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SUPREME COURT
STATE OF FLORIDA

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

JENNIFER RIPPLE, ETC.
Petitioner,

v.

CBS CORPORATION, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

"In our adversarial system, one side—the side with a bad argument—has an incentive to urge departure from (or distortion of) text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 10 (2012). That is exactly what Defendants do in their Answer Brief, performing legal acrobatics in an attempt to convince this Court to depart from (or distort) the plain text of the Wrongful Death Act.

The reason is obvious: The statute's plain text is, by design, fatal to Defendants' efforts to evade liability. Section 768.21(2) authorizes, without limitation, a decedent's "surviving spouse" to recover statutory damages. Because Mrs. Ripple ("Ripple") is Mr. Counter's ("Counter") "surviving spouse," the text of section 768.21(2) plainly authorizes her to recover these damages. Moreover, even if Counter had left behind no "surviving spouse," his surviving adult children would have been eligible to recover under section 768.21(3), which specifically provides that a decedent's surviving adult children may recover "if there is no surviving spouse."

Although this statutory framework plainly contemplates recovery by *either* the decedent's "surviving spouse" *or* the decedent's

surviving adult children, Defendants swing for the fences by asking the Court to conclude that *neither* Counter's "surviving spouse" *nor* his surviving adult children may recover under these provisions. In doing so, Defendants advance a dizzying array of contradictory arguments and interpretive methods.

Defendants begin by conceding that Ripple is Counter's "surviving spouse" in the literal sense because she was married to Counter when he died. Defendants deny, however, that she qualifies as Counter's "surviving spouse" under section 768.21(2) because she married Counter after he was already "injured." In support, Defendants ask the Court to look beyond the statute's plain text to find that it incorporates an unwritten common-law rule known as the marriage-before-injury rule, which, according to Defendants, silently bars an entire category of surviving spouses, including Ripple, from recovering under the Wrongful Death Act. Defendants insist that this interpretation is defensible because it consistent with sound public policy and avoids a supposedly absurd result.

In the very next section of their brief, however, Defendants perform an extraordinary about-face, arguing that the Court must strictly construe the Wrongful Death Act to find that Ripple *is*

Counter's "surviving spouse" within the meaning of section 768.21(3), and that her status as such precludes Counter's surviving adult children from recovering. In support, Defendants emphasize that the Court must follow the "plain meaning" of "surviving spouse" irrespective of whether the marriage occurred after the decedent was already injured-—the exact opposite of their opening argument. Under Defendants' newfound textualist bent, they insist there is no room for public policy or absurdity considerations because such issues are within the sole province of the Legislature.

Try as they may to reconcile these contradictory arguments, Defendants' arguments are irreconcilable. Either Ripple is Counter's "surviving spouse" within the meaning of the Wrongful Death Act, *as a whole*, or she is not. *See* Scalia & Garner, *supra*, at 170 ("'There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.'"). And either this Court should employ principles of textualism in analyzing this question, or it should not. But Defendants cannot have it both ways, as the Fourth District correctly recognized.

The only discernible consistency in Defendants' contradictory positions is that, in each instance, Defendants adopt whatever

argument or interpretive method furthers their goal of evading liability, no matter how incompatible it is with arguments and interpretive methods they advance elsewhere in their brief. Accepting Defendants' contradictory positions, however, would require a judicial re-write of the statute and return to the common law, where a victim's death enabled tortfeasors to evade liability—the precise result the Legislature enacted the Wrongful Death Act to *avoid*.

The Court is dutybound to constrain itself to the statute's plain text, and to effectuate—rather than frustrate—the statute's remedial purpose. That requires holding that Ripple is eligible to recover damages under section 768.21(2) because she is Counter's "surviving spouse." But if the Court finds that Ripple is not Counter's "surviving spouse" *within the meaning of the Wrongful Death Act*, it must hold that Counter's surviving adult children are eligible to recover under section 768.21(3).

ARGUMENT

I. THE INTERPRETIVE CANONS CONFIRM THE MARRIAGE-BEFORE-INJURY RULE DOES NOT APPLY TO WRONGFUL-DEATH CLAIMS

In the Answer Brief, Defendants attempt to reconcile their tortured reading of the statute with the interpretive canons. But their attempt only confirms that the marriage-before-injury rule does not apply to wrongful-death claims.

A. The Omitted-Case Canon

The Fourth District's decision to engraft the common-law marriage-before-injury rule onto the statute contravenes the omitted-case canon, which provides that "nothing is to be added to what the text states or reasonably implies." Scalia & Garner, *supra*, at 96. In *R.R. v. New Life Community Church of CMA, Inc.*, 303 So.3d 916, 923 (Fla. 2020), this Court applied the omitted-case canon while explaining that "[w]hen a statute purports to provide a comprehensive treatment of the issue it addresses, judicial lawmaking is implicitly excluded" such that there is "no room for supplemental common law … rules." Drawing from this principle, the Initial Brief explains that the Wrongful Death Act's treatment of wrongful death claims is "comprehensive" such that, under the

omitted-case canon, "judicial lawmaking" with respect to wrongful death claims "is implicitly excluded." I.B.39-41.

Defendants, on the other hand, contend that *R.R.* and the statute it analyzed are inapposite. *R.R.* analyzed section 95.031, which states that "except as provided" by statute, "the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues." *Id.* It thereafter lists several rules and exceptions that are applicable to various kinds of causes of action. Defendants argue this statute and thus *R.R.'s* analysis are distinguishable for two reasons.

1. The Omitted-Case Canon Can Apply to Statutes that Do Not Expressly Exclude Judicial Lawmaking

Defendants contend that *R.R.* applied the omitted-case canon solely because the statute it analyzed contains three words that the Wrongful Death Act does not. According to Defendants, the words "except as provided" in section 95.031 render that statute comprehensive in a way that the wording of the Wrongful Death Act does not because those words specifically instruct the reader to look to statutes (and thus not common law) to find exceptions to the statutory rules it establishes. This is incorrect for two reasons.

First, Defendants' reading of *R.R.* is far too narrow. Nothing in the opinion suggests that those three words were dispositive in the analysis. To the contrary, the Court's assessment of comprehensiveness was based on "the overall statutory framework" and the fact that the statute listed specific rules and exceptions to them. *R.R.*, 303 So.3d at 921-24. This is in line with numerous Florida cases that have applied the omitted-case canon to statutes that do not include any words like "except as provided" by statute. *See, e.g.*, *State v. Demons*, 351 So.3d 10, 15 (Fla. 4th DCA 2022). These cases confirm a principle that should go without saying: A statute does not need to expressly exclude judicial lawmaking for a court to find that it "implicitly" does so under the omitted-case canon.

Second, the Wrongful Death Act contains wording that is similar to that in section 90.031. The Wrongful Death Act specifically directs the reader to the statutory text to determine how "[d]amages may be awarded." It dictates that "[d]amages may be awarded *as follows*," and then sets forth a series of meticulously crafted statutory rules and exceptions, 768.21, which employ defined terms that are likewise subject to meticulously crafted statutory rules and exceptions,

768.18. The statute does not direct the reader to consider any *other* way that "damages may be awarded."

Third, application of the omitted-case canon does not require statutory "comprehensiveness." Scalia & Garner, *supra*, at 93-100; *Demons*, 351 So.3d at 15. The fact that the statute in *R.R.* was "comprehensive" was sufficient, but not necessary, for the canon's application. Under the canon, the bottom line is that "a matter not covered is to be treated as not covered." Scalia & Garner, *supra*, at 93.

2. Section 768.20 Does Not Effectuate a Wholesale Incorporation of Common-Law Defenses

Defendants next contend that the Wrongful Death Act cannot be said to exclude judge-made law like the statute in *R.R.* because unlike the statute in that case, section 768.20 of the Wrongful Death Act authorizes defenses against survivors. The validity of this contention, however, depends on Defendants' next assertion, which is that section 786.20 "broadly" preserves "common law defenses" against survivors, like the marriage-before-injury rule. A.B.31. That assertion is both circular and contrary to the plain text of the statute,

which is why Defendants do not cite even a single case that supports it. A.B.31.

It ignores that the Legislature specifically enacted the Wrongful Death Act to *fix* the consequence of death at common-law, not *codify* it. *See* § 768.17, Fla. Stat. A wholesale incorporation of "common law defenses" would maintain the common law's *status quo* and thus *entirely* defeat the statute's remedial purpose. Consider, for example, the most obvious common-law defense that applied to *all* of a decedent's survivors at common law: that the decedent's death extinguished all of the survivors' claims. *Kelly v. Georgia-Pacific, LLC*, 211 So.3d 340, 342-43 (Fla. 4th DCA 2017). Taken to its logical conclusion, Defendants' argument would authorize defendants to assert *this* defense in cases under the statute, thus allowing tortfeasors to evade liability in all cases. Because the text of the statute dictates that it was enacted to avoid this very outcome, Defendants' argument is without merit.

The statute, moreover, cannot be said to authorize a defense against a survivor based solely on the fact that the survivor was part of a class of people who were ineligible to recover at common law, especially where such a defense would contradict rights expressly

granted by the statute. At common law, for example, the children of an injured plaintiff were ineligible to recover for parental loss of consortium. *Larusso v. Garner*, 888 So.2d 712, 719 (Fla. 4th DCA 2004). The Wrongful Death Act, however, expressly authorizes a decedent's children to recover under section 768.21(3). A defendant cannot assert as a defense against a surviving child that he or she is ineligible to recover under section 768.21(3) merely because he or she would have been ineligible to recover for parental loss of consortium at common law.

Defendants cite just one case as a supposed example of section 768.20 "broadly" authorizing common-law defenses to be asserted against a survivor: *Variety Children's Hospital v. Perkins*, 445 So.2d 1010 (Fla. 1983). That case, however, has *nothing* to do with section 768.20. Although it is true that the Court in *Variety Children's Hospital* applied a common-law rule—the rule of res judicata—in a case under the Wrongful Death Act, it did so pursuant to the text of section 768.19 (not section 768.20), which mandates a wholly separate inquiry focused on whether the decedent (not the survivor) had a viable claim at the time of his or her death. *See id.* at 1011

Variety Children's Hospital involved a child who was injured and filed a personal-injury action against the tortfeasor. Ultimately, the child litigated the personal-injury claim to conclusion, prevailed, and recovered damages. The child thereafter died from the injury, and the child's estate filed a claim under the Wrongful Death Act against the same tortfeasor for the same injury. The question presented was whether the statute authorized this claim given that the child had already litigated to conclusion a personal-injury claim against the same defendant for the same injury. *Id.*

The Court determined that the question was governed by the plain text of section 768.19, *id.*, which required the Court to analyze whether *the decedent* possessed a viable claim against the defendant *the moment before he died*, when such a claim would still have been *governed by the common law*. *See* 768.19, Fla. Stat. (creating cause of action where wrongful act "would have entitled the person injured to maintain an action and recover damages if death had not ensued ...."); *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So.2d 109, 117 (Fla. 2002). Accordingly, the Court considered common-law defenses that would have barred *the decedent's* claim (while he was alive).

One such applicable common-law defense was res judicata. The Court reasoned that because *the decedent* had fully litigated his personal-injury claim before he died, *he* would have been barred by res judicata from relitigating that claim the moment just before he died. *See Variety Children's Hospital*, 445 So.2d at 1012. Thus, the Court found that under section 768.19, the decedent's estate did not possess a claim under the Wrongful Death Act. *See id.* at 1011.

Variety Children's Hospital was a straightforward application of the text of section 768.19. *Id.* ("Our holding is based upon the language contained in section 768.19 ...."). As such, it does not support Defendants' position here. Unlike the statutorily mandated assessment of whether *the decedent* possessed a valid claim at the time of his death, nothing in the text of section 768.19, or any other provision of the statute, requires analysis of whether the *surviving spouse* possessed a valid claim at the time of the decedent's death. The common-law marriage-before-injury rule, therefore, is not germane to any analysis required by the statute, and *Variety Children's Hospital* is inapposite and certainly does not support the

proposition that section 768.20 effectuates a wholesale incorporation of common-law defenses against survivors.[1]

B. The *Expressio-Unius* Canon

The *expressio-unius* canon provides that "[t]he expression of one thing implies exclusion of others ...." Scalia & Garner, *supra*, at 107. Under this canon, the Initial Brief explains that "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 such limitations and conditions on the "surviving spouse." I.B.42.

Defendants do not deny this. Instead, they contend that "the [*expressio-unius*] canon has no application" here because "[t]he marriage before injury rule" does not "add to or subtract from any limitations on a spouse's right to recover." A.B.40.

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[1] The only other case Defendants cite is *Nolan v. Moore*, 81 Fla. 594 (Fla. 1920), a 123-year-old opinion that analyzed a 111-year-old *predecessor* to the Wrongful Death Act that has long since been repealed. Defendants fail to mention that the *Nolan* holding was based on a "liberal construction in favor of the beneficiaries" rather than a strict construction against them.

The position is bizarre. Engrafting the marriage-before-injury rule onto the statute would plainly add a "limitation" on the "right to recover" of a "surviving spouse" who married the decedent after the decedent was injured. The rule would completely bar such a "surviving spouse" from recovering. Defendants' response is easily refuted.

C. Statutorily Mandated Liberal Construction

In the Initial Brief, Ripple explains that if the Court harbors any doubt about whether to incorporate the common-law marriage-before-injury rule into the statute, it should resolve that doubt by liberally construing the statute in favor of effectuating its remedial purpose, as commanded by section 768.17. Such a liberal construction would require the Court to reject the common-law rule.

In response, Defendants contend that the statute's interpretive direction is "of limited use" and "cannot avoid the Court analyzing the act under the presumption against changes in the common law" for two reasons, both of which are without merit. A.B.41.

First, Defendants note that "[t]he terms of a statute control when interpreting the statutory language." A.B.41. Ripple could not agree more. It is thus unclear why Defendants invoke this rule. They

are the ones who ask the Court to look beyond "the terms" of the statute. "The terms" of the statute dictate that the "surviving spouse," without limitation, may recover under section 768.21(2) *and* that this provision shall be "liberally construed" in favor of awarding such compensation. § 768.17, Fla. Stat. "The terms" of the statute, therefore, refute Defendants' argument.

Second, Defendants emphasize that "a legislative directive to construe a statute liberally 'should be regarded as requiring a fair interpretation as opposed to a strict or crabbed one ...." Scalia & Garner, *supra*, at 233. Ripple agrees with this, too. The problem for Defendants is that they do not offer *any* interpretation of *the text* of section 768.21(2)—much less a "fair" one—that supports the applicability of marriage-before-injury rule. To the contrary, Defendants ask the Court to *look beyond* that text to find that it is subject to this unwritten common-law limitation. By definition, such a request cannot be considered a "fair" interpretation of the text in section 768.21(2).

D. The Presumption Against Change in Common Law

1. The Presumption Does Not Apply

Defendants claim "[t]he precise question to be considered is whether the Wrongful Death Act abrogated the common law prohibition against marrying into loss of consortium causes of action." A.B.42. This characterization demonstrates the flaw in Defendants' analysis. This case does not concern a "loss of consortium cause of action." It concerns a statutory claim for wrongful death, which is entirely "separate and independent" from, and is not a continuation of, a common-law claim, *Kelly*, 211 So.3d at 342, *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So.3d 114, 120 (Fla. 2021), and the two do not overlap in any way or govern the same subject, I.B.46-50.

Defendants conflate these claims in an attempt to convince the Court to apply an inapplicable presumption that the latter claim does not abrogate a rule restricting the former one. The attempt is nonsensical. Because the two claims do not occupy the same space, there is no need to determine whether one "displaces" the other. I.B.46-50.

Defendants' *only* response is to argue that there *is* overlap between a common-law loss-of-consortium claim and a wrongful-death claim. A.B.43-45. In support, Defendants emphasize that the Wrongful Death Act allows a "surviving spouse" to recover "loss of consortium" damages "from the date of injury," § 768.21(2), such that in some cases "the act permits recovery of damages that, at least prior to death, would be recoverable through a common law loss of consortium claim for the period between injury and death." A.B.43. The argument is meritless for two reasons.

First, section 768.21(2) merely establishes a measure of damages. It does not define the claim. Two claims can exist separately and independently yet authorize a similar or even an exact measure of damages. For example, a tort claim and an employment discrimination claim both authorize a plaintiff to recover lost wages. *Scott v. Otis Elevator Co.*, 572 So.2d 902, 903 (Fla. 1990); *Lewis v. Federal Prison Industries, Inc.*, 953 F.3d 1277, 1277 (11th Cir. 1992). Yet there is no presumption that such claims are subject to the same rules, limitations, or exceptions unless one displaces the other. They are entirely distinct claims such that there is no need for such a presumption.

Second, the damages authorized by section 768.21(2) are not identical to those authorized by the common law. Section 768.21(2) "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." *Philip Morris USA, Inc. v. Rintoul*, 342 So.3d 656, 675 (Fla. 4th DCA 2022) (Warner, J., dissenting).

2. If the Presumption Applies, the Fourth District Misapplied It

Assuming, arguendo, the presumption against change in common law applies, the Fourth District misapplied it because the statute satisfies both prongs of the test articulated in *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990).

First, the statute unequivocally states that it changes the common law by asserting that it is "remedial" with respect to the outcome of death at common law and, more particularly, the ability of a victim's survivors to recover. I.B.50-53. Defendants acknowledge this but contend that this is not sufficient because the statute "says nothing at all, much less anything unequivocal, about the marriage before injury common law rule." A.B.46. But the statute's silence with respect to the common-law marriage-before-injury rule is hardly

surprising. When a statute changes an entire body of common law, one would not expect the statute to also specifically address each individual rule, limitation, or exception in that body. It is sufficient that the statute states that it changed the body of law *in its entirety*.

Second, the statute is so repugnant to the common-law marriage-before-injury rule that the two cannot coexist. I.B.50-53. Indeed, the statute's authorization, without limitation, of any "surviving spouse" to recover damages under section 768.21(2) cannot be said to "coexist" with a common-law rule that precludes an entire category of "surviving spouses" from recovering such damages. Defendants disagree because, according to them, "the rule simply precludes certain spouses from recovering" just as it did at common law. A.B.46. This is in line with Defendants' position below, where they contended that the common-law rule can coexist with the statute as an "exception" to it. But an incompatibility between a common-law rule and a statute cannot be reconciled by simply

characterizing the former as an exception to the latter, particularly where Defendants offer no limiting principle. I.B.53-54.[2]

II. IF RIPPLE IS NOT A "SURVIVING SPOUSE" UNDER SECTION 768.21(2), SHE CANNOT BE A "SURVIVING SPOUSE" UNDER SECTION 768.21(3)

The Fourth District held that, because Defendants successfully established that Ripple is not Counter's "surviving spouse" within the meaning of section 768.21(1) & (2), they could not establish that she was Counter's "surviving spouse" within the meaning of section 768.21(3). The Fourth District invoked the doctrine of judicial estoppel, and the Initial Brief explains that this holding is consistent with the presumption-of-consistent-usage canon. I.B.65-66.

Defendants do not provide any response to the presumption-of-consistent-usage canon. Instead, they challenge the ruling on two other primary grounds.

First, Defendants contend that they have never argued Ripple is not Counter's "surviving spouse," such that their assertion that

[2] The Initial Brief states that, aside from the Fourth District, no court has ever applied a common-law marriage-before-injury rule to a claim under a wrongful death act. I.B.1. Defendants, however, found one case where a court did just that. *Quirin v. Lorillard Tobacco Co.*, 2015 WL 128052 (E.D. Ill. Jan. 8, 2015). Thus, Defendants correctly note that the statement in the Initial Brief is inaccurate.

she is Counter's "surviving spouse" under section 768.21(3) cannot be construed as inconsistent. A.B.53-57. Defendants insist that they have always conceded Ripple is a "surviving spouse," but one who is ineligible to recover under section 768.21(2). A.B.53-57.

This characterization is just another way of saying Ripple is not a surviving spouse *within the meaning of section 768.21(2).* The sole function of section 768.21(2) is to authorize damages to "the surviving spouse." Thus, if someone is "the surviving spouse" *within the meaning of section 768.21(2)*, that means he or she is someone who may recover those damages. And if someone is not authorized to recover those damages, that means he or she is not a "surviving spouse" *within the meaning of section 768.21(2).*

By successfully asserting Ripple is not a "surviving spouse" who can recover the damages authorized by section 768.21(2), Defendants successfully established that Ripple is not "the surviving spouse" *within the meaning of section 768.21(2)*. The Fourth District correctly characterized Defendants' position as such.

Second, according to Defendants, Ripple never asserted to the Fourth District that Defendants' positions regarding Ripple's status as "the surviving spouse" were inconsistent or violated the doctrine

of judicial estoppel. A.B.53-57. While Ripple did not use the words "judicial estoppel," the whole point of her argument was that Defendants' positions were contradictory. To that end, Ripple asserted in her briefing to the Fourth District that if Ripple does not qualify as Counter's "surviving spouse" under section 768.21(2), then she cannot be said to qualify as his "surviving spouse" under section 768.21(3). 4DCA.I.B.28-31; 4DCA.Reply.13. And she specifically characterized Defendants' argument that Ripple is Counter's "surviving spouse" under section 768.21(3) as "an extraordinary about-face" to its argument that she is not his "surviving spouse" under section 768.21(2). 4DCA.Reply.13.

CONCLUSION

The Court should reverse the Fourth District's holding that the marriage-before-injury rule applies to wrongful death claims. If the Court affirms that ruling, it should affirm the Fourth District's ruling concerning the surviving adult children.

Dated: April 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail on this 27th day of April, 2023, 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, that this document complies with the applicable font requirement and word count limit.

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