IN THE SUPREME COURT OF THE STATE OF FLORIDA

KAREN CAPONE, etc.,

Petitioner, Case No. SC11-849

v. L.T. No. 3D09-3331 & 05-10312

PHILIP MORRIS USA INC.,

Respondent.

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF PETITIONER, KAREN CAPONE

CELENE H. HUMPHRIES
Florida Bar No. 884881
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604

Attorneys for Amicus, Florida Justice Association

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Florida Justice Association ("FJA") is a voluntary, state-wide association of approximately 3,000 members pledged to the preservation of the right, and protecting Florida's citizens from civil wrongs. The FJA felt it necessary to submit this amicus brief because the decision of the Third District Court of Appeal prohibits the amendment of a personal injury action complaint to assert a wrongful death action when the plaintiff dies while litigating his or her personal injury action, and because the district court decision creates the unjust result that an allegedly culpable tortfeasor wholly escapes liability. That decision, *Capone v. Philip Morris U.S.A. Inc.*, 56 So. 3d 34 (Fla. 3d DCA 2010), holds that any surviving claim must be brought as a new and separate wrongful death action even when the statute of limitations for bringing the new action has run. In that case, the wrongful death statute of limitations had run, and the Third District affirmed the dismissal of any action against the tortfeasor.

The FJA is interested in this case and is a proper *amicus* because many FJA members are trial lawyers with vast experience trying personal injury actions. The FJA and its experienced members inform the Court that the death of a plaintiff during the pendency of a personal injury action is a common event, and the common practice of the majority of the FJA members is to amend a personal injury action to assert a wrongful death action.

SUMMARY OF THE ARGUMENT

Our purpose in this brief is not to replicate, nor could we, the detailed analysis provided by the Petitioner's able counsel, but to address the significant impact of the Third District's erroneous interpretation of section 768.20, and to address decisions of other jurisdictions relevant to applying the relation-back doctrine where the wrongful death statute of limitations has expired.

As asserted by Petitioner, Karen Capone, individually and as personal representative of the Estate of Frank Capone, ("Mrs. Capone"), this Court should reject the Third District's holding because, on the death of a plaintiff, the Florida Rules of Civil Procedure clearly authorize a trial court to substitute a personal representative of the plaintiff's estate so that he or she can amend the complaint to continue the claims as a survival action, a wrongful death action, or both in the alternative. Instead of considering the rules of procedure, the Third District concluded that the Wrongful Death Act forecloses those procedures. In the event this Court rejects Mrs. Capone's contention that this is a procedural issue and, therefore, is controlled by the rules because the Florida Constitution vests this Court with exclusive authority to regulate practice and procedure in the courts, the FJA writes to provide this Court with additional information regarding the substantial impact of the Third District's interpretation of the Wrongful Death Act.

The FJA also supplements Mrs. Capone's assertion that this Court should reject the Third District's corollary holding, that Mrs. Capone's wrongful death action is untimely, because the amended complaint relates back to the date of the original complaint. In particular this amicus brief summarizes the law of other jurisdictions which have applied the relation back doctrine to hold that, where the wrongful death statute of limitations has expired, a wrongful death claim in an amended complaint relates back to the date the original personal injury complaint was filed.

ARGUMENT

I. The Third District's decision ignores the common and accepted practice of amending a personal injury complaint to pursue a wrongful death action, and it will cause a substantial strain on this state's courts and on the litigants appearing in those courts.

The FJA writes to provide this Court additional information regarding the substantial impact of the Third District's erroneous interpretation of the Wrongful Death Act. Unfortunately, one of the sad realities of personal injury litigation is the death of a plaintiff during the pendency of a personal injury action. This is a common event. The FJA and its experienced members inform this Court that the common practice of the vast majority of FJA members in this circumstance is to amend a personal injury action to assert a wrongful death action, and this practice is virtually always accepted by trial courts without question, much less raised on

appeal. Mrs. Capone's initial brief cites a number of appellate decisions which recognize this practice, including a decision from this Court. The FJA writes to make clear that those decisions are just the tip of the iceberg. Amending a personal injury action to assert a wrongful death action is a time-honored, routine practice that has happened in innumerable cases that are not appealed. Plus, the FJA represents that the number of cases which are appealed is much larger than the few cases listed by Mrs. Capone. The reality is that the written opinions issued in those decisions often do not note this aspect of the procedural history because it is not questioned by anyone, including the tortfeasors.

To now upset this routine practice which is so familiar to the state's practitioners and this state's courts would work an injustice by creating additional, unnecessary obstacles to recovery after an injury leads to a death, and would cause an unnecessary strain on the courts of this state. The most obvious example is the point made by Mrs. Capone. The Third District's interpretation of the Wrongful Death Act renders Florida Rule of Civil Procedure 1.260 virtually meaningless. That is the rule which expressly permits the substitution of parties upon the death of a party. Rule 1.260(a)(1). If the Third District is right, then this rule would apply only upon the death of a defendant, which is a far less common scenario given that the plaintiffs initiate tort actions because they have been physically

injured and those injuries make them more likely than a defendant to die during litigation.

The impact of the Third District's decision is even more profound and pervasive than eviscerating rule 1.260. By requiring personal representatives to initiate an entirely new action separate from the personal injury action, those personal representatives will be denied the benefit of essential civil procedure rules relating to the use of discovery taken during litigation. For example, Florida Rule of Civil Procedure 1.330, which is titled *Use of Depositions in Court Proceedings*, specifically provides that the substitution of parties does not affect the right to use depositions previously taken. If a new action for wrongful death must be filed, the benefits provided by this rule evaporate. All depositions from the original personal injury action would become hearsay in the second, new wrongful death action. Similarly, all admissions obtained by a party under Florida Rule of Civil Procedure 1.370, titled *Requests for Admission*, would immediately become meaningless because the rule expressly states that any admission is "for the purpose of the pending action only" and may not "be used against that party in any other proceeding."

The aftershocks stemming from the Third District's decision would further ripple out and directly impact this Court because it would need to revise the civil procedure rules (as well as any affected rules of appellate procedure, family law

and judicial administration) in order to preserve the longstanding benefits and procedures for these litigants who are forced to start afresh by filing a new action. This long process will begin with all pertinent Florida Bar rules committees embarking on a massive review and overhaul of all potentially affected rules. Any proposed amendments must then be reviewed by this Court. Rarely (perhaps never) does this process take less than two years. Importantly, even the Evidence Code will be affected, requiring revision by the Florida Legislature and adoption by this Court.

In the meantime, personal representatives will be denied the benefit of these important rules and statutes, and their actions will be unnecessarily delayed as the parties conduct discovery again and bring any discovery disputes to the courts for determination . . . again. This Court's eventual adoption of new rules and the revision of the Evidence Code will not end the repercussions caused by the Third District's decision. Arguably, it will accelerate even more as litigants debate the meaning and application of these amendments. Surely, the strain on the court system and practitioners, and the resulting inefficiencies caused by one flawed decision reversing decades of customary practice would not promote "the just, speedy, and inexpensive determination of every action" which is required by Florida Rule of Civil Procedure 1.010.

II. Other jurisdictions have applied the relation back doctrine to hold that, where the wrongful death statute of limitations has expired, a wrongful death claim in an amended complaint relates back to the date the original personal injury complaint was filed.

In addition to holding that a personal injury complaint may not be amended to pursue a wrongful death action, the Third District held that Mrs. Capone's wrongful death action was untimely under both the two-year wrongful death statute of limitations found in section 95.11(4)(d), Florida Statutes (2006), and the one-year period set in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Regarding the statute of limitations, Mrs. Capone asserts that this holding was error because the amended complaint would have related back to the date of the original complaint. In this amicus brief, we supplement that assertion with a discussion of the applicable law in other jurisdictions.

The overwhelming majority of other jurisdictions with similar relation back rules hold that a wrongful death claim in an amended complaint relates back to the date of the filing of the original personal injury complaint. For example, the following courts found that the wrongful death action relates back to the original personal injury complaint because the relevant rule of procedure provides for relation back where claims arise from the same conduct, transaction, or occurrence. *Lewin v. American Export Lines, Inc.*, 224 F.R.D. 389, 397-98 (N.D. Ohio 2004); *Frances v. Plaza Pacific Equities, Inc.*, 847 P.2d 722, 726-27 (Nev. 1993); *Sompolski v. Miller*, 608 N.E.2d 54, 56-59 (Ill. Ct. App. 1992); *Bernier v. Keene*

Building Prods., No. 78-98P (D. Me. Feb. 25, 1985) (unpublished opinion quoted in *Knauer v. Johns-Manville Corp.*, 638 F. Supp. 1369, 1384 (D. Md. 1986)); *Reyes v. Kent General Hosp., Inc.*, 487 A.2d 1142, 1146 (Del. 1984) (dicta); *Caffaro v. Trayna*, 319 N.E.2d 174, 176 (N.Y. 1974); *cf. Knauer.*, 638 F. Supp. at 1384 (concluding that cases finding relation back "are most persuasive and, indeed, to this Court, appealing" but declining to find relation back under Maryland law because the limitations period for a Maryland wrongful death claim is a condition precedent to bringing suit).

California appears to be the only jurisdiction to reject applying the relation-back doctrine in the modern era, but its relation-back rule requires that the claims must not only rest on the same general set of facts, but must also involve the "same injury" and "refer to the same instrumentality." *Brumley v. FDCC Cal., Inc.*, 67 Cal. Rptr. 3d 292, 300-02 (Cal. Ct. App. 2007). And, even in California, a wrongful death claim will relate back to a prior loss of consortium claim brought in the underlying personal injury action by the same plaintiff. *Lamont v. Wolfe*, 190 Cal. Rptr. 874, 875-878 (Cal. Ct. App. 1983). This means that, even under California's stricter rule, Mrs. Capone's amended complaint asserting a wrongful death action would relate back to her husband's complaint in his personal injury action.

The policy underlying the relation-back doctrine in Florida requires the same result here. In *Cabot v. Clearwater Constr. Co.*, 89 So. 2d 662, 664 (Fla. 1956), the Florida Supreme Court explained that, since the adoption of the new rules of civil procedure in 1950, "No longer are we concerned with the 'tricks and technicalities of the trade.'" Instead, "the objective of all pleadings is merely to provide a method for setting out the opposing contentions of the parties." *Id.* at 664. For this reason, Florida courts liberally apply the relation-back doctrine. *See, e.g., Williams v. Avery Devel. Company-Boca Raton*, 910 So. 2d 851, 853 (Fla. 4th DCA 2005); *Roback v. Cassaro*, 837 So. 2d 1061, 1063 (Fla. 4th DCA 2003); *Darden v. Beverly Health & Rehabilitation*, 763 So. 2d 542, 543 (Fla. 5th DCA 2000); *Schwartz v. Wilt Chamberlain's of Boca Raton*, 725 So. 2d 451, 453 (Fla. 4th DCA 1999). The Third District identified no basis for creating an exception where a personal injury complaint is amended to assert a wrongful death action, and no basis is discernible. Therefore, as with the overwhelming majority of other jurisdictions, this Court should hold that the wrongful death action relates back to the original complaint filed in the personal injury action.

This is even truer in the more than 8,000 individual actions being brought around the state in Florida's trial courts, pursuant to *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In an attempt to minimize the staggering burden caused by so many new cases, Circuit Courts have adopted various procedures,

including limiting the number of cases which are activated for litigation. The result is that plaintiff's counsel in some inactive cases have been unable to file a motion to amend the action to assert a wrongful death action within two years of the plaintiff's death. And, in jurisdictions without court orders regulating activation of the many thousands of cases, "stand-still" agreements have been reached at Defendants' request so that discovery is not started and cases are not set for trial until certain steps are taken. The relation-back doctrine should apply even more in this context, particularly in light of the fact that, unlike any Florida case addressing the relation-back doctrine, these defendants have been well aware of these potential claims for decades, *see Engle*, 945 So. 2d at 1275, and, in each case involving a late amendment, there was an underlying personal injury claim for fatal or potentially fatal injuries suffered by an elderly person. Given all this, the Defendants in this case could not maintain a legitimate claim of prejudice in an attempt to avoid relating the wrongful death complaint to the timely filed *Engle* progeny personal injury action

CONCLUSION

For the reasons stated, it is respectfully submitted that the Court should accept the Petitioners' arguments.

CELENE H. HUMPHRIES
Florida Bar No. 884881
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604

Attorneys for Amicus, Florida Justice Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email and U.S. Mail to John S. Mills (jmills@mills-appeals.com), The Mills Firm, P.A., 203 N. Gadsden St., Suite 1A, Tallahassee, Florida 32301; J. Michael Fitzgerald (mfitzgerald@hardhatlaw.com), Fitzgerald & Associates, P.A., P.O. Box 6246, Charlottesville, VA 22906; Gary Sasso (gsasso@carltonfields.com), Joseph Hagedorn Lang, Jr. (jlang@carltonfields.com), Leah A. Sevi (lsevi@carltonfields.com), Carlton Fields, P.A., 4221 West Boy Scout Blvd., P.O. Box 3239, Tampa, Florida 33601; Bruce Allen Weil (bweil@bsfllp.com), Boies, Schiller & Flexner, LLP, 100 Southeast Second Street, Suite 2800, Miami, Florida

33131; and William Geraghty (wgeraghty@shb.com), Shook, Hardy & Bacon, LLP, 201 S. Biscayne Blvd., Suite 2400, Miami, Florida 33131 on this _____ day of February 2012.

_____
CELENE H. HUMPHRIES
Florida Bar No. 884881

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
CELENE H. HUMPHRIES
Florida Bar No. 884881