IN THE SUPREME COURT OF FLORIDA

JOAN RUBLE, as Personal Representative of the Estate of Lance Ruble, Deceased,

Petitioner,

v.

Case No. SC11-1173
L.T. No. 3D10-488

RINKER MATERIALS CORPORATION, RINKER MATERIALS, LLC, and RINKER MATERIALS OF FLORIDA, INC.,

Respondents.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case is before the Court on conflict jurisdiction. Petitioner seeks review of the Third District Court of Appeal's decision affirming the trial court's order granting Respondents' Motion to Dismiss Petitioner's Amended Complaint. The issue before this Court is whether, on the death of the plaintiff in a personal injury case, the personal representative should have been permitted to substitute herself as the plaintiff and to amend the complaint to assert a wrongful death claim, a survival claim, or both (as alternative claims), as the Second District has held; or whether the case must be dismissed and the personal representative required to file an entirely new wrongful death lawsuit, as the Third District held below. *Ruble v. Rinker Material Corp. et al.*, 59 So. 3d 137 (Fla. 3d DCA 2011) (rehearing denied May 6, 2011). (Third DCA Opinion is included in Petitioner's Appendix ("App.") at Tab 1).

Petitioner respectfully submits that, as discussed below, the legislative intent of the Wrongful Death Act (§§ 768.16-768.26, Fla. Stat.) and Florida's liberal standards concerning the amendment of pleadings, as well as this and other Courts' interpretations of the Wrongful Death Act, all dictate that the Third District incorrectly applied the Act and that a personal representative should be able to amend the complaint to plead a wrongful death cause of action, as she attempted to do in this case. Therefore, Petitioner respectfully requests that this Court reverse

the decisions of the trial court and the Third District Court of Appeal and remand the case with instructions to permit the personal representative to be substituted as the plaintiff and to proceed with the Amended Complaint for wrongful death so the case can be tried on the merits.

The following references are used in this Initial Brief:

Petitioner/Plaintiff, Joan Ruble, is referred to as "Mrs. Ruble", "Plaintiff", or "Petitioner", but usually as "Mrs. Ruble". Mrs. Ruble's deceased husband, Lance Ruble, is referred to as "Mr. Ruble" or "the deceased".

Respondents/Defendants, Rinker Materials Corporation, Rinker Materials LLC, and Rinker Materials of Florida, Inc., are collectively referred to as "Rinker", "Respondent", or "the Rinker Defendants," but usually as "the Rinker Defendants".

References to the original record on appeal are cited as "R.__:__" followed by the volume and page numbers designated in the record (for example: R.I:1-2). One of the documents in the original record is a transcript with page numbers printed on the transcript pages. In that case, the cited page number is the transcript page, as opposed to the actual page in the record.

Filings in the Third District Court of Appeal are referred to by date and name because the index and any pagination of those papers has not yet been

prepared and, pursuant to this Court's order of October 17, 2011, are not due to be filed until after the deadline for serving this brief.

References to Petitioner's Appendix, which accompanies this Initial Brief and includes key papers from the Record on Appeal, as well as the subsequent rulings filed in the Third District and an unpublished decision, will be by the symbol "App. ___" followed by the tab and page number (for example: App. 1, 1).

All emphasis in this Initial Brief is that of the scrivener, except as otherwise indicated.

STATEMENT OF THE CASE AND FACTS

A. Mr. and Mrs. Ruble and The Complaints In This Case.

In August 2007, Lance Ruble was diagnosed with terminal mesothelioma, an incurable disease caused by exposure to asbestos. On August 11, 2008, Mr. Ruble and his wife, Joan Ruble, filed a Complaint in Miami Dade Circuit Court asserting three claims against the named defendants alleging that the defendants' asbestos-containing products caused Mr. Ruble's mesothelioma. (R.I:3-30). Count One of the Complaint alleged Negligence, Count Two alleged Strict Liability, and Count Three alleged Loss of Consortium as to Joan Ruble. (*Id.*). Five days after the filing of the original Complaint, on August 16, 2008, Mr. Ruble passed away from his

asbestos induced mesothelioma before the original Complaint was served on any of the Defendants.

On September 5, 2008, less than a month after the filing of the original Complaint, Mrs. Ruble filed and formally served the Defendants with an Amended Complaint for Wrongful Death. (R.I:31-74). The Amended Complaint asserts the same three causes of action against the same defendants, is based on the same conduct and occurrences at issue in the original Complaint, and is identical in all respects to the original Complaint, with the only exceptions being that the Amended Complaint substituted Mrs. Ruble, in her capacity as Personal Representative of the Estate of Lance Ruble, as a plaintiff and sought damages pursuant to Florida's Wrongful Death Statute (§768.20, Fla. Stat.), in addition to the survival and loss of consortium damages sought in the original Complaint. (*Id*.). Mrs. Ruble was still a party to the Amended Complaint in her individual capacity, as she had been in the original Complaint, in light of her loss of consortium claim, but she was now also proceeding as personal representative of Mr. Ruble's estate. Notably, the Amended Complaint was filed well within the two-year statute of limitations for wrongful death actions. *See* § 95.11(4)(d), Fla. Stat.

B. Defendants' Motion to Dismiss The Amended Complaint and The Trial Court's Order Granting Their Motion.

On October 15, 2008,[1] the Rinker Defendants filed a Motion to Dismiss the Amended Complaint, claiming Florida's Wrongful Death Act required Mrs. Ruble to open an entirely new and separate case file and number. (R.1:122-141). While the Motion to Dismiss was pending, Mrs. Ruble, in an abundance of caution, filed a Motion for Leave to File an Amended Complaint on January 16, 2009. [2] (R.I:146-169). The Amended Complaint filed with the Motion for Leave to Amend the Complaint was the same as the Amended Complaint previously filed and served on September 5, 2008.

The trial court heard argument on the Rinker Defendants' Motion to Dismiss the Amended Complaint on January 21, 2009. On March 18, 2009, the trial court issued an order reserving ruling on the Motion and indicating that it would give any interested asbestos litigants the opportunity to be heard on the issue at an

[1] Please note that the dates of filing referenced throughout this Petition refer to the dates indicated in the record on appeal as prepared by the Clerk of the Court for the Eleventh Judicial Circuit. However, the dates of filing often differ from the dates indicated in the electronic docket used by the parties in asbestos cases in Florida and maintained by Lexis/Nexis. The Lexis/Nexis electronic docket indicates the Motion to Dismiss was filed on October 30, 2008, as opposed to October 15, 2008, as indicated in the record prepared by the Clerk of the Court. Given that no timeliness issues have been raised, the differences between the electronic docket and the Clerk's record are not relevant to any issues on appeal.

upcoming monthly asbestos calendar, during which the trial court was set to hear outstanding matters in all pending asbestos cases on the court's docket. (R.I:170-71). On April 7, 2009, the Rinker Defendants filed a Notice of Supplemental Authority to their Motion to Dismiss the Amended Complaint, which focused on why Mrs. Ruble's Loss of Consortium claim should be dismissed. (R.I:172-74). Thereafter, on April 13, 2009, Mrs. Ruble voluntarily dismissed Count III of the Amended Complaint, the Loss of Consortium claim. (R.I:175). Mrs. Ruble is, therefore, no longer proceeding individually, and no issues remain regarding the viability of the Loss of Consortium claim.

On July 15, 2009, the trial court again heard argument from the parties on the issue of whether Mrs. Ruble should be permitted to proceed with her Amended Complaint for wrongful death. (R.II:180-217 (Transcript of Hearing)). At the hearing, Plaintiff's counsel urged the trial court to permit Mrs. Ruble to amend her Complaint and argued that the trial court, like trial and appellate courts throughout the state, had been permitting surviving plaintiffs in asbestos and other personal injury/wrongful death litigation to amend personal injury complaints to include wrongful death claims, as Mrs. Ruble had done here for years, without issue.

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[2] As discussed below, Mrs. Ruble had the right to file the Amended Complaint as a matter of course because no responsive pleading to the original complaint had been filed or served, and she was a named party in both complaints. *See* Fla. R. Civ. P. 1.190. In fact, the original complaint had never even been served. Rule 1.190 is discussed in the Argument portion of this Brief, *infra*.

(R.II:180-217 at p.5). Plaintiff's counsel also argued that the Defendants had cited no rule or statute requiring personal representatives, like Mrs. Ruble, to open an entirely new case, as opposed to simply amending the complaint in the already pending case (*Id*. at p.6), and that the only discernible reason the Defendants were asking the court to require this unduly burdensome procedure in this case was to cause needless delay in the litigation and force Plaintiff to spend more money filing and serving the pleadings in the new lawsuit. (*Id*. at pp.6-7). As Plaintiff's counsel further argued, such redundancy and wastefulness are inconsistent with and not required by the Wrongful Death Act, the Florida Rules of Civil Procedure, or the Rules Governing Members of the Florida Bar. (*Id*. at p.7). Notably, the Rinker Defendants failed to identify any prejudice that would ensue by permitting Mrs. Ruble to proceed with the Amended Complaint or any interest that would be served by the filing of a new case.

On November 18, 2009, Plaintiff filed a Reply to the Rinker Defendants' Motion to Dismiss the Amended Complaint, and the Rinker Defendants filed their Sur-Reply on December 29, 2009.[3] On February 5, 2010, the trial court granted the Rinker Defendants' Motion to Dismiss the Amended Complaint. (R.II:218-19;

[3] Plaintiff's Reply did not appear in the Original Record on Appeal, and, therefore, Plaintiff/Appellant filed an unopposed Motion to Supplement the Record with the Reply, which was attached to the Motion to Supplement. The Clerk of Court noted in the Index to the Record on Appeal that it was unable to locate the Reply. The District Court never ruled on the Motion to Supplement.

App.2). In its Order, the trial court, after summarizing the procedural history and the position of the Rinker Defendants, explained:

> The Florida Wrongful Death Act provides in pertinent part that "[w]hen a personal injury to the decedent results in death, no action for personal injury shall survive and any such action pending at the time of death shall abate." Fla. Stat. §768.20. The act goes on to state that "[t]he surviving spouse may… recover for loss of decedent's companionship and protection and for mental pain and suffering from the date of the injury." Fla. Stat. §768.21(2). Notably, because the Act allows a surviving spouse to recover these types of damages from the date of injury, rather than the date of death, they are inclusive of the types of damages that are generally associated with loss of consortium claims. *ACandS, Inc. v. Redd*, So. 2d 492, 495 (Fla. 3d DCA 1997).
>
> Here, Mr. Ruble's claim was one for personal injuries and those injuries ultimately caused his death. Consequently, his personal injury claims, as well as any derivative claims associated with the personal injury action - such as Ms. Ruble's loss of consortium claim – are barred by the Wrongful Death Act. *See AcandS*, 703 So.2d at 492-93 (stating that plaintiff's death abated his personal injury action and holding that no derivative loss of consortium claims survived the abatement).
>
> As a result of Mr. Ruble's death and the abatement of his prior claims, Ms. Ruble may not amend her complaint to substitute a wrongful death action for the personal injury action that existed previously. Instead, Plaintiff must file a new complaint to allege wrongful death.

Mrs. Ruble filed a timely Notice of Appeal on February 19, 2010. (R.II:176-79). Notably, while her appeal was pending, but prior to the filing of her Initial Brief on appeal, the two-year statute of limitations for the filing of the wrongful death claims ran on August 16, 2010. *See* § 95.11(4)(d), Fla. Stat.

C. Proceedings In The Third District Court Of Appeal.

On appeal, Mrs. Ruble argued that the trial court erred in granting the Rinker Defendants' Motion to Dismiss the Amended Complaint and that Mrs. Ruble should have been permitted to substitute herself, in her capacity as the personal representative of Mr. Ruble's estate, as the plaintiff in the case and to amend the Complaint to allege wrongful death. (Initial Brief of Appellant filed in Third District on Sept. 1, 2010). In support of her arguments to the Third District, Mrs. Ruble contended that although the Wrongful Death Act provides that a personal injury action pending at the time of a plaintiff's death abates, neither the Act nor any authority in this State prohibits the amendment of the original complaint to set forth the new wrongful death cause of action. (*Id*.). Rather, she argued, the law requires that leave to amend shall be freely given (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)) and that courts throughout the State, including this Court, have interpreted the Wrongful Death Act as contemplating the modification of and consolidation with personal injury actions (*citing, e.g., Martin v. United Security Services, Inc*., 314 So. 2d 765, 770 (Fla. 1975)). (*Id*.). Mrs. Ruble further argued that, although Florida Rule of Civil Procedure 1.260(a) does not apply to permit substitution of parties when an injured personal injury plaintiff dies, Rule 1.260(c) does provide an avenue by which the personal representative, like Mrs. Ruble, may be substituted as the plaintiff due to the fact that the Wrongful Death Act provides

a transfer of interest from the decedent to the survivors and the estate. (*Id*.). Finally, Mrs. Ruble argued that practical consideration, conservation of judicial and clerk resources, and equity dictate that the trial court order was erroneous and improper.

In their Answer Brief filed in the Third District, the Rinker Defendants asserted that the trial court correctly dismissed the Amended Complaint, arguing that the use of the word "abate" in the Wrongful Death Act means that the action was "extinguished" and that, therefore, Florida Rule of Civil Procedure 1.260(a) prohibits the substitution of Mrs. Ruble as the plaintiff. (Answer Brief of Appellee filed in the Third District on November 18, 2010). The Rinker Defendants also cited a line of Florida cases which they interpret to mean that the Wrongful Death Act was intended to altogether extinguish cases in which personal injury claims were originally asserted and to require the institution of a new and separate case. (*Id*.). They also argued that Mrs. Ruble's argument that Mr. Ruble's interests transferred to her is without merit. (*Id*.).

While the appeal in this case was pending before the Third District, on December 1, 2010, the Third District issued its opinion in *Capone v. Philip Morris U.S.A., Inc*., 35 Fla. L. Weekly D2639 (Fla. 3d DCA Dec. 1, 2010). In *Capone*, the Third District held:

> The original complaint for personal injury could not be amended, on [plaintiff's] death, to include a new wrongful death claim because

> Florida law establishes that a personal injury claim is extinguished upon the death of the plaintiff, and any surviving claim must be brought as a new and separate wrongful death action-it cannot be brought as an amendment to a personal injury action. [Citations omitted].

Capone v. Philip Morris U.S.A., Inc., 56 So. 3d 34, 36 (Fla. 3d DCA 2011) (Rehearing and Rehearing En Banc Denied March 23, 2011). Shortly after the issuance of its opinion in *Capone*, the Third District went on to affirm the trial court's order in the instant case and, in so doing, cited *Capone*, as well as Section 768.20, Florida Statutes, *Martin v. United Security Services, Inc.*, 314 So. 2d 765 (Fla. 1975), *A Cand S, Inc. v. Redd*, 703 So.2d 492 (Fla. 3d DCA 1997), and *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So.2d 31 (Fla. 2d DCA 2003), all of which are discussed below. (App. 1) (*Ruble v. Rinker Material Corp. et al.*, 59 So. 3d 137 (Fla. 3d DCA 2011)). The Third District issued an order denying Mrs. Ruble's Motion for Rehearing En Banc and Motion for Rehearing or Certification on May 6, 2011.

Mrs. Ruble timely filed her Notice to Invoke the Discretionary Jurisdiction in this Court on June 11, 2011, and, on October 17, 2011, this Court issued its Order accepting jurisdiction and ordering briefing on the merits.[4]

[4] This Court also accepted jurisdiction and ordered the same briefing schedule in the *Capone* case.

STANDARD OF REVIEW

This is a Petition for discretionary review of a District Court order affirming a trial court order granting the Respondents' Motion to Dismiss Petitioner's Amended Complaint. There are no factual issues in dispute. Rather, this Petition presents a pure question of law. The standard of review for dismissal of a complaint and for pure questions of law is *de novo*. *See Kirton v. Fields*, 997 So.2d 349, 352 (Fla. 2008); *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003). This Honorable Court may decide all issues of law without deference to any lower court. *Coleman v. Fla. Ins. Guaranty Assoc., Inc*., 517 So. 2d 686 (Fla. 1988).

SUMMARY OF THE ARGUMENT

The trial court's order dismissing Mrs. Ruble's Amended Complaint and requiring her to file an entirely new lawsuit to pursue wrongful death claims on behalf of her deceased husband's estate and survivors, and the Third District's opinion affirming the order, are contrary to the legislative intent of the Wrongful Death Act and the policies of the rules of civil procedure.

There is no express prohibition in the Wrongful Death Act nor the Florida Rules of Civil Procedure against amending a personal injury complaint to add wrongful death claims, nor has the Legislature or this Court expressed such an intent. The courts' rulings in this case effectively create a new, unnecessary procedural hurdle which will only further clog the courts with more lawsuits and

case files and serves no identifiable purpose other than to delay and increase the cost of litigating wrongful death cases.

Under the required liberal application of rules regarding amendments of pleadings and the Wrongful Death Act, Mrs. Ruble was entitled to amend the complaint as a matter of course and should have been permitted to do so. Mrs. Ruble should not be required to re-file a whole new lawsuit to effect what would be accomplished by simply amending the already pending Complaint where the wrongful death claims are based on the identical facts and occurrences. Requiring her to do so is directly contrary to the policies of the Rules of Civil Procedure and the legislative intent of the Wrongful Death Act.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT, AND THE DISTRICT COURT ERRONEOUSLY AFFIRMED THAT DECISION.

The trial court held that after the death of a plaintiff in a personal injury case, the personal representative of the decedent's estate may not amend the pending personal injury complaint to add claims pursuant to the Wrongful Death Act. Rather, according to the trial court's holding, the decedent's personal representative must initiate an entirely new case and file a new complaint, despite the fact that the allegations in the wrongful death complaint are identical to and based on the same facts and occurrences as the decedent's prior personal injury

complaint. This holding is not based on any express provision requiring such procedural somersaults and, instead, flies in the face of the well established policies favoring liberal amendment of pleadings and the legislative intent of the Wrongful Death Act, which is remedial and must be liberally construed in favor of recovery by survivors. The trial court's decision was erroneous, as was the District Court's decision affirming it.

A. The Trial Court's Order Violated Established Public Policy Favoring Liberal Amendment of Pleadings So Cases May Be Decided On Their Merits.

1. Mrs. Ruble Should Have Been Permitted To Amend The Complaint As A Matter of Course.

In the instant case, the trial court's Order was issued upon the Rinker Defendants' Motion to Dismiss the Amended Complaint. However, in its Order, the trial court expressly held that "Ms. Ruble may not amend her complaint…" (R.2:218-219). Under the circumstances of this case, the trial court's decision is particularly problematic because at the time Mrs. Ruble, who already was a party to the case in her individual capacity, filed the Amended Complaint, no responsive pleading to the original Complaint had yet been served. Indeed, Mr. Ruble died only five days after the filing of the original Complaint, which had not yet even been formally served on the defendants.

Under Florida Rule of Civil Procedure 1.190(a), a plaintiff may amend the complaint as a matter of course at any time before a responsive pleading is served.

Thus, as Mrs. Ruble's counsel argued to the trial court (R:II:180-217), Mrs. Ruble should have been allowed to amend the Complaint without leave of court. *See Boca Burger, Inc. v. Forum*¸ 912 So. 2d 561, 567-68 (Fla. 2005) (holding that a trial court has no discretion to prevent an amended complaint when no answer was filed and the defendant cannot contest the right to amend); *Dieudonne v. Publix Supermarkets, Inc*., 994 So. 2d 505, 506 (Fla. 3d DCA 2008). There is no reason why this rule should not apply in this case, and, therefore, the trial court erred in holding that Mrs. Ruble could not amend the Complaint.

2. The Trial Court Should Have Permitted The Amendment So The Case May Be Decided On Its Merits.

Although leave of court was not required to amend the Complaint in this case, when requested, such leave should not have been denied. "Public policy favors the liberal amendment of pleadings so that cases may be decided on the merits." *Southern Developers & Earthmoving, Inc. v. Caterpillar Financial Svcs. Corp*., 56 So. 3d 56, 62 (Fla. 2d DCA 2011); *Crown v. Chase Home Finance*, 41 So. 3d 978, 980 (Fla. 5th DCA 2010); *Gilbert v. Florida Power & Light Co*., 981 So. 2d 609, 612 (Fla. 4th DCA 2008). This well established public policy is in accord with the express requirements of Florida Rule of Civil Procedure 1.190(a), which provides, in pertinent part, that "[l]eave of court [to amend pleadings] shall be given freely when justice so requires." Rule 1.190(e) further provides that "[a]t any time in furtherance of justice, upon such terms as may be just, the court may

permit any… pleading… to be amended." Fla.R.Civ.Pro. 1.190(e). Because of this policy, the settled law in this State is that leave to amend should not be denied unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile. *See, e.g., Life General Security Insurance Co. v. Horal*, 667 So. 2d 967, 969 (Fla. 4th DCA 1996). To that end, a trial court's refusal to permit amendment where none of these considerations has been shown is an abuse of discretion. *See Southern Developers*, 56 So. 3d at 62-63; *Gilbert*, 981 So. 2d at 612; *Dieudonne*, 994 So. 2d at 506.

In the instant case, as noted above, the trial court expressly held that "Ms. Ruble may not amend her complaint…" (R.2:218-219). Likewise, in *Capone*, upon which the Third District relied in its decision in this case, the Third District expressly stated that the personal injury complaint "could not be amended" upon the plaintiff's death. *Capone*, 56 So. 3d at 36. Thus, the decision not to allow Mrs. Ruble to amend her complaint must be viewed against the backdrop of this public policy. Moreover, the policy favoring the liberal amendment of pleadings is even more compelling in this case, in which the amendment is based on the same conduct and occurrence upon which the original claim was brought. *See Dausmane v. Hillsborough Area Reg'l Transit*, 898 So. 2d 213, 215 (Fla. 2d DCA 2005) ("Leave to amend should be freely given, the more so… when the amendment is based on the same conduct, transaction[,] and occurrence upon

which the original claim was brought."), *quoting Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla., Inc*., 637 So. 2d 968, 970 (Fla. 5th DCA 1994).

The decisions of the trial court and the Third District in this case cannot be reconciled with this strong public policy. In a recent decision in the Second District, the court noted this precise concern. In *Skyrme v. R.J. Reynolds Tobacco Co*., -- So. 3d --, 2011 WL 5832338, *3 (Fla. 2d DCA, Nov. 18, 2011), the Second District expressed its concern with the circuit court's reliance on the *Capone* decision in ruling that the personal representative of a decedent's estate could not substitute herself as the plaintiff and amend the decedent's personal injury complaint to assert a wrongful death cause of action. The Second District noted: "[W]e do not see how the result in *Capone* … is supported by the law in Florida regarding the liberal amendment of pleadings." *Id*., *citing Dausman*, 898 So. 2d at 215, and Fla. R. Civ. P. 1.190(a). Petitioner respectfully submits that the Second District was correct – the *Capone* decision is not supported by the law in Florida regarding the liberal amendment of pleadings.

3. There Is No Demonstrable Basis for Denying the Amendment.

As stated above, Florida courts have carved out an exception to the liberal policy on allowing amendments where it is shown that allowing the amendment would (1) prejudice the opposing party; (2) be an abuse of the privilege to amend;

or (3) be futile. *See Dieudonne*, 994 So. 2d at 507; *Gilbert*, 981 So. 2d at 612. In this case, there was no showing at the trial court level nor during the appellate process of any of these concerns.

No Prejudice To The Defendants Would Result From The Amendment.

The Rinker Defendants have not and cannot set forth any basis upon which they would be prejudiced as a result of allowing the amendment. As explained in the Statement of Facts, above, the Amended Complaint is based on the same conduct and occurrences that were the basis for the original Complaint, and the Amended Complaint sets forth the same causes of action (strict liability, negligence, and loss of consortium) as the original Complaint. The Rinker Defendants cannot complain, therefore, that they were not on notice of the allegations against them. The only differences between the Complaints are the substitution of Mrs. Ruble, in her capacity as the personal representative of Mr. Ruble's estate, for Mr. Ruble as a named plaintiff and the addition of a claim for damages pursuant to and in accordance with the Wrongful Death Act (which were pled in addition to the survival and loss of consortium damages already sought in the original Complaint). However, as this Court has found, "The mere substitution of parties plaintiff, without substantial or material changes from the claims of the original petition, does not of itself constitute setting forth a new cause of action in the amended petition." *Griffin v. Workman*, 73 So. 2d 844, 847 (Fla. 1954),

quoting Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E. 2d 195, 198. Similarly, the addition of a new element of damages pursuant to the Wrongful Death Act in the Amended Complaint did not substantially change the cause of action. *See Talan v. Murphy*, 443 So. 2d 207, 208-09 (Fla. 3d DCA 1984). Whether the Complaint asserts claims for damages on behalf of the decedent or on behalf of the decedent's estate and survivors, the elements of proof remain the same, as the decedent's condition from the time of injury to the time of death is relevant to both. Nonetheless, in the instant case, the addition of the claim for damages under the Wrongful Death Act could not have prejudiced the Rinker Defendants given that the amendment was done so early in the proceedings that discovery and proof of damages was not yet at issue and that, whether Mrs. Ruble proceeded with an Amended Complaint or by way of a new Complaint, the Defendants would be facing the Wrongful Death Act damages one way or the other. Thus, it cannot be shown that allowing the amendment in this case would unfairly prejudice the Rinker Defendants. Indeed, the only demonstrable prejudice which may occur is to Mrs. Ruble, who will need to pay new filing and process serving fees (which are significant in cases such as this) and whose case will suffer certain delay and frustration by going back to square one and starting a new case, and to the court, which will be unnecessarily clogged with an additional, duplicate case file.

There Has Been No Abuse of The Privilege To Amend.

Mrs. Ruble did not abuse the amendment privilege. To the contrary, Mrs. Ruble had not previously moved the court to amend the Complaint. Since she had not sought to amend the Complaint before the instance now under review, it cannot be said that she has now abused the privilege. *See Life General Security Insurance Co. v. Horal*, 667 So. 2d 967, 969 (4th DCA 1996); *Soucy v. Casper*, 658 So. 2d 1017 (Fla. 4th DCA 1995).

Amendment of The Complaint Was Not Futile.

It has not been alleged nor shown that Mrs. Ruble cannot state a claim for negligence or strict liability damages pursuant to the Wrongful Death Act. Therefore, there has been no showing that amendment of the Complaint would have been futile.

Accordingly, the trial court should have permitted Mrs. Ruble to amend the Complaint both because she was free to do so as a matter of course and because of the strong public policy which dictates that leave to amend must be liberally granted to allow cases to be tried on their merits. The trial court erred in depriving Mrs. Ruble of leave to amend by granting the Defendants' Motion to Dismiss, and the District Court erred by affirming the trial court's order.

4. The Court Should Have Allowed Mrs. Ruble To Be Substituted For Mr. Ruble As A Plaintiff in The Amended Complaint.

Mrs. Ruble should also be permitted to substitute herself as a plaintiff in Mr. Ruble's place because, as the representative of Mr. Ruble's estate, she now has the capacity to pursue the wrongful death claims, whereas Mr. Ruble no longer does. Courts routinely permit the substitution of plaintiffs where the change reflects the party's capacity to bring the suit. For example, in *Niemi*, *supra*, the Second District held that trial court violated the essential requirements of law by denying a personal representative's motion to substitute because Florida law substitutes wrongful death actions for personal injury actions. 862 So. 2d at 33. Moreover, this Court has held that the substitution of a plaintiff to reflect a change in the capacity to bring the suit does not of itself constitute setting forth a new cause of action. *See Griffin*, 73 So. 2d at 847. As this Court found in *Griffin*, where the cause of action is not affected by the substitution, there is no substantive change simply by substituting parties to affect the right of action, which is remedial. In *Griffin*, the plaintiff substituted herself as the administrator of the decedent's estate after she was appointed as the administrator. She requested that the court substitute her for her father, who did not have the capacity to proceed as the administrator in the case. The Court found that the substitution affected only the right of action, because only the administrator of the estate may pursue a wrongful death claim and held that the court erred in not permitting the substitution. *Id*.

Similarly, in this case, Mrs. Ruble only seeks to substitute herself, in her capacity as the representative of Mr. Ruble's estate, because only the representative of the estate, and not the decedent, can pursue the wrongful death claim. Therefore, the substitution would affect only the right of action but will have no effect on the negligence or strict liability causes of action. *See also Cunningham v. Florida Dept. of Children and Families*, 782 So. 2d 913 (Fla. 1st DCA 2001) (substitution of party having capacity to bring suit not a change in the original cause of action); *Talan v. Murphy*, 443 So. 2d 207 (Fla. 3d DCA 1983); *Lindy's of Orlando v. United Electric Co*., 239 So. 2d 69 (Fla. 4th DCA 1970) (same).[5] Accordingly, Mrs. Ruble should be permitted to substitute herself as the plaintiff because she has the capacity to pursue the wrongful death claims in this case, whereas the previously named plaintiff, Mr. Ruble, does not.

Further, as Petitioner argued to the Third District, although Florida Rule of Civil Procedure 1.260(a)(1) is not available as an avenue for substitution in this case in light of the fact that the personal injury action has been extinguished by the Wrongful Death Act, Florida Rule of Civil Procedure 1.260(c) does provide an

[5] Petitioner points out that these cases arose in the context of whether the amendments to substitute the proper parties should relate back to the filing of the original complaint for statute of limitations purposes. These courts found that they should relate back because no change in the cause of action was found. Although the statute of limitations is not at issue in this appeal, Petitioner submits that the same result would occur in this case upon amendment and substitution of Mrs. Ruble.

available method for the trial court, upon motion by the Plaintiff, to substitute "Joan Ruble as the personal representative of the Estate of Lance Ruble, deceased," into the Amended Complaint. Mrs. Ruble has already been assigned as the personal representative of Lance Ruble's estate, and thus his interests have transferred to her. Rule 1.260(c), Transfer of Interest provides:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court, upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

As this Court found in *Martin v. United Security Services, Inc*., 314 So. 2d 765, 770 (Fla. 1975), the change of the action to a wrongful death action simply affected a "transfer" of the pain and suffering from the decedent to the survivors. Petitioner submits that although the right of action is different by virtue of the wrongful death claim, nonetheless, the fact that the interested party is now the estate of the deceased, instead of the deceased himself, is simply a transfer of interest for purposes of the Amended Complaint which is indistinguishable from a transfer of interest in a contract or real estate transaction. *See Miami Airlines v. Webb, III*, 114 So.2d 361, 363 (Fla. 3d DCA 1959) (court may permit a transfer of interest and substitution during pendency of suit).

Thus, dismissal of the suit is not warranted in this case simply because Mrs. Ruble seeks to substitute herself as a plaintiff, because Rule 1.260(c) provides an

additional basis upon which the substitution should be permitted. *See e.g. Sun States Utilities Inc., v. Destin Water Users, Inc.*, 696 So.2d 944, 945 (Fla. 1st DCA 1997), *quoting Gas Dev. Corp. v. Royal Oak Builders, Inc.*, 253 So.2d 738, 741 (Fla. 4th DCA 1971) ("Assuming that the appellants are correct in their position that Mr. Atkins received all property of the corporation, their ultimate conclusion, i.e. that the suit should have been dismissed because it was not maintained in the name of the real party of interest, is untenable. Rule 1.260(c) fully answers this contention").

Accordingly, the trial court's order granting the Motion to Dismiss and denying Mrs. Ruble permission to amend the Complaint contravene sound public policy favoring the liberal amendment of pleadings.

B. The Trial Court's Order Contradicts The Legislative Intent Behind the Wrongful Death Act.

There is no express prohibition in the Wrongful Death Act against amending an existing personal injury complaint upon the death of the injured plaintiff to assert claims pursuant to the Wrongful Death Act. By their rulings in this case, the trial court and the Third District have effectively written such a prohibition into the Act. Doing so, however, flies in the face of the legislative intent and general policies behind the Wrongful Death Act. The Legislature set forth the intent underlying the Florida Wrongful Death Act in Section 768.17, Florida Statutes. That provision states:

> Legislative intent.—It is the public policy of this 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.

§ 768.17, Fla. Stat. "Therefore, the intent of the act is to shift the losses of survivors to the wrongdoer. Section 768.17 further mandates that the wrongful death act shall be liberally construed in aid of accomplishing that intent." *Greenfield v. Daniels*, 51 So. 2d 421, 426 (Fla. 2010). In analyzing the provisions of the Wrongful Death Act, this Court has repeatedly stated that it "is guided by the Legislature's general intent that the remedial provisions of the wrongful death statute should be liberally, rather than strictly or narrowly, construed." *Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 290 (Fla. 2003), *citing* § 768.17, Fla. Stat.; *see also Golf Channel v. Jenkins*, 752 So. 2d 561, 565-66 (Fla. 2000) (remedial statutes should be construed in favor of granting access to the remedy provided by the statute).

1. This Court Has Repeatedly Emphasized the Remedial Nature of The Wrongful Death Act and the Requirement That It Be Liberally Construed to Further That Intent.

This Court has had the opportunity to analyze the provisions of the Wrongful Death Act on numerous occasions, and each time this Court has furthered the Act's legislative intent and interpreted the Act to give remedial effect for the survivors. For example, in *Greenfield*, *supra*, this Court considered whether a minor child of a decedent who was born while his mother was married to

a different person should be entitled to claim survivor damages in a wrongful death action. Given that the statute does not define the word "father", the Court considered the legislative intent of the Act to determine what definition should be used. The Court first noted that the Act itself mandates that it is remedial and must be liberally construed in aid of accomplishing that intent. 51 So. 3d at 426. The Court also took note of the Florida Law Revision Commission's report embodying the Commission's recommendations regarding the revisions to the Wrongful Death Act. As the Court noted, "The report also recommended that the Act be liberally interpreted to further justice, and should allow recovery by survivors…" *Id*. at 427, *quoting* Florida Law Revision Commission, *Recommendation and Report on Proposed Revision of Florida Wrongful Death and Survival Statute* 3 (Dec. 1969). In light of the legislative intent of the Act that losses are to be shifted from the survivors to the wrongdoers and that the Act is to be liberally construed to effect that intent, this Court found that the word "father" included the biological son of the decedent though born out of wedlock. *Id*.

More recently, in *Wagner, Vaughan, McLaughlin & Brenna, P.A., v. Kennedy Law Group*, 64 So. 3d 1187 (Fla. 2011), this Court considered the attorneys' fees provision of the Wrongful Death Act (§ 768.26, Fla. Stat.) to determine whether it applies when a wrongful death claim is settled pre-suit. This Court again took note of the legislative intent of the Act and stated that it is guided

by the Legislature's intent that the Act is to be liberally construed to effect its remedial provisions. *Id*. at 1191, *citing Meeks*, 863 So. 2d at 290. The Court also specifically noted that the Act "eliminates the multiplicity of suits that resulted from each survivor bringing an independent action" because "survivors may not bring separate legal actions and are required to participate in the single legal action filed by the estate." *Id*. The Court ultimately determined that the attorney's fees provision of the Act applies even where the action is settled pre-suit and explained, "This application of the statute is consistent with the stated legislative intent that the Act be 'liberally construed.'" *Id*. at 1192, *citing* § 768.17, Fla. Stat.

It was in *Martin v. United Security Services, Inc*., 314 So. 2d 765 (Fla. 1975), however, that this Court addressed the legislative intent underlying the use of the word "abate" in the Act. In *Martin*, the petitioners argued that the Wrongful Death Act unconstitutionally eliminated survivors' claims for the pain and suffering of a decedent without adequate notice. In finding the Act constitutional, this Court engaged in an analysis of the Wrongful Death Act as compared to its predecessor statute and of the legislative intent behind specific provisions in the Act, including the provision at issue in this case, Section 768.20, relating to the abatement of actions for personal injuries resulting in death. In so doing, this Court noted that under the prior statutory provisions, two separate and independent causes of action could be brought for a negligently caused death. 314 So. 2d at

767. As such, the administrator of the decedent's estate could maintain a survival action on behalf of the deceased to recover damages for the decedent's own pain and suffering and other damages and expenses personal to the decedent. In addition, the decedent's survivors could maintain a wrongful death action on their own behalf to recover damages for their own losses and suffering, and other damages and expenses personal to them and caused by the loss of the decedent. This Court specifically emphasized that the new and current Wrongful Death Act was "intended to merge the survival action for personal injuries and the wrongful death action into one lawsuit." *Id*. at 768.

After listing out the categories of damages recoverable under the current Act, the *Martin* Court pointed out:

> In merging the two prior actions, the legislature transferred the items of damages for loss of earnings, medical expenses, and funeral expenses from the survival statute to the new Wrongful Death Act. The claim for pain and suffering of the decedent from the date of injury to the decedent was eliminated. Substituted therefor was a claim for pain and suffering of close relatives, ***the clear purpose being that any recovery should be for the living and not for the dead***…

314 So. 2d at 769 (emphasis added). The Court then interpreted the provision in the Act which provides that any personal injury action pending at the time of the decedent's death "shall abate." § 768.20, Fla. Stat. The Court's analysis of this provision is directly applicable to the issue now before the Court in the instant case.

As the *Martin* Court explained, the particular provision, which abates any pending personal injury action, "effectively provides that no ***separate*** statutory action for personal injuries resulting in death can survive the decedent's demise." *Id*. at 770 (emphasis added). As the Court went on to elucidate:

> [I]t is clear that the essence of the survival action, specifically tortfeasor answerablility in damages to the decedent's estate for 'injury resulting in death,' will remain inimpaired by the new legislation. ***The primary difference is the merger of the actions and the transfer of pain and suffering damage from the decedent to the survivors. The only logical construction of the [abatement provision] is that it expresses the legislative intent that a separate lawsuit for death-resulting personal injuries cannot be brought as a survival action*** under Section 46.021. ***The action can be brought, in a consolidated form, under the new Wrongful Death Act. The purpose of the [abatement provision] is to implement the consolidation.*** It, together with the preceding sentence and the rest of the Act, conveys an unmistakable legislative intent to incorporate into the new Wrongful Death Act the survival action formerly maintainable under Section 46.021, but modified to substitute a survivor's pain and suffering for a decedent's pain and suffering as an element of damages.

Id. at 770 (emphasis added).[6] Thus, this Court has already explained the intent of the abatement provision, which is to implement ***consolidation***.

As the *Martin* decision makes clear, the abatement provision was intended to foreclose survivors from bringing a separate lawsuit for the decedent's personal

[6] In the reported decision, the Court refers to "the italicized sentence" and "the preceding sentence" where Petitioner has inserted [abatement provision]. No italicized sentence appears in the quoted section, but the Court makes clear before and after the quoted passage that it is referring to the sentence in the Wrongful Death Act regarding abatement (§ 768.20, Fla. Stat.).

injuries and to implement the consolidation of the previous personal injury action and the wrongful death action. This is absolutely consistent with the course of action Mrs. Ruble attempted to pursue in the instant case. Mrs. Ruble did not bring separate lawsuits to recover for Mr. Ruble's personal injuries while also proceeding with claims on behalf of the survivors for their own damages. Instead, she attempted to bring the wrongful death action in the same, consolidated lawsuit as the previous personal injury action and to substitute Mr. Ruble's survivors' pain and suffering for that of Mr. Ruble himself.

Nowhere in the *Martin* opinion does the Court say anything to suggest that the abatement provision was intended to cause a pending lawsuit to terminate and to require that an entirely new and separate one be filed. And, nothing in the text of the Wrongful Death Act suggests that when a plaintiff in a personal injury lawsuit dies from the personal injury, his personal representative must file a new lawsuit rather than amend the existing complaint to add an alternative or substitute a new claim for wrongful death. Indeed such a requirement is directly contrary to the *Martin* opinion's overall theme of "merger" and "consolidation" of the actions.

As the above opinions from this Court illustrate, the Wrongful Death Act is remedial and it must be liberally construed to facilitate recovery by a decedent's survivors and estate from the tortfeasors responsible for causing the decedent's death. As the *Martin* opinion further demonstrates, the abatement provision of

Section 768.20, in particular, was intended to implement the consolidation of claims on behalf of decedents with those on behalf of survivors. The trial court and Third District's conclusions that the Act requires survivors and personal representatives to jump through additional hoops and file separate lawsuits in order to assert the consolidated action is directly contrary to the stated remedial intent of the Act and can only be the result of a restrictive rather than liberal interpretation of this remedial statute.

2. Other Courts Have Disagreed With The Third District's Reasoning in Capone and This Case.

Guided by the legislative intent of the Wrongful Death Act, other courts that have considered the issue of whether a personal representative can amend a personal injury complaint to add a claim for wrongful death have found that the *Capone* analysis is contrary to the Act's intent.

For example, in *Skyrme*, *supra*, Florida's Second District considered the *Capone* holding that a personal representative cannot amend the personal injury complaint but must, instead, file a new, separate lawsuit for wrongful death. The Court expressed its concern with the Third District's holding, stating, "[W]e do not see how the result in *Capone* is consistent with the law in Florida addressing the unique relationship between a personal injury claim and a wrongful death claim…" 2011 WL 5832338, at *3, *citing Toombs v. Alamo Rent-A-Car, Inc*., 833 So. 2d 109, 118 (Fla. 2002); *Celotex Corp. v. Meehan*, 523 So. 2d 141, 147 (Fla. 1988);

Martin, supra; Niemi, supra; Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254 (Fla. 5th DCA 2010).

Similarly, a federal district court in the Middle District of Florida recently declined to accept the *Capone* court's construction of the Act as requiring a personal representative to file an entirely new lawsuit on grounds that it is inconsistent with existing practice, illogical, and constitutes a restrictive interpretation of a remedial statute. *Starling v. R.J. Reynolds Tobacco Co*., Case No. 09-10027-CV-RBD at p.27 (M.D. of Fla. Nov. 2, 2011) (App. 3). Specifically, District Judge Roy B. Dalton wrote:

> The suggestion that a separate action for wrongful death following the death of a plaintiff must be presented by filing a new complaint in a new lawsuit defies all logic and, while perhaps a boon to the judicial coffers from the standpoint of filing fees, would create a needless administrative hoop that is not contemplated by the Act.
>
> ***
>
> There is nothing to suggest, however, that the institution of this new, separate statutory cause of action arising from the same facts cannot be implemented by virtue of an amendment to an existing complaint so long as the plaintiff does not seek to proceed on both causes of action where there is no issue related to the cause of death.

Id. at pp. 27-28, *citing* §§ 768.19-768.21, Fla. Stat. In reaching his conclusion, Judge Dalton considered the legislative history of the Act and its remedial intent, pointing out, "Remedial statutes are to be interpreted 'in favor of granting access to the remedy provided by the Legislature'." *Id*. at p. 29, *citing Golf Channel v. Jenkins*, *supra.*

While the *Skyrme* and *Starling* decisions directly addressed and disagreed with the Third District's holding in *Capone*, other courts have reached similar conclusions concerning the meaning of the Wrongful Death Act's requirements upon the death of a personal injury plaintiff. Specifically, in *Niemi v. Brown & Williamson Tobacco Corporation*, 862 So. 2d 31 (Fla. 2d DCA 2003), the trial court denied a decedent's personal representatives' motion to substitute them as plaintiffs in the decedent's pending personal injury action on the grounds that the action had abated at the time of the decedent's death. The Second District granted the personal representatives' petition for writ of certiorari, finding that the trial court had departed from the essential requirements of law by denying the motion to substitute. *Id*. at 34. Focusing on the Wrongful Death Act's abatement provision, the Second District interpreted the provision to mean that "when death is the result of a personal injury, the law of Florida essentially substitutes a statutory wrongful death action for the personal injury action that would otherwise survive under section 46.021 [Fla. Stat.]." *Id*. at 33. In a now oft-quoted discussion of the problem with reading the Act to require the personal representatives to start an entirely new lawsuit to assert wrongful death claims (as the Third District did in this case), the Second District wrote:

> As a matter of legal theory, "abatement" may bring a pending action to an end or extinguish it, but this theoretical event does not automatically terminate a lawsuit, which is represented by a physical

> file in the courthouse. A pending lawsuit does not simply self-destruct like the secret message on a rerun of "Mission Impossible."

862 So. 2d at 33. This is precisely the point Mrs. Ruble attempted to convey to the trial court and the Third District here. Mrs. Ruble agrees that Mr. Ruble's personal injury cause of action was extinguished when he died, but this does not mean that the entire lawsuit must be terminated. Rather, the provision only requires that the wrongful death cause of action should be substituted for the personal injury claims and the personal representative substituted for the decedent in the already pending lawsuit, where otherwise based on the identical facts and occurrences. As discussed in Mrs. Ruble's Brief on Jurisdiction filed in the instant case, the Third District's decisions in this case and *Capone* directly conflict with the Second District's holding in *Niemi*.

Similarly, in *Laizure v. Avante at Leesburg, Inc*., 44 So. 3d 1254, 1258 (Fla. 5th DCA 2010), the Fifth District Court of Appeal recognized the effect of the Wrongful Death Act as merely transforming personal injury claims into wrongful death claims or substituting the wrongful death claims for personal injury claims. Emphasizing the fact that the wrongful death action belongs to the survivors of the decedent and is predicated on the wrongful act or negligence of the defendant, the court found that the decedent's death "transformed a personal injury claim into one for wrongful death."

Again, there is no support for the Third District's reading of an additional procedural requirement into the Act either in the Act itself or in case law anywhere outside the Third District. The Rinker Defendants relied on the Fifth District Court of Appeals decision in *Taylor v. Orlando Clinic*, 555 So. 2d 876 (Fla. 5th DCA 1990), in support of their argument that the Act requires the filing of a separate lawsuit to assert the wrongful death claims. However, in *Taylor*, the Fifth District was confronted with an entirely different factual scenario than that presented in the instant case or *Capone*. In *Taylor*, the decedent and his wife filed a medical malpractice action alleging negligence against health care providers and seeking damages for loss of consortium on behalf of the decedent's wife. After the death of the decedent, the personal representative of the decedent's estate filed a motion to amend the pending negligence complaint to substitute a wrongful death action, and the personal representative also filed a separate, new lawsuit setting forth the same wrongful death allegations against the same defendants named in the proposed amended complaint. The trial court dismissed both causes of action, finding that the personal representative had improperly split causes of action. The Fifth District held that the wife's loss of consortium claim survived her husband's death, and, therefore, the trial court erred in dismissing the wife's cause of action for loss of consortium in the original case. *Id*. at 878. [7] The Fifth District further

[7] Subsequently, in *ACandS Inc.*, *supra*, the Third District held that a loss of

held that the decedent's cause of action did not survive his death, and, therefore, that the trial court properly dismissed the decedent's personal injury action. *Id*. at 879. In so doing, the Fifth District pointed out that the personal representative's motion to substitute "erroneously attempted to substitute a wrongful death action for the abated personal injury negligence action." *Id*. at 879. Finally, the Fifth District held that the trial court had erroneously dismissed the separate and newly filed wrongful death lawsuit because the wrongful death lawsuit was separate and distinct from the personal injury action and, therefore, there was no impermissible splitting of actions. *Id.*

Given the posture of the case when it reached the Fifth District, it is difficult to determine whether the Fifth District intended to foreclose the possibility of a plaintiff amending a complaint to add wrongful death claims where, as here, the plaintiff had not also filed a separate wrongful death case. At a minimum, that was not the holding in the case.

Courts prior to and subsequent to *Taylor* have certainly permitted such practice. *See e.g. Nance v. Johns-Manville Sales Corp*., 466 So.2d 1113 (Fla. 3d DCA 1985) (trial court allowed mesothelioma victim's survivor to file amended complaint for wrongful death and to be substituted as the party plaintiff in a

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consortium claim could not survive the death of the plaintiff either. 703 So.2d at 494.

personal representative capacity against asbestos manufacturers after victim died during the pendency of personal injury action);[8] *Davies v. Owens-Illinois, Inc.*, 632 So.2d 1065, 1066 (Fla. 3d DCA 1994) (same); *Chesteron v. Fisher*, 655 So.2d 170, 171 (Fla. 3d DCA 1995) (same); *see also Green Tree Servicing, LLC v. McLeod*, 15 So.3d 682, 684 (Fla. 2d DCA 2009) (where the plaintiff died, and the widow who was appointed as the personal representative of her late husband's estate, was substituted as the party plaintiff in the action against the defendant and then filed a second amended complaint that added a claim against the defendant for wrongful death - the procedural posture was summarized by the court, and did not even draw its attention in its analysis of the right to arbitration.).

As demonstrated above, the Wrongful Death Act mandates that its provisions be liberally construed to facilitate its remedial purpose. This Court has consistently applied the provisions of the Act to facilitate recovery by survivors from tortfeasors that caused their decedents' deaths. The trial court and the Third District opinions in this case cannot be reconciled with this established policy. Rather, their opinions appear to be the result of a restrictive application of the Act which will only serve to complicate and hinder the process for recovery by survivors. The decisions should therefore be reversed.

[8] The appeal of *Nance* was addressed on separate grounds by the Florida Supreme Court in *Celotex Corp v. Meehan, Nance and Colon*, 532 So.2d 141 (Fla. 1988). The procedural history was recounted, and not addressed. See id. at 147.

C. The Interests of Fairness, Equity, and Practicality Also Dictate That The Third District's Decision Was Erroneous.

Finally, as Petitioner argued to the Third District, the view expressed by the lower courts in this case and by the Rinker Defendants contradicts the express purpose of the Florida Rules of Civil Procedure which "shall be construed to secure the just, speedy and inexpensive determination of every action." Fla. R. Civ. P. 1.010 (Scope and Purpose of the Rules of Civil Procedure). The Rinker Defendants have not articulated any reason throughout the course of this litigation why Mrs. Ruble should not be permitted to substitute herself as a plaintiff and amend the Complaint to allege wrongful death claims. Rather, as discussed above, it is clear that the procedure required by the trial court and the Third District below will only serve to delay and increase the expense of wrongful death litigation.

The procedure is also inconsistent with the Florida Rules of Professional Conduct, Rule 4-3.2, Expediting Litigation, which states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." There is no interest being served here other than pure delay.

Accordingly, the decisions of the trial court and the Third District violate the policies of the Rules governing the litigation of cases at every level, and, as such, the decisions should not be allowed to stand.

CONCLUSION

The trial court's order granting the Rinker Defendants' Motion to Dismiss the Amended Complaint and the Third District Court of Appeal's Decision Affirming the order are erroneous and directly contravene the public policies and legislative intent discussed above.

Accordingly, based on all of the reasons and citations of authority set forth above, Petitioner respectfully requests that this Court reverse the decisions of the trial court and the Third District Court of Appeal and remand the case with instructions to the trial court to permit the personal representative to be substituted as the plaintiff and to proceed with the Amended Complaint for wrongful death so the case can be tried on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail upon Chris N. Kolos, Esq., Holland & Knight, LLP, 200 South Orange Avenue, Ste 2600, Orlando, FL 32801, and Larry A. Klein, Holland & Knight, LLP, 222 Lakeview Ave, Ste 1000, West Palm Beach, FL 33401, on this ___ day of December, 2011.

_____
Melissa D. Visconti, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
Melissa D. Visconti, Esq.