

**IN THE SUPREME COURT OF FLORIDA**

JENNIFER RIPPLE, etc.,

Petitioner,

Case No. SC22-597

v.

L.T. Case No. 4D20-1939

CBS CORPORATION, et al.

Respondents.

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

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RECEIVED, 07/05/2022 06:52:12 PM, Clerk, Supreme Court

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## **STATEMENT OF THE ISSUES**

The Petition presents the following issue:

Whether the district court correctly determined that the Wrongful Death Act does not explicitly, clearly, and unambiguously abrogate the common law marriage before injury rule, which holds that a spouse may not recover loss of consortium damages based on an injury to the other spouse if the injury predated the marriage.

If the Court accepts jurisdiction in this case, then Respondents intend to raise the following independent issue:

Whether the district court erroneously held that where a surviving spouse is not permitted to recover loss of consortium damages under the Wrongful Death Act because she married the decedent after the injury that caused the death, the decedent's adult children may recover loss of consortium damages based on "judicial estoppel," even though the Act makes such damages available only "if there is no surviving spouse," and even though "this case does not fit squarely within the Florida Supreme Court's description of judicial estoppel . . . ." App. at 19.

## **STATEMENT OF THE CASE AND FACTS**

Richard Counter was diagnosed with mesothelioma in May 2015. App. at 1, 3. Five months later, he died from the disease. *Id.* at 3. Between those events, Counter married Jennifer Ripple, with whom he had lived for decades, and filed a personal injury action against numerous defendants, including Respondents (“Defendants”). *Id.* at 3. He alleged that asbestos exposure from asbestos-containing products caused his disease. *Id.*

After Counter died, Ripple became personal representative of Counter’s estate (the “Estate”). *Id.* The Estate obtained leave to file an amended complaint that sought numerous forms of damages under the Wrongful Death Act, including loss of consortium damages for Ripple as surviving spouse, loss of consortium damages for Counter’s adult children from a prior marriage, lost support and services, medical expenses, funeral expenses, and net accumulations. *Id.* at 3, 8.

Defendants sought judgment on the pleadings on the Estate’s claim under section 768.21(2) for loss of consortium damages for Ripple. Defendants relied on *Kelly v. Georgia-Pacific, LLC*, 211 So. 3d 340 (Fla. 4th DCA 2017), which held that a spouse whose marriage

postdated the injury at issue cannot recover loss of consortium damages under the Wrongful Death Act. *Id.* at 4-5. *Kelly* analyzed the common law marriage before injury rule, which prohibits persons from recovering loss of consortium damages where the injury at issue predated the marriage. *Id.* at 10. Applying this Court's test to determine when statutory enactments abrogate common law principles, *Kelly* held that the Wrongful Death Act did not explicitly, clearly, and unequivocally abrogate the common law rule. *Id.* at 9-10.

The Estate asked the trial court to follow *Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212 (Fla. 5th DCA 2018), in which the Fifth District disagreed with *Kelly* and allowed an estate to recover loss of consortium damages for a spouse who married a decedent after the accident that later caused his death. App. at 5-6, 14-16. The Estate acknowledged that, if the trial court followed *Kelly*, which controlled in the trial court's district, then the Defendants should receive judgment as to Ripple's loss of consortium damages. *Id.* at 5. The trial court followed *Kelly* and granted the motion. *Id.* at 6.

Defendants subsequently sought partial summary judgment regarding the adult children's damages under section 768.21(3). *Id.*

at 6. The Wrongful Death Act permits adult children to recover such damages only “if there is no surviving spouse,” and there was no dispute that, in this case, Ripple was Counter’s surviving spouse, albeit one who could not recover loss of consortium damages because they married after the injuries at issue. *Id.* at 6, 8. The trial court agreed, ruling that the plain language of section 768.21(3) precluded recovery for the adult children.

The Estate then dismissed its remaining damages claims and asked the trial court to enter a final judgment against it. *Id.* at 8. The trial court did so, and the Estate appealed to the Fourth District. *Id.*

On appeal, the Estate invited the Fourth District to recede from *Kelly*. *Id.* at 17. The Fourth District declined. *Id.* Instead, the Fourth District reaffirmed its commitment to *Kelly* and disagreed with the Fifth District’s analysis in *Domino’s*. The Fourth District explained that *Kelly* correctly analyzed the common law rule under this Court’s test to determine whether a statute abrogates the common law, whereas *Domino’s* merely read the Wrongful Death Act in isolation, without mentioning, much less conducting, the abrogation analysis. *Id.* at 16-17.

The Fourth District also explained that the *Domino's* approach led to an absurd result. *Id.* at 17. Under *Domino's*, where two spouses marry after one is injured, the uninjured spouse has no loss of consortium claim so long as the injured spouse survives, but the uninjured spouse can recover those damages if the injured spouse succumbs to and dies from the injuries. *Id.*

Accordingly, the Fourth District followed its decision in *Kelly*. Because the injuries at issue in this case—the alleged asbestos exposures that supposedly led to Counter's mesothelioma and death—occurred before his marriage to Ripple, the district court ruled that the marriage before injury rule applied and that Ripple cannot recover loss of consortium damages in connection with those injuries. *Id.* at 2, 10, 17. The district court therefore affirmed the trial court's ruling on Ripple's loss of consortium damages. *Id.* at 17. The district court also certified conflict with the Fifth District's decision in *Domino's*. *Id.*

In a concurring opinion, Judge Gerber agreed with *Kelly* that the Wrongful Death Act does not abrogate the marriage before injury rule. *Id.* at 20-21 (Gerber, J., concurring specially). He also pointed to difficulties surrounding the problems the common law rule aimed

to address. For example, he stated that the Fifth District’s decision in *Domino*’s “potentially opens a wide door” for someone to marry an injured person shortly before death for purposes of recovering under the Wrongful Death Act. *Id.* at 21. Ultimately, Judge Gerber echoed the Fourth District’s statement in *Kelly* that any attempt to change the law in this area must come from the legislature. *Id.*

The decision below also addressed the trial court’s ruling regarding the adult children’s damages under section 768.21(3). The Fourth District acknowledged that, by the text of the Wrongful Death Act, adult children may recover only “if there is no surviving spouse . . . .” *Id.* at 18. Nonetheless, the Fourth District held that “judicial estoppel” prevented Defendants from relying on that language. *Id.* at 18-19. According to the Fourth District, Defendants had asserted that Ripple was not a surviving spouse under section 768.21(2) and thus could not assert that a surviving spouse existed for purposes of section 768.21(3). *Id.* at 19. The Fourth District accordingly held that Counter’s adult children from his prior marriage could recover under section 768.21(3). *Id.* at 19-20.

## ARGUMENT

### **I. The Court Has Jurisdiction to Resolve the Conflict Over Whether the Common Law Marriage Before Injury Rule Precludes Loss of Consortium Damages for a Surviving Spouse Where the Injury Predated the Marriage.**

This Court has discretionary jurisdiction to review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district on the same question of law. Art. V, § 3(b)(3), Fla. Const. This Court also has discretionary jurisdiction to review any decision certified to be in direct conflict with another district court of appeal. Art. V, § 3(b)(4), Fla. Const.

Under the marriage before injury rule, “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 Kelly*, 211 So. 3d at 344. To allow otherwise “would have the effect of allowing [a party] to marry into the cause of action.” *Tremblay*, 390 So. 2d at 817.

When the Fourth District decided *Kelly*, Florida appellate decisions had previously applied the common law rule in the context of latent and patent injuries. *See Fullerton v. Hospital Corporation of*

*America*, 660 So. 2d 389 (Fla. 5th DCA 1995) (holding that the common law rule precluded husband's loss of consortium claim based on wife's radiation exposure, which years later led to thyroid cancer, where the marriage occurred only after the exposures ended); *Tremblay*, 390 So. 2d at 818 (holding that rule precluded wife's loss of consortium claim based on husband's accident, where marriage occurred after the accident). No district court, however, had addressed whether the Wrongful Death Act abrogated the common law rule if the injured spouse then died from the injuries.

Applying the analysis prescribed by *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914 (Fla. 1990), the Fourth District in *Kelly* examined whether the Wrongful Death Act abrogated the common law rule and held it did not. The Fourth District's decision below confirmed the correctness of that result once again. App. at 16-17.

The Fifth District reached the opposite conclusion in *Domino's*, but it did so without analyzing whether the Wrongful Death Act abrogated the common law rule. Instead, *Domino's* read the Act in isolation, found that it did not set forth the common law rule, and held that, as a result, the common law rule did not apply to a spouse

seeking recovery under the Act. 248 So. 3d at 218-21. *Domino's* certified conflict with *Kelly*, *id.* at 221, but neither party sought review by this Court.

As a result, in the Fourth District, a spouse cannot marry into a Wrongful Death Act cause of action, but a spouse in the Fifth District is able to do so at any point prior to the injured spouse's death. The Court has jurisdiction to grant review.

**II. If the Court Grants Review, Then the Court Should Also Review the Fourth District's Erroneous Use of "Judicial Estoppel" to Avoid the Wrongful Death Act's Plain Language Regarding Adult Children.**

If the Court exercises its jurisdiction and grants review, then the Court should also consider the Fourth District's use of judicial estoppel to avoid the Wrongful Death Act's plain language regarding recoveries by adult children. In so ruling, the Fourth District erroneously injected its own legislative preferences into the Wrongful Death Act. No grounds for estoppel exist, no common law rule's possible abrogation requires analysis, and the statutory language is clear and unambiguous.

The Wrongful Death Act states that "[m]inor 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. (emphasis added). There is no dispute that Ripple is Counter’s surviving spouse. Counter’s adult children, therefore, cannot recover under this statute.

The Fourth District apparently recognized that the statutory language cannot be read to permit Counter’s adult children to recover, so the Fourth District invoked “judicial estoppel” to preclude Defendants from relying on that language. The court ostensibly did so because Defendants supposedly argued that Ripple was not Counter’s surviving spouse for purposes of her own recovery. App. at 18-19.

But that never occurred. Indeed, on its face, the district court’s opinion reveals that Defendants asserted, and the trial court agreed, that Ripple **was** a surviving spouse but the common law marriage before injury rule precluded her from recovering loss of consortium damages. As the Fourth District recounted:

***At the defendants’ urging***, the circuit court attempted to reconcile its inconsistent findings under sections 768.21(2) and 768.21(3) by ***describing the decedent’s wife as his “surviving spouse, albeit a spouse who is herself barred from recovery pursuant to Kelly.”***

*Id.* at 18 (emphasis added).

That the Fourth District’s judicial estoppel ruling was not tied to any actual argument that Ripple is not a surviving spouse is also seen in the court’s holding. The court held 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.” App. at 20. No assertion regarding surviving spouse status is necessary.

In reaching this result, the Fourth District acknowledged that this Court has defined judicial estoppel as an equitable doctrine used to prevent litigants from taking inconsistent positions in separate proceedings. *Id.* at 18-19. The Fourth District disregarded that definition and, having (inaccurately) characterized Defendants’ positions in this single proceeding as inconsistent, invoked judicial estoppel to ensure that Counter’s adult children could recover under section 768.21(3). *Id.* at 19-20.

The decisions in *Tremblay*, *Fullerton*, and *Kelly* recognized that these matters raise policy considerations that the common law once resolved and which now may be changed only by the legislature, not the courts. *Kelly*, 211 So. 3d at 347 (“Although there may be persuasive policy reasons for superseding this common law rule, especially in the present case where the injury is latent, such a change may come only from the legislature by statutory enactment.”); *Fullerton*, 660 So. 2d at 391 (“In the absence of any statutory law on this point, Florida courts are required to follow the common-law rule.”); *Tremblay*, 390 So. 2d at 818 (“When an individual receives an injury, many persons may suffer. Brothers and sisters and even close friends are likely to be emotionally affected, but no one suggests that these persons have a cause of action. . . . There has to be a line drawn somewhere, and absent legislation it would be improvident for this court to extend it.”). The decision below ignored this critical point and erroneously engrafted its own legislative preferences onto the Wrongful Death Act. This Court should review, and quash, that portion of the decision below.

## **CONCLUSION**

The Court has jurisdiction to grant review. If it does so, then the Court's review should also consider the Fourth District's use of judicial estoppel to avoid the Wrongful Death Act's plain language regarding recoveries by adult children.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 5, 2022, 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 document complies with the font and word length requirements of the Florida Rules of Appellate Procedure.

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