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IN THE SUPREME COURT OF FLORIDA

JENNIFER RIPPLE, etc.,

Petitioner/Appellant,

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

v.

CBS CORPORATION, et al.,

Respondents/Appellees.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

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# PETITIONER'S BRIEF ON JURISDICTION

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## STATEMENT OF THE ISSUES

Section 768.21(2), Florida Statutes, provides that under the Wrongful Death Act, a "surviving spouse" may "recover for the loss of the decedent's companionship and protection and for mental pain and suffering from the date of the injury." The plain text of this statute does not condition recovery on marriage before injury.

The primary question in this appeal, which forms the basis of a certified conflict between the Fourth and Fifth Districts, is whether a surviving spouse is barred from recovering under section 768.21(2) if he or she married the decedent after the decedent's injury occurred.

This question, in turn, hinges on the following issues.

Did the Fourth District violate the constitutional separation of powers by engrafting a judicially-crafted marriage-before-injury rule onto unambiguous statutory text that does not require marriage before injury?

Is it necessary to analyze whether section 768.21(2) supersedes the common law marriage-before-injury rule, even though section 768.21(2) does not alter anything about how that common law rule governs the common law claims it was crafted to limit?

Assuming, arguendo, the Court answers the foregoing question in the affirmative, does the Wrongful Death Act supersede the common law marriage-before-injury rule?

## STATEMENT OF THE CASE AND FACTS

From the 1950s through the 1990s, Richard Counter was exposed to "asbestos," a toxic substance that can cause mesothelioma, a rare form of incurable cancer. App.2-3. On May 22, 2015, sixty years after first being exposed to asbestos, Mr. Counter was diagnosed with mesothelioma. App.3.

On July 4, 2015, Mr. Counter married Mrs. Ripple, his girlfriend of thirty-four years. *Id.* Thereafter, Mr. Counter filed a common law personal injury action alleging the defendants were negligent and strictly liable for manufacturing, selling, or distributing asbestos-containing products that caused his mesothelioma. *Id.* On November 1, 2015, Mr. Counter died from mesothelioma. *Id.* Thereafter, 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. *Id.* In the operative complaint, Mrs. Ripple sought, in pertinent part, damages as Mr. Counter's "surviving spouse" under section 768.21(2). *Id.*

On January 26, 2019, the trial court ruled, as a matter of law, that Mrs. Ripple cannot recover damages as Mr. Counter's "surviving spouse" under section 768.21(2) because she "was not married to [Mr. Counter] at the time of the exposure." App.6. In doing so, the trial court found that it was bound by *Kelly v. Georgia-Pacific, LLC*, 211 So.3d 340 (Fla. 4th DCA 2017), wherein the Fourth District became the only court nationwide to hold that the common law marriage-before-injury rule—which historically governed only to common law loss-of-consortium claims—applies to a statutory claim under a wrongful death statute. *Id.* at 345-47, 349.

On appeal, the Fourth District affirmed the trial court's decision and reaffirmed its commitment to *Kelly*. App.2. The Fourth District recognized that, after *Kelly* was decided, the Fifth District published *Domino's Pizza, LLC v. Wiederhold*, 248 So.3d 212 (Fla. 5th DCA 2018), which rejected *Kelly* and concluded the common law marriage-before-injury rule does ***not*** apply to wrongful death claims. App.12-17. Thus, the Fourth District certified conflict with *Domino's*. App.17.

## ARGUMENT

### I. THE COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION BELOW

This Court has discretionary jurisdiction to review the decision issued by the Fourth District below because the Fourth District certified it to be in direct conflict with *Domino's*. *See* Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi).

#### A. The Common Law and the Wrongful Death Act

A brief history of the common law and the Wrongful Death Act helps explain the conflict between the Fourth and Fifth Districts. When a person is "injured" by a tortfeasor, the common law authorizes two pertinent types of claims: (1) a "personal injury" claim by the injured person (e.g., a negligence action); and (2) a loss-of-consortium claim by the injured person's spouse. 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 17:2 (2021-2022 ed.); *ACandS, Inc. v. Redd*, 703 So.2d 492, 493-94 (Fla. 3d DCA 1997). Long ago, however, the judiciary limited the class of spouses entitled to pursue a common law loss of consortium claim by crafting the so-called marriage-before-injury rule. *Tremblay v. Carter*, 390 So.2d 816, 817 (Fla. 2d DCA 1980). This rule holds that a spouse may only

pursue a common law loss-of-consortium claim if he or she married the injured person before the injury occurred. *Id*. 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 common law authorizes such personal injury and loss of consortium claims **until an injured person dies**, at which point the common law dictates that the common law claims associated with the injury 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

To "remed[y]" this "anomaly," the legislature enacted the Wrongful Death Act, which provides a "'separate and independent cause of action" that accrues when an injured person dies. *Id*. 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 ...." Section 768.21(2), in turn, authorizes a "surviving spouse" to "recover for the loss of the decedent's companionship and protection and for mental pain and suffering from the date of the injury." Critically, the statute's plain text does not condition recovery on marriage before injury.

In Florida, the common law marriage-before-injury rule dates back more than sixty years, *Tremblay*, 390 So.2d at 817, and the Wrongful Death Act dates back 130 years, *Louisville & N.R. Co. v. Jones*, 34 So. 246, 248 (Fla. 1903). Yet, until the Fourth District's 2017-decision in *Kelly*, no Florida Court had ever applied the common law marriage-before-injury rule to a statutory claim under the Wrongful Death Act. Meanwhile, courts nationwide ***unanimously*** rejected the contention that the marriage-before-injury rule applies to statutory claims under wrongful death statutes that are analogous to Florida's. *Kelly*, 211 So.3d at 349-50; *Domino's*, 248 So.3d at 221.

### B. The Conflicting Decisions by District Courts Regarding the Marriage-Before-Injury Rule's Application to Wrongful Death Claims

The Fourth District's conclusion that the common law marriage-before-injury rule applies to statutory claims under the

Wrongful Death Act is in conflict with the Fifth District's *Domino's* opinion. This conflict is borne out not only in the Fourth District's opinion in this case, but also in several other cases, summarized chronologically below.

1. *Kelly v. Georgia-Pacific, LLC*

In 2017, the Fourth District issued its opinion in *Kelly* and thus 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 the Wrongful Death Act. *Kelly*, 211 So.3d at 349 (Carole, J., dissenting). The Fourth District articulated three grounds in support of its decision.

First, although the Fourth District acknowledged that the Act superseded the common law by creating a new cause of action that did not exist at the common law, it determined that the Act did not specifically 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 …." *Id.* at 343-46.

Second, even though the Act's plain language does not condition recovery on marriage before injury, the Fourth District concluded that the statutory text "anticipated" that the surviving spouse would have been married to the decedent prior to the injury, because the term "survivors" is limited to familial relationships, and damages are calculated from the date of the "injury." *Id.* at 345-46.

Third, the Fourth District provided an "absurdity" rationale, opining that "it would make no sense" to allow a spouse to recover consortium damages under the Act simply because his or her spouse has died "when that same spouse would be prohibited from recovering the same damages under a loss of consortium claim had his or her spouse survived." *Id.* at 346.

In a strongly-worded dissent, Judge Carole Taylor emphasized that under the Act's plain language, "marriage *at the time of injury* is not a necessary element of the cause of action," such that 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 also rejected the notion that the Act's plain text "anticipated" that the surviving spouse would have been married to the decedent prior to 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.

Additionally, Judge Taylor found that the Act "supersedes the common law" because it was designed to "remedy" the anomalous effects of the common law, and because it "is repugnant" to the common law marriage-before-injury rule, which would eliminate an entire category of "surviving spouses" otherwise eligible to recover under the Act's plain text. *Id.* at 347-48.

Finally, Judge Taylor rejected the majority's "absurdity" analysis by noting that the term "survivors" is unambiguous" and that "[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." *Id.* at 349 (citation omitted).

2. *Domino's Pizza, LLC v. Wiederhold*

Shortly after *Kelly* was published, the Fifth District issued its decision in *Domino's*, which expressly rejected the *Kelly* majority opinion and adopted the *Kelly* dissent. *Domino's*, 248 So.3d at 220.

In doing so, the Fifth District focused on the plain language of the Act, noting that the "common and ordinary meaning" of "surviving spouse" is simply "a person who outlives his or her husband or wife," and that "nothing in [this statutory definition] limits those terms to familial relationships existing at the time of injury." *Id.* at 219-220. Thus, because "[t]he statute defines 'survivors' as including 'the decedent's spouse' without any other limitation," *id.* the Fifth District concluded "[i]t would be inappropriate for this Court to read any more into [the statutory definition] than what is plainly there." *Id.* (citation omitted). Accordingly, the Fifth District held that a surviving spouse may recover for loss of consortium under the Wrongful Death Act even if the marriage occurred after the injury. *Id.*

The Fifth District, moreover, explained that it was "unconvinc[ed]" by *Kelly*'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. In this regard, 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 therein did not to pursue an appeal to the Florida Supreme Court, leaving an active conflict between the Fourth and Fifth Districts.[1]

3. *Ripple v. CBS Corp.*

As explained above, on March 30, 2022, the Fourth District published its decision in this case, in which it reaffirmed its commitment to *Kelly.* In its opinion, 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 Act supersedes the common law marriage-before-injury rule. According to the Fourth District, "[t]hat approach

[1] Thereafter, the Western District of Washington likewise rejected *Kelly*. *Jack v. Borg-Warner Morse Tec, LLC*, 2018 WL 4409800 (W.D. Wash. Sept. 17, 2018).

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.'" Based on this, the Fourth District "certif[ied] conflict between *Kelly* and *Domino's*."

4. *Philip Morris USA, Inc. v. Rintoul*

Recently, on May 11, 2022, the Fourth District published its decision in *Philip Morris USA, Inc. v. Rintoul*, 2022 WL 1482413 (Fla. 4th DCA May 11, 2022), in which the Fourth District again reaffirmed its commitment to *Kelly* and certified conflict with *Domino's*. *Id.* at *10. Judge Martha Warner issued a dissent finding that *Kelly* was wrongly decided and explaining why she "would adopt … Judge Taylor's dissent in *Kelly*." *Id.* at *14.

***

Thus, this Court has jurisdiction to resolve the certified conflict.

## III. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE DECISION BELOW

This petition presents an issue of sufficient magnitude to merit the Court's exercise of discretionary jurisdiction.

In the Fourth District, unlike *anywhere* else, for a "surviving spouse" to recover under section 768.21(2), he or she must not only be a "surviving spouse," but must also have been married to the

decedent before the injury occurred. A "surviving spouse" in the Fifth District is not subject to this requirement, and a "surviving spouse" in the First, Second, or Third District faces complete uncertainty. This Court should resolve the conflict to ensure uniform "surviving spouse" rights throughout the state.

Of equal significance is that the Fourth District reached its conclusion by engrafting a judicially-crafted marriage-before-injury rule onto unambiguous statutory text that does not require marriage before injury, raising significant separation-of-powers concerns. *See* Fla. Const. Art. 2 § 3; *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla. 1998) (Courts are "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. To do so would be an abrogation of legislative power."). 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 ensure adherence to the separation of powers, which is "[t]he cornerstone of American democracy," *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla. 2004), this Court should accept jurisdiction.

## CONCLUSION

This Court has jurisdiction to resolve the certified conflict and should exercise its discretion to do so.

Dated: May 16, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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:

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## CERTIFICATE OF COMPLIANCE

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

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