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

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In this Reply Brief, Petitioners, Respondents, and Mr. Ruble, the decedent, will be referred to as they were in the Initial Brief, as will the record on appeal (R), transcripts, and references to the Appendix accompanying Petitioner's Initial Brief.

ARGUMENT

1. The Respondents Misconstrue The Issue On Appeal.

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 amend the decedent's personal injury complaint to assert a wrongful death claim or whether the personal representative must file an entirely new lawsuit to allege their wrongful death cause of action. Notably, the Rinker Defendants have phrased the issue differently, and their re-phrasing of the issue is not a distinction without a difference.

Mrs. Ruble, who was a named plaintiff in the original personal injury complaint and who had been appointed as the personal representative of Mr. Ruble's estate after his death, did not seek to "substitute a wrongful death action" for the pending personal injury action, as the Rinker Defendants suggest in the Statement of the Facts and the statement of the Issue in their Answer Brief. Instead, she sought to file an amended complaint which added a wrongful death

cause of action to the existing personal injury complaint, and the trial court and the Third District ruled that she could not do so but, rather, that she had to file an entirely new and separate lawsuit to allege the wrongful death claim. The trial court and the Third District erred in so holding for the reasons set forth in Mrs. Ruble's Initial Brief and below.

2. Respondents Ignore Conflicting Cases Directly Addressing The Issue.

In both the Summary of Argument and the Argument sections of their Answer Brief, the Rinker Defendants state that "[e]very Florida court which has addressed the issue" and that "[a]ll of the cases addressing this issue" have held that a separate wrongful death case must be filed upon the death of a plaintiff in a personal injury case. *See* Respondents' Answer Brief on the Merits at pp. 2 and 3. Respondents completely ignore the decision in *Niemi v. Brown & Williamson Tobacco Corp*., 862 So. 2d 31 (Fla. 2d DCA 2003), in which the Second District expressly held that, upon the death of a plaintiff in a personal injury lawsuit, the personal representative should be permitted to appear in the action and amend the pleadings to state a claim for wrongful death. *Id*. at 33-34. Clearly, the Rinker Defendants are not unaware of the case, upon which Mrs. Ruble relied in her Brief on Jurisdiction and her Initial Brief on the Merits before this Court, because they do cite to the case in support of their argument that "[a]bate means extinguished"

(which, by the way, is not the holding of the *Niemi* case[1]). *See* Respondents' Answer Brief on the Merits at p. 2. Instead, they have simply chosen to ignore the Second District's holding in the *Niemi* case, which is the basis for conflict jurisdiction.

Respondents have also chosen to ignore the Second District's more recent decision in *Skyrme v. R.J. Reynolds Tobacco Co*., 75 So. 3d 769 (Fla. 2d DCA 2011),[2] in which the court did address the issue in this case and noted "we 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 or how it is supported by the law in Florida regarding the liberal amendment of pleadings." *Id*. at 773. Although the *Skyrme* decision is cited and discussed in Petitioner's Initial Brief on the Merits, the Rinker Defendants do not even acknowledge it in their Answer Brief.

Although they do acknowledge the Middle District of Florida's decision in *Starling v. R.J. Reynolds Tobbaco Co*., Case No. 09-10027-CV-RBD, 2011 WL 6965854 (M.D. of Fla. Nov. 2, 2011) (App. 3), the Rinker Defendants choose to

[1] Not only did the *Niemi* court not hold that abate means extinguish, but the Court actually stated: "We will not attempt a precise definition of 'abate' for purposes of section 768.20." 862 So. 2d at 33.

[2] In *Skyrme*, the Second District denied a petition for writ of certiorari on the issue because the plaintiffs' case had not yet been dismissed and, therefore, the plaintiffs had not suffered irreparable harm. As such, although the Second District addressed the issue, the comments quoted here are not the court's holding.

ignore the fact that the case directly addresses the Wrongful Death Act. Instead, they disingenuously attempt to distinguish and limit the court's holding in the case on the grounds that it is an *Engle* progeny case and the court did note (in a footnote) that the inequities of reading the Act to require the filing of a new complaint would be especially harsh for *Engle* progeny plaintiffs, who are limited by a one-year filing deadline. 2011 WL 6965854 at *27 n.19. In reality, the court's holding is that the Wrongful Death Act does not bar amendment of an existing personal injury complaint to add a claim for wrongful death, and the court's analysis is based, in large part, on the legislative intent of the Wrongful Death Act. See 2011 WL 6965854 at *30.

Meanwhile, in support of their contention that every case to have addressed the issue supports their position on appeal, the Rinker Defendants rely on only one case (outside of the *Ruble* and *Capone* decisions) that actually addresses the issue, *Taylor v. Orlando Clinic*, 555 So. 2d 876 (Fla. 5th DCA 1989). In a somewhat baffling assessment of the case, the Rinker Defendants argue that the *Taylor* case is "factually the same as this case." Respondent's Answer Brief on the Merits at p.4. Again, the Rinker Defendants conveniently ignore important details about the case. As explained in Mrs. Ruble's Initial Brief, the factual scenario in *Taylor* was very different, in important respects. In *Taylor*, after the death of the personal injury plaintiff in a medical malpractice case, the personal representative filed a motion to

amend the pending personal injury complaint to "substitute" a wrongful death cause of action for the personal injury action and also filed a separate lawsuit alleging the same wrongful death cause of action. There is simply no rational basis for stating that the setting in the *Taylor* case is "factually the same" as the background of the instant case, in which Mrs. Ruble did not attempt to substitute the cause of action but, instead, added a different cause of action and in which she did not also file a separate lawsuit.

The Fifth District's holding in the *Taylor* case is discussed in Mrs. Ruble's Initial Brief on the merits. Mrs. Ruble agrees that the Fifth District's explanation for affirming dismissal of the amended complaint (that the motion to amend "erroneously attempted to substitute a wrongful death action for the abated personal injury negligence action") is not favorable for Mrs. Ruble's position in this case. However, the Fifth District's decision to dismiss was based on Florida Rule of Civil Procedure 1.260(a)(1) and the court's determination that the Rule cannot be used to substitute one cause of action for another. That is not what Mrs. Ruble attempted to do in this case, and, therefore, the holding does not apply to the circumstances in this case. Moreover, as also explained in Mrs. Ruble's Initial Brief, the circumstances in *Taylor* are so factually different that it is difficult to guess what the Fifth District would have done had it been confronted with the circumstances presented in the instant case.

As for the other cases cited by the Rinker Defendants in support of their claim that every other case addressing this issue supports their position in this appeal, the other cases do not address the issue. For example, in *Nissan Motor Co., Ltd., v. Phlieger*, 508 So. 2d 713 (Fla. 1987), there was never a personal injury complaint filed by the decedent, who died instantly, and, therefore, the matter of amending the complaint was not an issue. Neither *United Telephone Company v. Mayo*, 345 So. 2d 648 (Fla. 1977), nor *Merchants and Bankers Guaranty, Co. v. Downs*, 175 So. 704 (Fla. 1937), involve a personal injury or wrongful death case, and, therefore, do not support the Rinker Defendants' claim that every other case to address the issue in this case supports their position.[3]

In *A Cand S, Inc. v. Redd*, 703 So.2d 492 (Fla. 3d DCA 1997), not only did the Third District not address the right of a plaintiff to amend a complaint which sets forth a personal injury cause of action to add a wrongful death cause of action, but, in fact, the court specifically disagreed with *Taylor, supra*, in holding that a loss of consortium claim does not survive the death of a personal injury plaintiff. Finally, the Rinker Defendants cite *Higgins v. Johnson*, 422 So. 2d 16 (Fla. 2d

[3] To the extent the Rinker Defendants intend to rely on the holdings in these cases that plaintiffs may not amend pleadings to allege new and distinct causes of action, the matter of the right to liberal amendment of pleadings is thoroughly addressed in Mrs. Ruble's Initial Brief on the merits and also addressed below. Mrs. Rinker also points out that these cases cited by the Rinker Defendants address plaintiffs attempting to add entirely new causes of action as opposed to different causes of action based on the identical transactions and occurrences, as here.

DCA 1982), for the proposition that "where a personal injury plaintiff dies, the plaintiff's personal representative would have to file a new lawsuit." However, in *Higgins*, the Second District, in a decision preceding the *Niemi* and *Skyrme* decisions (which do directly address the issue in this case), reversed the trial court's order granting a continuance of a case against the objections of a dying plaintiff. In considering the potential effects of the continuance under the circumstances in the case, the Second Circuit was hypothesizing about what would happen if the plaintiff died while the case was pending. In fact, the plaintiff had not died, and the court did not actually address the situation, so the case hardly lends support to the Rinker Defendants' position here, especially in light of the fact that the Second District has subsequently made their position (which supports Mrs. Ruble) clear on the issue presented in this case.

Suffice it to say that Petitioner takes issue with Respondents' very bold assertion that every case to have addressed the issue raised in this appeal has held that Mrs. Ruble cannot amend the decedent's personal injury complaint to add a claim for wrongful death.

3. Respondents Misstate Mrs. Ruble's Argument And The Plain Language of The Wrongful Death Act.

Respondents argue:

> 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.

Respondents' Answer Brief on the Merits at pp. 2-3. Respondents not only misstate Mrs. Ruble's argument, but they also misstate the plain language of the Wrongful Death Act. Again, their twists on words do make a difference.

First, it is worth noting that, in this case, Mrs. Ruble did not simply seek to "change the personal injury action into a wrongful death action." Rather, Mrs. Ruble sought to amend the original, pending complaint (which, as she argued in the Initial Brief on the Merits, she should have been permitted to do as a matter of course) to add a wrongful death cause of action to the already pending personal injury action. It may seem like splitting hairs, but the significance is apparent from Respondents' next twist on words.

Contrary to Respondents' interpretation, the Wrongful Death Act does not abate the personal injury "case". Instead, the Act abates the personal injury "action". The difference was articulated by the Second District in *Niemi*:

> 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. There is no justifiable reason to restrictively read the words of the Wrongful Death Act to mean that the entire lawsuit (or "case") should come to an end upon the death of a personal injury plaintiff. Rather, a reading of the plain

language of the statute indicates that the personal injury cause of action abates if the alleged personal injury results in death. What happens next is a matter of procedure, not dictated by the statute but, instead, guided only by the Rules of Civil Procedure (addressed below).

As applied to the course of events below, Mr. and Mrs. Ruble's lawsuit, which asserted a personal injury cause of action and sought associated damages (including loss of consortium) in a complaint (R.I:3-30), was pending when Mr. Ruble died. Mrs. Ruble, the personal representative of Mr. Ruble's estate, filed an amended complaint (R.I:31-74) in the pending lawsuit as a matter of course in which she added a wrongful death cause of action and a claim for associated damages to the otherwise identical complaint, as well as substituting herself, in her capacity as personal representative, for Mr. Ruble, as a named plaintiff. The amended complaint sought both survival damages and wrongful death damages. It is worth noting that, although Respondents now indicate that they agree that Mr. Ruble's asbestos-induced mesothelioma was the cause of his death, the cause of death is very often a point of contention in asbestos actions, as in many other personal injury actions. Therefore, at the time she filed the amended complaint, the cause of death was unresolved (the Rinker Defendants had not yet answered), so Mrs. Ruble pled the causes of action in the alternative, in an abundance of caution, so that, in the event the Rinker Defendants successfully argued that an

asbestos-related disease was not the cause of Mr. Ruble's death, she could still potentially claim damages for his asbestos-related personal injury, mesothelioma.[4]

As more fully explained in the Initial Brief, Mrs. Ruble's course of action was completely consistent with the Wrongful Death Act, which says nothing about the procedures that should be followed, and also consistent with the Florida Rules of Civil Procedure, which provide that a plaintiff should be permitted to amend a complaint as a matter of course before a responsive pleading is filed, that leave to amend should be liberally granted, and that a plaintiff may plead alternative causes of action. *See* Fla. R. Civ. P. 1.190(a) and (e) and 1.110(g).

4. Respondents Fail To Explain Why Amendment of An Existing Personal Injury Complaint to Add A Wrongful Death Claim Cannot Be Reconciled With Section 768.20 and Ignore The Act's Legislative Intent.

Putting aside the fact that the Respondents misarticulate in their Answer Brief Mrs. Ruble's argument and intended course of action below, Respondents fail to explain why amendment of an existing complaint alleging a personal injury

[4] Now that the parties agree that Mr. Ruble's alleged personal injury (asbestos-induced mesothelioma) caused his death, the personal injury cause of action certainly abated. As such, Mrs. Ruble should now be able to amend her complaint again to take out the personal injury claims so that only the wrongful death cause of action and claims for damages remain. It is worth noting that had the defendants not agreed on the cause of death, the court's decision below could force Mrs. Ruble to proceed with a separate wrongful death lawsuit and a survivor lawsuit for Mr. Ruble's personal injury claims, which could actually lead to inconsistent results if the cases were tried separately.

cause of action to add a wrongful death claim "cannot be reconciled with 768.20", as they argue. *See* Respondents' Answer Brief on the Merits at pp. 2-3.

As explained above and in Mrs. Ruble's Initial Brief on the merits, nothing in the Wrongful Death Act says the lawsuit must be dismissed and a new lawsuit must be filed to allege the wrongful death cause of action. So, what part of the Act this procedure not be reconciled with? More importantly, the Rinker Defendants inexplicably completely ignore the express legislative intent of the Act, which is that the Act is "remedial and shall be liberally construed." § 768.17, Fla. Stat. If anything, as fully explained in the Initial Brief, it is the Rinker Defendants and the Third District's position that a new complaint must be filed that cannot be reconciled with the Act or its expressed intent.

5. Respondents Misapprehend The Significance of The Cases Cited By Mrs. Ruble In Her Initial Brief.

The Rinker Defendants have chosen to selectively consider the cases cited in Mrs. Ruble's Initial Brief and to ignore the reasons set forth by Mrs. Ruble for those citations. For example, they assert that *Martin v. United Security Services, Inc*., 314 So. 2d 765 (Fla. 1975), "is not at all on point." Respondents' Answer Brief on the Merits at p. 5. *Martin* is directly on point as to the reason for which it was cited in Mrs. Ruble's Initial Brief. That is, Mrs. Ruble cited this Court's decision in *Martin* for the Court's analysis of the legislative intent of the Wrongful Death Act and this Court's interpretation of the meaning of the word "abate" in the

Act. *See* Petitioner's Initial Brief on the Merits at pp. 27-31. Both the legislative intent of the Act and the meaning of the word abate, not to mention this Court's views of the meaning of the Act in general, are directly relevant to the issues in this case, in which we ask this Court to interpret a statute. "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enteprises-Florida, Inc*., 898 So. 2d 1 (Fla. 2004). Again, it is perplexing why the Rinker Defendants have chosen to ignore the legislative intent of the Wrongful Death Act. No, the *Martin* case does not directly address the issue of whether a personal injury complaint can be amended upon the death of a plaintiff to add a wrongful death cause of action, but to say that it is "not at all on point" really misses the point.

Similarly, the Rinker Defendants argue that *Laizure v. Avante at Leesburg, Inc*., 44 So. 3d 1254 (Fla. 5th DCA 2010), is not on point. *Laizure* also involves interpretation of the Wrongful Death Act, albeit in a different factual context. Mrs. Ruble cited *Laizure* as an another example of a court interpretting the effect of the Act as "transforming" a personal injury cause of action into one for wrongful death, similar to this Court's explanation in *Martin* that the Act "merges" the personal injury and wrongful death actions, as opposed to extinguishing lawsuits. Initial Brief on the Merits at p.34.

6. Respondents Ignore The Routine Practice of The Trial Bar To Amend The Personal Injury Complaint Upon The Death of A Plaintiff.

The Rinker Defendants ignore the purpose of Mrs. Ruble's citation to numerous other appellate court decisions in Florida which reflect that the amendment of complaints upon the death of a plaintiff to add wrongful death claims has been the common, recognized practice throughout the State and that, before the *Capone* and *Ruble* decisions, courts have recognized the practice of doing so without issue. These cases, discussed on pages 36 and 37 of the Initial Brief on the Merits, are merely the tip of the iceberg. At a minimum, such cases reflect not only that this practice is virtually always accepted by trial courts without question, much less raised on appeal, but also the significant impact the *Capone* and *Ruble* decisions could have on litigation throughout the State if they are allowed to stand.[5] Mrs. Ruble acknowledges that none of the cited cases directly addresses the issue now presented in this case (indeed, that is the point), nor does Mrs. Ruble intend to rely on those decisions as a basis for conflict here. Rather, as

[5] Petitioner Mrs. Ruble respectfully directs this Court's attention to Petitioner's Initial Brief on the Merits filed in this Court in the *Capone* case (SC11-849), as well as the *Amicus Brief of the Florida Justice Association in Support of Petitioner, Karen Capone*, also filed in this Court in the *Capone* case. Both briefs further elaborate on the extent to which this has been the common practice and on the impact these decisions could have. Mrs. Ruble adopts herein all arguments advanced in the Initial Brief on the Merits and the Amicus Brief in the *Capone* case, to the extent they are relevant to the issues presented in this case. Petitioner Mrs. Ruble also points out that on June 6, 2011, she filed a Notice of Related case in the instant case advising the Court that the issues in the instant case and the pending *Capone* case are related.

reflected in Mrs. Ruble's Initial Brief on Jurisdiction, the Second District's decision in *Niemi, supra*, provides the basis for conflict jurisdiction.

Mrs. Ruble notes that the Rinker Defendants again argue that there is no basis for this Court to exercise its discretionary jurisdiction in this case. Mrs. Ruble again contends that this Court's exercise of conflict jurisdiction in this case is proper and will rely on all arguments set forth in her Initial Brief on Jurisdiction.

7. Respondents and The District Court Erroneously Rely On The Wrongful Death Act To Prohibit Mrs. Ruble's Right To Amend The Complaint.

In summarily dismissing Mrs. Ruble's arguments based on Florida Rule of Civil Procedure 1.190 that leave to amend must be liberally granted, the Rinker Defendants argue that the Wrongful Death Act precludes any discretion of the trial court to permit such an amendment in this case. The Rinker Defendants' reliance on the Wrongful Death Act, like the Third District appears to have done, is erroneous. Whether one party may be substituted for another and whether a complaint can be amended are purely procedural matters, and the Florida Constitution provides this Court with the exclusive authority to determine rules of

"practice and procedure in all courts."[6] Art. V, § 2(a), Fla. Const. Procedural requirements of a statute are unconstitutional. *E.g., Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

However, the issue need not be decided on constitutional grounds because, as Mrs. Ruble argued in her Initial Brief, nothing in the Wrongful Death Act purports to prevent plaintiffs from amending a pending personal injury lawsuit to add a wrongful death claim upon the death of a plaintiff nor to grant defendants the substantive right to insist on a separate wrongful death lawsuit being filed rather than simple amendment of the pending personal injury complaint. The remedial nature of the Act, as expressed in the Act itself, makes it clear that the Legislature had no intention to erect such procedural obstacles to the assertion of a wrongful death claim.

8. Respondents Point To No Reason Why Mrs. Ruble Should Not Be Permitted To Amend The Pending Complaint To Add A Claim For Wrongful Death.

The Rinker Defendants point to no language in the Wrongful Death Act, nor any other statute or rule, which mandates that a plaintiff must file a new, separate

[6] The term "practice and procedure" encompasses "the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) (quoting *In re Fla. R. Crim. P.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). The method by which a substantive claim may be prosecuted in court is a classic issue of practice and procedure. *Avila South Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977).

lawsuit instead of amend a pending personal injury complaint upon the death of a personal injury plaintiff to add a wrongful death claim. There is no such statutory provision or rule. The trial court and the Third District have effectively attempted to create such a rule, despite the fact that doing so contravenes the express statutory intent of the Wrongful Death Act. There is no support, statutory or otherwise, for their having done so, and, therefore, the decision of the Third District should be quashed.

The Rinker Defendants still fail to identify any prejudice that will result from allowing Mrs. Ruble to amend the pending complaint. There is none. The only harm that will come from a decision in this situation is to Mrs. Ruble, and any other plaintiff in her shoes, if the trial court and Third District decisions are allowed to stand. As set forth in Petitioner's Initial Brief on the Merits, no matter how long a case has been pending or how much discovery and litigation has already occurred in the case, a plaintiff will be forced to start all over again and may very well lose the benefit of the time, work, and expense already expended in the terminated personal injury lawsuit. Mrs. Ruble will now be forced to pay a new filing fee, new service of process costs, and any other costs associated with institution of a new lawsuit, despite the fact that she already paid the costs and went through the process for the identical case, albeit with a different label. Worse, she will be forced to wait through further delay, as her case gets put to the

back of the line behind the many cases filed after the personal injury lawsuit. Additionally, the courts will suffer the delays, expense, and clogging of the courts that will arise every time a personal injury plaintiff dies if a separate wrongful death lawsuit must be filed each time. Meanwhile, while all of this unnecessary delay, expense and clogging of the courts will prejudice plaintiffs like Mrs. Ruble and the courts, no harm whatsoever will come to defendants, like the Rinker Defendants, or anyone else if the case is allowed to proceed on an amended complaint.

Clearly, based on the facts of the instant case and the Rinker Defendants' failure to make any meritorious contention to the contrary, the trial court's dismissal of Mrs. Ruble's amended complaint and the Third District's decision affirming the dismissal were improper. To further the remedial scheme established by the Wrongful Death Act and the civil procedure rules' goals of promoting "just, speedy, and inexpensive determination of every action," the decision below should be quashed.

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 policies and legislative intent discussed above.

Accordingly, based on all of the reasons and citations of authority set forth in the Initial Brief on the Merits and 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 Mrs. Ruble to amend the pending complaint to substitute herself, in her capacity as the personal representative of Mr. Ruble's estate, 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 3rd day of March, 2011.

/S/
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.

/S/
Melissa D. Visconti, Esq.