouse" **or** surviving children aged twenty-five or older, but prevents duplicative recovery of such damages by **both** of these categories of survivors. The trial court's ruling, however, re-writes this either/or proposition into a neither/nor proposition, such that *all* of Mr. Counter's survivors would have been barred from recovering noneconomic damages. This interpretation is directly contrary to the statute's remedial purpose, because it produces the same result that would have occurred at the common law: the tortfeasors whose wrongdoing caused Mr. Counter's death will evade liability, and the losses will be borne by his survivors.

Thus, if this Court affirms the Fourth District's conclusion that Mrs. Ripple is not Mr. Counter's "surviving spouse" within the meaning of section 768.21(2), it should also affirm its conclusion that she is also not Mr. Counter's "surviving spouse" within the meaning of section 768.21(3).

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourth District's conclusion that the common-law marriage-before-injury rule applies to statutory wrongful death claims and that, as a consequence, Mrs. Ripple is barred from recovering as Mr. Counter's

surviving spouse. If the Court reaches the non-certified question regarding the Fourth District's holding as to the Surviving Adult Children, it should affirm it.

Dated: November 23, 2022

Respectfully submitted,

/s/ Mathew D. Gutierrez
THE FERRARO LAW FIRM, P.A.
600 Brickell Avenue # 3800
Miami, FL 33131
Tel.: 305-375-0111
MATHEW D. GUTIERREZ, ESQ.
FBN: 94014
mgutierrez@ferrarolaw.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2022, a true and correct copy of the foregoing was filed through the Florida Courts e-Filing Portal and thereby served on all counsel of record, including:

MG+M The Law Firm
600 Brickell Ave., Suite 1400
Miami, FL 33131
Lucia V. Pazos
lpazos@mgmlaw.com

Matthew J. Conigliaro
Carlton Fields, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607-5780
mconigliaro@carltonfields.com

Bice Cole Law Firm, P.L.
999 Ponce de Leon Blvd., Suite 710
Coral Gables, FL 33134
Amanda Cachaldora
cachaldora@bicecolelaw.com
Susan J. Cole
cole@bicecolelaw.com
Melanie Chung-Tims
chungtims@bicecolelaw.com
Neil. A. Covone
covone@bicecolelaw.com

/s/ Mathew D. Gutierrez

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.045, that this document complies with the applicable font requirement and word count limit.

/s/ Mathew D. Gutierrez