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' ANSWER BRIEF ON THE MERITS

HOLLAND & KNIGHT LLP
Larry A. Klein
Florida Bar Number: 0043381
larry.klein@hklaw.com
222 Lakeview Avenue, Suite 1000
West Palm Beach, FL 33401
561.650.8304 telephone
561.650.8399 telecopy

HOLLAND & KNIGHT LLP
Chris N. Kolos
Florida Bar Number: 438235
chris.kolos@hklaw.com
Post Office Box 1526
200 South Orange Avenue, Suite 2600
Orlando, FL 32801
407.425.8500 telephone
407.244.5288 telecopy

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF CASE AND FACTS 1

ISSUE..2

WHEN A PLAINTIFF IN A PERSONAL INJURY ACTION DIES, CAN A WRONGFUL DEATH ACTION BE SUBSTITUTED FOR THE PERSONAL ACTION BY AMENDMENT? 2

SUMMARY OF ARGUMENT 2

ARGUMENT 2

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF COMPLIANCE...10

TABLE OF AUTHORITIES

Cases

ACandS, Inc. v. Redd,
703 So. 2d 492 (Fla. 3d DCA 1997)....................5

Capone v. Philip Morris U.S.A., Inc.,
56 So. 3d 34 (Fla. 3d DCA 2011),
review granted, 75 So. 3d 1243 (Fla. 2011) (table) (No. SC11-849) 6

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

Clar v. Dade City,
116 So. 2d 34 (Fla. 3d DCA 1959)....................7

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

Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.,
498 So. 2d 888 (Fla. 1986) 8

Engle v. Liggett Group, Inc.,
945 So. 2d 1246 (Fla. 2006) 6

Floyd v. Wallace,
339 So. 2d 653 (Fla. 1976) 3

Gaines v. Sayne,
727 So. 2d 351 (Fla. 2d DCA 1999)....................3

Higgins v. Johnson,
422 So. 2d 16 (Fla. 2d DCA 1982)....................5

Laizure v. Avante at Leesburg, Inc.,
44 So. 3d 1254 (Fla. 5th DCA 2010) 7

Martin v. United,
314 So. 2d 765 (Fla. 1975) 5, 6

Martino v. Wal Mart,
835 So. 2d 1251 (Fla. 4th DCA 2003) 7

Merchants and Bankers Guaranty, Co. v. Downs,
175 So. 704 (Fla. 1937) 5

Nance v. Johns-Manville Sales Corp.,
466 So. 2d 1113 (Fla. 3d DCA 1985)....................7

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

Nissan Motor Co., Ltd. v. Phlieger,
508 So. 2d 713 (Fla. 1987) 4

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

Starling v. R.J. Reynolds Tobacco Co.,
No. 09-10027, 2011 WL 6965854, at *1 (M.D. Fla., Nov. 2, 2011) 6

Taylor v. Orlando Clinic,
555 So. 2d 876 (Fla. 5th DCA 1989) 4

United Telephone Company v. Mayo,
345 So. 2d 648 (Fla. 1977) 5

<u>Statutes</u>

§ 768.20, Fla. Stat. (2008).................... 2, 5, 6, 8

§ 768.21, Fla. Stat. (2008)....................4

<u>Rules</u>

Fla. R. Civ. P. 1.080....................3

Fla. R. Civ. P. 1.190....................8

Fla. R. Civ. P. 1.260....................8

Fla. R. Civ. P. 1.260(a)(1)....................3, 4

Fla. R. Civ. P. 1.260(c) 7

STATEMENT OF CASE AND FACTS

Petitioner's statement of facts, while not inaccurate, makes this case appear far more complicated than it is. The relevant facts are that the decedent died while his personal injury case was pending, and that his death resulted from the same injuries alleged in the personal injury case. (R 218.) As petitioner states on page 3 of her brief, the decedent's injuries and death were alleged to have been caused by exposure to asbestos. At the time of his death, August 16, 2008, as petitioner admits on page 4 of her brief, petitioner had two years in which to file a wrongful death action, but she refused to do so. She took the position that she was entitled to substitute a wrongful death action by amending the complaint in the personal injury case. Based on the case law, the trial court concluded that a wrongful death action could not be substituted by amendment in the pending personal injury case and dismissed the personal injury case on February 5, 2010. (R 218.) The dismissal specifically stated that it was without prejudice to file a new wrongful death action. Petitioner appealed the order of dismissal to the Third District Court of Appeal, which affirmed. *Ruble v. Rinker,* 59 So. 3d 137 (Fla. 3d DCA 2011).

ISSUE

WHEN A PLAINTIFF IN A PERSONAL INJURY ACTION DIES, CAN A WRONGFUL DEATH ACTION BE SUBSTITUTED FOR THE PERSONAL ACTION BY AMENDMENT?

SUMMARY OF ARGUMENT

Every Florida court which has addressed the issue has held that a personal injury case cannot be amended into a wrongful death case. In this case petitioner had two years from decedent's death to file her wrongful death case. She knew, because the trial court so stated in its order of dismissal, that Florida law did not allow her to amend. Nevertheless, although petitioner had ample time to file a wrongful death action, even after her notice of appeal was filed, she would not do so. The opinion of the Third District Court of Appeal in this case should be approved, or review should be denied based on lack of conflict.

ARGUMENT

Section 768.20, Florida Statutes (2008), 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), Florida Rule of Civil Procedure, which provides:

> (1) If a party dies and the claim is <u>not thereby extinguished</u>, 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.) *See Floyd v. Wallace,* 339 So. 2d 653, 654-55 (Fla. 1976) ("[c]ounsel should not have been permitted to proceed on behalf of a deceased plaintiff without first complying with the substitution provision of Rule 1.260(a)(1)"); *Gaines v. Sayne*, 727 So. 2d 351, 353 n.2 (Fla. 2d DCA 1999) ("a motion to substitute a party in the event of death is only proper when the claim is not extinguished by death").

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.

The first case to do so was *Taylor v. Orlando Clinic,* 555 So. 2d 876 (Fla. 5th DCA 1989), which is factually the same as this case, except that the trial court dismissed the personal injury action when the plaintiff died because no motion for substitution had been filed within 90 days under Rule 1.260(a)(1). The appellate court affirmed the dismissal, but not because the 90 days had run. The dismissal was affirmed because the personal representative's motion to amend "erroneously attempted to substitute a wrongful death action for the abated personal injury negligence action." *Id.* at 879. Despite plaintiff's efforts to distort *Taylor,* it is on all fours and explains why these cases require separate lawsuits:

> The negligence action requires a personal injury but not a death; the wrongful death action requires a death but not necessarily a death caused by negligence. The negligence action accrues at the time of the negligent act; the wrongful death action accrues at the time of the death. The negligence action is in favor of the person injured; the wrongful death action is in favor of the decedent's estate and statutorily designated survivors. The measure of damages in a personal injury negligence action is different from the damages provided by section 768.21, Florida Statutes, for a wrongful death. In effect, both causes of action cannot exist at the same time because the cause of action for wrongful death does not accrue until the death which is the very event that extinguishes the personal injury cause of action that theretofore existed in favor of the negligently injured person.

Taylor, 555 So. 2d at 877; *see also 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 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 and Bankers Guaranty, Co. v. Downs,* 175 So. 704, 711 (Fla. 1937) (amendment cannot be used to allege a new and distinct cause of action).

In *ACandS, Inc. v. Redd,* 703 So. 2d 492 (Fla. 3d DCA 1997), a personal injury plaintiff suffering from mesothelioma died during trial. The trial court ruled that the decedent's claim was abated, but allowed the wife to recover on her consortium claim. The appellate court reversed and held that the wife's claim was abated by section 768.20 just as was her husband's claim. *See also Higgins v. Johnson,* 422 So. 2d 16, 17 (Fla. 2d DCA 1982) (where personal injury plaintiff dies, plaintiff's personal representative would have to file a new lawsuit).

Martin v. United, 314 So. 2d 765 (Fla. 1975), relied on by plaintiff, is not at all on point. In *Martin* there were two issues: (1) whether the Wrongful Death Act passed in 1973 could constitutionally eliminate elements of damage recoverable under prior statutes; and (2) whether punitive damages were still recoverable. Plaintiff emphasizes words in the opinion such as "transfer" or "consolidation", but they are simply words this Court was using to describe how the Legislature had combined wrongful death and survival actions, addressed earlier in separate

statutes, into one statute. In *Martin,* the decedent was shot and killed instantly, and no abatement, substitution, or amendment was at issue.

Petitioner cites *Starling v. R.J. Reynolds Tobacco Co.,* No. 09-10027, 2011 WL 6965854, at *1 (M.D. Fla., Nov. 2, 2011) as being critical of the current state of Florida law, which requires the filing of new lawsuit for a wrongful action. Mr. Starling was a smoker who had a personal injury suit pending against tobacco companies at the time of his death. He was a member of the class of smokers covered by this Court's decision in *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246 (Fla. 2006). The *Engle* decision gave members of the class one year from January 11, 2007, to file individual lawsuits. Mr. Starling died on March 8, 2008, beyond the one-year limitation established in *Engle*. That issue is unique to *Engle* cases. This case is governed by section 768.20, which provides that the personal injury abated at Mr. Ruble's death.

Contrary to the implication in the *Starling* order, *Capone v. Philip Morris U.S.A., Inc.,* 56 So. 3d 34 (Fla. 3d DCA 2011), *review granted,* 75 So. 3d 1243 (Fla. 2011) (table) (No. SC11-849), does not present an issue caused by the *Engle* limitation period. As in this case, the estate in *Capone* had ample time in which to file a wrongful death action after the personal injury action abated under section 768.20.

Plaintiff argues that there was a transfer of "interest", which can be the basis for a substitution of parties under Rule 1.260(c). She suggests that the "interest" transferred is pain and suffering. Apparently she reasons that when Lance Ruble died, he transferred his interest in recovering damages for his injuries caused by mesothelioma to those entitled to recover different damages under the wrongful death statute. At the risk of even dignifying this argument, we would point out that causes of action for personal injury or death are not assignable. *Clar v. Dade City,* 116 So. 2d 34 (Fla. 3d DCA 1959). The transfer argument is therefore without merit.

Laizure v. Avante at Leesburg, Inc., 44 So. 3d 1254 (Fla. 5th DCA 2010), cited by petitioner, is not on point. In *Laizure,* the issue was whether an arbitration agreement signed by a person is binding on the person's estate.

Plaintiff represents that some courts have "permitted" the amendment of personal injury cases to become wrongful death cases, citing *Nance v. Johns-Manville Sales Corp.*, 466 So. 2d 1113 (Fla. 3d DCA 1985); *Davies v. Owens-Illinois, Inc.*, 632 So. 2d 1065, 1066 (Fla. 3d DCA 1994) and *Chesterton v. Fisher,* 655 So. 2d 170, 171 (Fla. 3d DCA 1995). None of those cases addressed the issue. That there was such an amendment was merely a fact stated in the appellate courts' history of the cases. *See 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). Obviously, neither the courts nor the parties in those cases were aware that such an amendment was contrary to section 768.20, and not authorized by Rule 1.260. Nor can these cases provide the basis for conflict jurisdiction in this Court, because the appellate courts in those cases did not decide the issue raised by this case. *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.,* 498 So. 2d 888 (Fla. 1986) (for conflict jurisdiction, the conflict must be express and direct, not inherent or implied).

Petitioner argues that amendment of pleadings should be liberally granted, but that general rule applies where a trial court has discretion to allow an amendment. *See* Rule 1.190. In this case, section 768.20, Florida Statutes (2008), precludes any discretion by providing that a personal injury case such as this one "abates" at the death of the plaintiff.

Petitioner's final argument is that public policy favors cases being resolved on their merits. All petitioner had to do in this case to achieve that was to file a separate lawsuit. As she acknowledges on page 3 of her brief, decedent died five days after the original personal injury complaint was filed, and before any defendant was served. The only thing petitioner could have avoided, by refusing to file a new lawsuit, was the payment of a second filing fee. If she had been able to amend, petitioner would still have had to draft a new complaint, with a different

plaintiff and different damage claims. And the defendants would still have to have been served, because they had not been served by the time decedent had died.

CONCLUSION

This case does not present a direct conflict. Nor does it present any reason to overrule existing case law requiring a new wrongful death lawsuit under these facts. The opinion of the Third District Court of Appeal should be approved.

Respectfully submitted,

/s/ Larry A. Klein
Larry A. Klein
Florida Bar No.: 0043381
larry.klein@hklaw.com
HOLLAND & KNIGHT LLP
222 Lakeview Avenue, Suite 1000
West Palm Beach, Florida 33401
561-833-2000 tel
561-650-8399 fax

- and -

Chris N. Kolos
chris.kolos@hklaw.com
Florida Bar No. 438235
HOLLAND & KNIGHT LLP
200 South Orange Avenue, Suite 2600
Orlando, Florida 32801
407-425-8500 tel
407-244-5288 fax

Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished via U.S. Mail on this _7th_ day of February, 2012, upon:

MELISSA D. VISCONTI, ESQ.
DAVID A. JAGOLINZER, ESQ.
CASE A. DAM, ESQ.
The Ferraro Law Firm, P.A.
4000 Ponce de Leon Boulevard, Suite 700
Coral Gables, FL 33146
Counsel for Petitioner

/s/ Larry A. Klein
Larry A. Klein

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this, *Respondents' Answer Brief on the Merits,* complies with the type size requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure, as it has been prepared in Times New Roman 14-point font.

/s/ Larry A. Klein
Larry A. Klein