THE SUPREME COURT OF FLORIDA

JOAN RUBLE,

Petitioner,

v.

Case No. SC11-1173

RINKER MATERIALS CORP.,

L.T. No. 3D10-488

Respondent.

______________________________/

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

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Table of Contents i

Table of Citations ii

Statement of the Case and Facts 1

Summary of the Argument 4

Argument 5

I. The Court Has Conflict Jurisdiction. 5

A. The Decision Below Conflicts With *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003), as to Whether a Personal Injury Complaint May Be Amended to Add a Wrongful Death Claim When the Plaintiff Dies. 5

II. The Court Should Accept Jurisdiction. 7

Conclusion 10

Certificate of Service 11

Certificate of Compliance 11

TABLE OF CITATIONS
CASES

A.W. Chesterson v. Fisher, 655 So. 2d 170 (Fla. 3d DCA 1995)............................7

ACandS v. Redd, 703 So. 2d 492 (Fla. 3d DCA 1997)....................................2,3,4

Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596 (Fla. 2d DCA 1992) 7

Baione v. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla. 2d DCA 1992) 7

Barwick, Dillian & Lambert, P.A. v. Ewing, 646 So. 2d 776 (Fla. 3d DCA 1994)...7

Bruce v. Byer, 423 So. 2d 413 (Fla. 5th DCA 1982) 7

Capone v. Philip Morris U.S.A. Inc., 56 So. 3d 34 (Fla. 3d DCA 2011) (rehearing denied March 23, 2011) 3,4

Corbin Well Pump & Supply, Inc. v. Koon, 482 So. 2d 525 (Fla. 5th DCA 1986)..7

Davies v. Owens-Illinois, Inc., 632 So. 2d 1065 (Fla. 3d DCA 1994) 7

First Protective Ins. Co. v. Featherston, 906 So. 2d 1242 (Fla. 2d DCA 2005).....7

Humana Health Plans, Inc. v. Durant, 650 So. 2d 203 (Fla. 4th DCA 1995) 7

Jaylene, Inc. v. Steuer, 22 So. 3d 711 (Fla. 2d DCA 2009)....................................7

Johnson v. Mullee, 385 So. 2d 1038 (Fla. 1st DCA 1980) 7

Jollie v. State, 405 So.2d 418, 420 (Fla. 1981)...7

Martinez v. Ipox, 925 So. 2d 448 (Fla. 2d DCA 2d DCA 2006) 7

Martin v. United Security Services, Inc., 314 So. 2d 765 (Fla. 1975).....................4

Niemi v. Brown & Williamson Tobacco Corp., 862 So. 2d 31 (Fla. 2d DCA 2003) 2, 4, 5, 6

Ruble v. Rinker Material Corp., 59 So. 3d 137 (Fla. 3d DCA 2011) 1

Williams v. Bay Hospital, Inc., 471 So. 2d 626 (Fla. 1st DCA 1985) 7

CONSTITUTIONAL PROVISIONS AND RULES OF COURT

Fla. Stat. § 768.20. 2

Fla. Stat. § 768.21. 2

Art. V, § 3(b)(3), Fla. Const. 5

Fla. R. App. P. 9.030(a)(2)(A)(iv) 5

Fla. R. Civ. P. 1.530(b). 6

OTHER AUTHORITIES

Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *Article and Essay: The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 521-22 (2005). 8, 9

STATEMENT OF THE CASE AND FACTS

Joan Ruble, as the personal representative of the estate of her deceased husband, Lance Ruble, invokes this Court's conflict jurisdiction to determine whether, on the death of the plaintiff in a personal injury case, the personal representative should be substituted for the plaintiff and allowed to amend the complaint to assert a survival claim, a wrongful death 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 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). (Appendix ("App.") 1).

On August 11, 2008, Plaintiffs Lance Ruble and his wife, Joan Ruble, filed a Complaint alleging three claims against the named defendants alleging that defendant's asbestos-containing products caused Lance Ruble's mesothelioma. (App.2). The first count alleged Negligence, the second count alleged Strict Liability, and the third count alleged Loss of Consortium as to Joan Ruble (*Id.*). Five days later, on August 16, 2008, Lance Ruble passed away from his asbestos induced mesothelioma before his Complaint was served on any Defendant. On September 5, 2008, Joan Ruble, individually and as Personal Representative of the Estate of Lance Ruble, filed and formally served her Amended Complaint for Wrongful Death against the same Defendants wholly supplanting the original

Complaint. (App.3). The first count alleged Negligence, the second count alleged Strict Liability, and the third count alleged Loss of Consortium as to Joan Ruble (*Id.*). On October 8, 2008, the Rinker Defendants filed a Motion to Dismiss the Amended Complaint, claiming Florida's Wrongful Death Act required opening an entirely new case file and number (App.4). On January 8, 2009, Plaintiff filed a Motion for Leave to File an Amended Complaint (App.5). On April 9, 2009, Plaintiff voluntarily dismissed Count III of the Amended Complaint, the Loss of Consortium claim (App.6).[1]

On January 27, 2010, the trial court granted the Rinker Defendants' Motion to Dismiss the Amended Complaint (App.7). The trial court, after summarizing the procedural history and the position of the Rinker Defendants, held:

> 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).

[1] Therefore, Joan Ruble is no longer proceeding individually.

> 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. *Id.*

On February 19, 2010, Ms. Ruble filed a Notice of Appeal (App.8).

On February 2, 2011 the Third District affirmed the dismissal of the amended complaint, its ruling forming a basis for conflict. Specifically, the court cited the following holding from *Capone v. Phillip Morris*, *U.S.A., Inc.*: "The original complaint for personal injury could not be amended on the 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." (App. 1), citing

Capone, 56 So.3d 37 (Fla. 3d DCA 2011)[2]; Fla. Stat. §768.20; *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).

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction because the decision below conflicts with decisions of other district courts of appeal or this Court. Specifically, the holding that a personal injury complaint must be dismissed upon the death of the plaintiff and that a wrongful death action may not be brought as an amendment to a personal injury action directly conflicts with the decision in *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003).

The Court should exercise its discretion to accept jurisdiction because the legal effect of the death of the plaintiff in a personal injury case is an extremely important issue. The decision below calls into question the historic practice of allowing the personal representative to be substituted as the plaintiff and, if appropriate, to amend the complaint to state a wrongful death claim. Because plaintiffs die every day, the decision affects thousands of cases.

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[2] The *Capone* case is presently pending jurisdictional determination in this Court. Because the 3rd DCA relied on the *Capone* decision in affirming the trial Court's dismissal of Plaintiff's Amended Complaint in the case below, Petitioner filed a Notice of Related Case before this Court in the instant case suggesting that this Court may wish to exercise "*Jollie*" or "piggy-back" jurisdiction as to the

ARGUMENT

I. THE COURT HAS CONFLICT JURISDICTION.

This Court has jurisdiction because the Third District's decision expressly and directly conflicts with a decision of another district court of appeal or this Court, which is sufficient to establish jurisdiction. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

A. The Decision Below Conflicts With *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003), as to Whether a Personal Injury Complaint May Be Amended to Add a Wrongful Death Claim When the Plaintiff Dies.

The primary holding in the decision below is that "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." (App. 1). This holding expressly and directly conflicts with *Niemi v. Brown & Williamson Tobacco Corp.*, *supra*. The Niemis sued tobacco companies for personal injuries sustained by Mr. Niemi, and he died before trial. *Id.* at 32. The co-personal representatives of Mr. Niemi's estate moved to be substituted as plaintiffs, but the trial court denied the motion "apparently concluding that the action had automatically abated at the time of Mr. Niemi's death." *Id.* at 33. The Second

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instant Petition (App. 9).

District held that this was a departure from the essential requirements of the law. *Id.* at 34.

Writing for the court, Judge Altenbernd acknowledged that the Wrongful Death Act provides that an action "abates" when the plaintiff's injuries lead to his or her death, but explained that this abatement "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.' " *Id.* at 33. He further noted that the personal injury claim would not abate until there had been a final determination that the death was caused by the complained-of injuries, as opposed to some unrelated cause. *Id.* at 33. The court accordingly held:

> The only way to resolve whether this action should be abated is to permit Mr. Niemi's co-personal representatives to appear in the action and to permit them to amend the pleadings. Unless the parties agree upon a cause of death, it is possible that the co-personal representatives will be required to plead both a personal injury action and an alternative wrongful death action.

Id. at 34. Thus, directly contrary to the Third District's express holding in this case, the Second District expressly held that the personal injury complaint can be amended to state a claim for wrongful death when there is any concern that the death was caused by the tort.

II THE COURT SHOULD ACCEPT JURISDICTION.

The issue of what happens to a personal injury action when the plaintiff dies is extremely important because it is a common occurrence. The Southern Reporter is replete with opinions that demonstrate that the usual course is to substitute the personal representative of the plaintiff's estate and allow the personal representative to amend the complaint to (1) continue pursuing the personal injury claim if the death was not caused by the complained-of injuries, (2) substitute a wrongful death claim if it was, or (3) pursue both avenues in the alternative if there is any doubt on the cause of death.[3] But the opinion below calls this practice into substantial doubt. And since the opinion speaks in terms of the trial court's authority, it casts doubt on the validity of thousands of final judgments. *See, e.g., Corbin Well Pump & Supply, Inc. v. Koon*, 482 So. 2d 525, 527 (Fla. 5th DCA 1986) ("While parties and their successors in title or interest are generally bound

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[3] *E.g., Jaylene, Inc. v. Steuer*, 22 So. 3d 711, 713 (Fla. 2d DCA 2009); *Martinez v. Ipox*, 925 So. 2d 448, 449 (Fla. 2d DCA 2d DCA 2006); *First Protective Ins. Co.v. Featherston*, 906 So. 2d 1242, 1243 (Fla. 2d DCA 2005); *A.W. Chesterson v. Fisher*, 655 So. 2d 170, 170-171 (Fla. 3d DCA 1995); *Humana Health Plans, Inc. v. Durant*, 650 So. 2d 203, 204 (Fla. 4th DCA 1995); *Davies v. Owens-Illinois, Inc.*, 632 So. 2d 1065, 1066 (Fla. 3d DCA 1994); *Barwick, Dillian & Lambert, P.A. v. Ewing*, 646 So. 2d 776, 778 (Fla. 3d DCA 1994); *Arthur v. Unicare Health Facilities, Inc.*, 602 So. 2d 596, 598 (Fla. 2d DCA 1992); *Baione v. Owens-Illinois, Inc.*, 599 So. 2d 1377, 1378 (Fla. 2d DCA 1992); *Williams v. Bay Hospital, Inc.*, 471 So. 2d 626, 628 (Fla. 1st DCA 1985); *Bruce v. Byer*, 423 So. 2d 413, 414 (Fla. 5th DCA 1982); *Johnson v. Mullee*, 385 So. 2d 1038, 1039 (Fla. 1st DCA 1980).

by final judgments in suits in which they appeared as parties, they are not bound if the judgment being attacked is void because the court rendering the judgment lacked subject matter jurisdiction.").

Indeed, because of the wide-ranging importance of this issue, the Florida Justice Association has already filed a notice of its intention to seek leave to file an amicus brief in the *Capone* Petition if jurisdiction is granted. *Capone* is a tobacco lawsuit. The issue is just as likely to arise in an automobile accident case, a medical malpractice case, or any other tort case where the plaintiff dies before trial.

As noted above, the Third DCA issued the *Capone* decision two months before the decision in this case and relied on its decision in *Capone* in support of its decision in the instant case. Like the instant Petition, the *Capone* Petition, which is pending a decision on jurisdiction in this Court, alleges conflict with the *Niemi* case. As set forth in Petitioner's Notice of Related Case, filed in the instant case on June 7, 2011, this Court could, therefore, invoke "piggy-back" or "*Jollie*" jurisdiction. *See* Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *Article and Essay: The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 521-22 (2005):

> The final category of conflict is "piggyback" conflict. Discretion over these cases arises because they cite as controlling precedent a decision of a district court that is pending for review in, or has been subsequently overruled by, the Florida Supreme Court; or they cite as controlling precedent a decision of the Florida Supreme Court from which the Court has subsequently receded.

See also Jollie v. State, 405 So.2d 418, 420 (Fla. 1981). Petitioner recognizes that *Jollie* jurisdiction here depends upon this Court's still pending decision on whether to exercise its discretionary jurisdiction in *Capone*. *See The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. at 22 ("[T]he Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review… During the interim, jurisdiction remains inchoate and only a possibility.").

Either way, this Court has conflict jurisdiction due to the direct conflict between the decision below and *Niemi*. Petitioner respectfully submits that this Court should exercise its jurisdiction and provide much needed guidance on the issue of what must happen to a pending personal injury case when the plaintiff dies. Is the plaintiff required to file an entirely new lawsuit with a new case number or is it a simple matter of substituting in the personal representative to continue the personal injury claim, convert it to a wrongful death claim, or pursue both claims in the alternative? The bar needs a definitive answer, and the impact of a decision on this issue will be far-reaching.

CONCLUSION

For the foregoing reasons, this Court has conflict jurisdiction and should exercise its discretion to grant review of this case.

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, Esq. Holland & Knight, LLP, 222 Lakeview Avenue, Suite 1000, West Palm Beach, Florida 33401-6148 on this 9th day of June, 2011.

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.

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Melissa D. Visconti, Esq.