

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1173
L.T. NO. 3D10-488

JOAN RUBLE, as Personal Representative of the
Estate of LANCE RUBLE, deceased,

Petitioner,

vs.

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

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

The only relevant facts are that this case was filed as a personal injury case, and during the pendency of the personal injury case, the plaintiff died from his personal injuries. The fact that plaintiff died from his injuries was alleged in the amended complaint and is acknowledged on page 1 of Petitioner's Brief on Jurisdiction. It was because plaintiff died from his injuries that the trial court ruled that the personal injury case could not, by amendment, be converted into a wrongful death case.

As the petitioner states on page 3 of her brief, the trial court ruled that a wrongful death case would have to be filed as a new lawsuit. There was no reason petitioner could not have filed a wrongful death suit, but, instead, petitioner filed this appeal, which was affirmed.

SUMMARY OF ARGUMENT

Petitioner asserts conflict with a single case, *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So.2d 31 (Fla. 2d DCA 2003), however, *Niemi* is distinguishable. In *Niemi*, the record did not show whether the plaintiff's death resulted from his injuries, or from other causes, and the appellate court reversed only for that issue to be clarified. In this case, it is undisputed that the plaintiff died from his injuries. Every Florida case addressing this issue requires a new lawsuit.

ISSUE

DOES THE OPINION IN THIS CASE CONFLICT WITH *NIEMI v. BROWN & WILLIAMSON TOBACCO CORP.*, 862 So.2d at 33?

ARGUMENT

Section 768.20 Florida Statutes states:

"When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate."

Abate means extinguished. *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So.2d 31, 33 (Fla. 2d DCA 2003).

Plaintiff's argument that she should be able to substitute the personal representative as plaintiff, and change the personal injury action into a wrongful death action, cannot be reconciled with section 768.20, which abated (extinguished) the personal injury case. Her position is also contrary to Rule 1.260(a)(1), which provides:

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.

(emphasis added).

It is not only the statute and the rule which require the filing of a separate wrongful death case when the plaintiff dies from the injuries alleged in a personal injury case. All of the cases addressing this issue have also come to that conclusion.¹ No Florida court, in which the issue was raised, has permitted an amendment to change a personal injury case to a wrongful death case. In the cases petitioner cites in footnote 3 of her brief, none addressed the propriety of amending and therefore, they have no value as precedent. *Martino v. Wal-Mart*, 835 So.2d 1251, 1255 fn.1 (Fla. 4th DCA 2003) (court rejected as authority a legal argument based on a stated procedural fact in an opinion because it was not a legal issue resolved by the court).

This Court has made it clear that a new and different cause of action, such as a wrongful death action, requires a separate lawsuit. *Nissan Motor Co., Ltd. v. Phlieger*, 508 So.2d 713, 714 (Fla. 1987) (the Wrongful Death Act creates a new and independent cause of action in the statutorily designated beneficiaries); *United Telephone Company of Fla. v. Mayo*, 345 So.2d 648, 655, fn.6 (Fla. 1977) (right to amend does not authorize a new and different cause of action); *Merchants &*

¹ *Capone v. Philip Morris U.S.A. Inc.*, 56 So.3d 34 (Fla. 3d DCA 2011); *Taylor v. Orlando Clinic*, 555 So.2d 876 (Fla. 5th DCA 1989); *Salfi v. Columbia/JFK Medical Center Limited Partnership*, 942 So.2d 417 (Fla. 4th DCA 2006); *ACandS, Inc. v. Redd*, 703 So.2d 492 (Fla. 3d DCA 1997); *Higgins v. Johnson*, 422 So.2d 16, 17 (Fla. 2d DCA 1982).

Bankers Guaranty Co. v. Downs, 175 So. 704, 711 (Fla. 1937) (amendment cannot be used to allege a new and distinct cause of action).

CONCLUSION

The opinion in this case does not conflict with *Niemi*, but on the contrary, is entirely consistent with *Niemi*. Review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished
via U.S. Mail on this 29th day of June, 2011, upon:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this, *Respondents' Brief on Jurisdiction*, complies
with the font requirements set forth in Rule 9.100(1) of the Florida Rules of
Appellate Procedure, as it has been prepared in Times New Roman 14-point font.

/s/ Larry A. Klein
Attorney