IN THE SUPREME COURT OF FLORIDA

KAREN CAPONE,

Plaintiff/Petitioner,

v.

PHILIP MORRIS USA INC.,

Defendant/Respondent.

Case No. SC11-849

Lower Tribunal No. 3D09-3331

ON REVIEW FROM A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT PHILIP MORRIS USA INC.'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS[1]

I. Proceedings before the Trial Court

A. Commencement of the Suit

Petitioner and Mr. Capone filed this personal injury action against Philip Morris USA Inc. ("PM USA") on May 19, 2005.[2] The Capones alleged that Mr. Capone was injured by smoking cigarettes manufactured by PM USA, and pled four causes of action: negligence, strict liability, fraudulent misrepresentation, and conspiracy to commit fraudulent misrepresentation. R. 1:4-33 [App. Tab B at ¶¶ 6–62]. Petitioner also alleged entitlement to damages for her loss of consortium. *Id.* at ¶ 63.

B. The Motions to Amend the Complaint and Substitute Parties

Mr. Capone died on July 18, 2006. R. 1:76-100 [App. Tab F at 2 & Ex. A]. Nearly a year and half later, Petitioner, acting in her capacity as personal representative of Mr. Capone's estate, filed (1) a motion to amend the complaint to assert a wrongful death action, and (2) a motion to substitute herself, as personal representative, for Mr. Capone individually. R. 1:63 [App. Tab C]; R. 1:75 [App. Tab E].

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[1] Each citation to the record on appeal is in the form "R. [volume number]:[page number]" and is followed by a parallel citation to the section of the appendix to this brief where a copy of the cited material may be found.

[2] The Capones never served defendant Brown & Williamson Tobacco Corporation (now R.J. Reynolds Tobacco Company) and voluntarily dismissed Publix Supermarkets, Inc. R. 2:232-402 [App. Tab A]; R. 1:128 [App. Tab G].

Petitioner's proposed amended complaint alleged that Mr. Capone "was a Florida citizen or resident who suffered **and died** from diseases and/or medical conditions caused by [his] addiction to cigarettes that contained nicotine." R. 1:64-74 [App. Tab D at ¶ 2] (emphasis added). Each count likewise alleged that "[Mr. Capone] was injured **and died**" as a result of PM USA's conduct. *Id.* at 29, 32, 35, 38, 41, 44 (emphasis added).[3] The proposed amended complaint purported, in the alternative, to "assert[] a claim for survival damages pursuant to Section 46.021," but only "in the event one or more Defendants contend[ed] that [Mr. Capone] died of some cause unrelated to smoking cigarettes." *Id.* at 24.[4] The proposed amended complaint pled no causes of action related to this contingent claim for supposed survival damages.

PM USA opposed the motions and moved to dismiss, arguing that the action abated by operation of the Wrongful Death Act upon Mr. Capone's death from the alleged injuries that formed the basis of the personal injury action. R. 1:76-100 [App. Tab F]. PM USA contended that Petitioner must bring her wrongful death action by way of a new, separate suit. *Id.* at 1–5. PM USA further argued that

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[3] The proposed amended complaint added claims for breach of express and implied warranties, and named additional defendants whom Petitioner never served. R. 1:64-74 [App. Tab D at ¶¶ 24, 30–35].

[4] In conjunction with this purported alternative survival claim, Petitioner also asserted a loss of consortium claim arising out of "the period before [Mr. Capone] died and in conjunction with an alternative survival claim . . . ." R. 1:64-74 [App. Tab D at ¶ 24].

Petitioner could not substitute herself for Mr. Capone as plaintiff because Florida Rule of Civil Procedure 1.260(a)(1) only permits substitution where the pending claim(s) was not extinguished upon death. *Id.* at 6.

Petitioner waited until nearly two years after Mr. Capone's death to set her motions for hearing, which occurred on September 2, 2008. Joseph Portuondo, a Miami-based attorney, appeared at the hearing for Petitioner rather than Petitioner's counsel of record, J. Michael Fitzgerald. R. 2:232-402 [App. Tab H at 3]. Mr. Portuondo presented no substantive argument, stating that he had "only had a couple of hours to deal with this issue" and asking if he could "have five days to have Mr. Fitzgerald file a response." *Id.* at 16, 18. The trial court accommodated this request. *Id.* Petitioner filed nothing within the time allotted.

C. The Final Dismissal Order and Petitioner's First Round of Post-Judgment Motions

On September 16, 2008, the trial court issued an order denying Petitioner's motions to amend and to substitute parties and dismissing the case "because [Petitioner's] petition is barred by the Wrongful Death Act . . . ." R. 1:101 [App. Tab I] ("Final Dismissal Order"). Petitioner never appealed this order. Instead, she set in motion what the Third District aptly described as a "needless procedural labyrinth."

First, Petitioner filed an undated and unsigned motion for an extension of time to submit the memorandum that she had failed to file within five days of the

September 2, 2008 hearing. R. 1:103-104 [App. Tab K]. On September 22, 2008, the trial court gave Petitioner until September 25, 2008, to file her responsive memorandum. R. 1:102 [App. Tab J]. Petitioner again failed to file her memorandum in a timely manner.

Second, Petitioner filed an unsigned and undated motion to reconsider and/or vacate the trial court's Final Dismissal Order—without a signed certificate of service—that the trial court docketed on September 29, 2008.[5] R. 1:105-106 [App. Tab L]. This motion set forth no substantive argument, but rather referenced an unsigned and undated memorandum of law appended to the motion (that likewise lacked a signed, dated certificate of service). *Id.*; R. 1:107-120 [App. Tab M]. Petitioner contended that she should be allowed to plead a wrongful death action and an alternative survival action, and that the trial court had inherent authority to allow both the amendment and the substitution of parties. R. 1:107-120 [App. Tab M at 112–19].

Third, on October 22, 2008, Petitioner filed a supplemental memorandum arguing that the trial court had inherent authority to treat her prior proposed amended complaint as a newly-filed lawsuit. R. 1:121-127 [App. Tab N at 5–6].

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[5] As discussed below, *see infra* at 12–13, a version of this motion subsequently appeared in the appellate record inexplicably bearing a signed certificate of service dated September 24, 2008.

Fourth, on November 4, 2008, Petitioner again "supplemented" her motion to reconsider, this time "for the purpose of correcting a scrivener's error in the original." R. 1:129 [App. Tab P]. Petitioner stated that although her original motion "was served on September 24, 2008," "it ha[d] come to the attention of [Mr. Fitzgerald] that the original was neither signed nor dated." *Id.*

PM USA opposed reconsideration and vacatur, arguing that "[Petitioner's] Proposed Amended Complaint only assert[ed] counts consistent with claims under the Florida Wrongful Death Act" and did not properly plead a survival action. R. 2:232-402 [App. Tab O at 5]. PM USA emphasized that each count in the proposed amended complaint alleged that "[Mr. Capone] was injured and died" "as a direct and proximate result of" PM USA's purported misconduct. *Id.* (citing Pl.'s Am. Compl. ¶¶ 29, 32, 35, 38, 41, 44). PM USA also raised a potential jurisdictional defect with Petitioner's motion. Specifically, PM USA questioned whether Petitioner's motion—unsigned, undated, and without a signed certificate of service—had been timely served within 10 days of the Final Dismissal Order.[6]

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[6] *See generally* Fla. R. Civ. P. 1.530(b) ("A motion for new trial or for rehearing shall be served not later than 10 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action."); *see, e.g.*, *Harris v. Harris*, 670 So. 2d 1187, 1187–88 (Fla. 5th DCA 1996) (trial court lacked authority to grant motion for rehearing under Rule 1.530 that was untimely served 13 days after entry of final judgment); *Penalba v. Penalba*, 616 So. 2d 165, 166 (Fla. 3d DCA 1993) (per curiam) (trial court lacked jurisdiction to vacate final judgment under Rule 1.530 where motion to vacate was untimely filed more than 10 days after entry of judgment).

At the November 6, 2008 hearing on Petitioner's motions, "after hearing the argument and reading the cases," Petitioner conceded that she needed to file a new wrongful death claim. R. 2:232-402 [App. Tab Q at 30]. Regarding timeliness, PM USA's counsel produced the envelope in which he had received the motion, which was on Mr. Fitzgerald's firm's stationery and bore a Miami postmark dated September 29, 2008—three days after the September 26, 2008 deadline. Mr. Fitzgerald stated that he had mailed the motion from Virginia, on September 24, 2008, before the 10-day deadline under Rule 1.530 had expired. *Id.* at 26, 27.

On May 8, 2009, without explanation, the trial court granted Petitioner's motion for reconsideration. R. 1:130 [App. Tab R].

D. PM USA's Motion to Vacate

On May 18, 2009, PM USA moved to vacate the trial court's May 8, 2009 order vacating its September 16, 2008 Final Dismissal Order. R. 1:131-206 [App. Tab S]. PM USA renewed its argument that Petitioner's motion to reconsider and/or vacate was untimely. *Id.* at 4. PM USA further asserted that the trial court's September 16, 2008 dismissal ruling was correct because, as Petitioner herself had conceded, she was required to file a separate wrongful death action. *Id.* at 5.

At the August 28, 2009 hearing on PM USA's motion, Mr. Fitzgerald attempted to show that Petitioner's undated and unsigned motion was timely by

stating that he had "mailed it to the clerk [of court] within the time period required" from Virginia. R. 2:232-402 [App. Tab T at 15]. At that hearing, the trial court and parties examined the actual motion in the court file and determined that neither it nor the certificate of service was signed and dated. *Id.* at 12–13, 17, 21, 22. Upon viewing the court file, Mr. Fitzgerald said that "it appear[ed]" he had neither signed the motion nor dated the certificate of service and that he "can't answer" why that was so other than "[e]rror on [his] part." *Id.* at 17. Mr. Fitzgerald nonetheless told the trial court he had "an independent recollection" of mailing the motion to the judge on September 24, 2008, *id.* at 24, and contended that his error in not timely serving PM USA was "not fatal," *id.* at 17, to which the trial court responded:

> So not filling out the certificate of service in a way that the Court could feel comfortable knowing that you sent it on that day is not helpful, and I have no way of knowing when you mailed this.
>
> But the only evidence that I have before me is that opposing counsel's showing me an envelope, the only envelope he received with a postmark of September 29th.
>
> * * *
>
> [I]t doesn't appear to have been timely, but in any way, it's docketed on the 29th. The only evidence that we have is a postmark. It's postmarked the 29th. And we have an original filing by you in the court file that doesn't have a signature or a certificate of service, so in some ways it wasn't filed at all. In some ways it's never been filed.

Id. at 18, 21–22.

On September 2, 2009, the trial court entered an order granting PM USA's motion to vacate (the "Vacatur Order"). R. 1:210-211 [App. Tab U]. The Vacatur Order reinstated the September 16, 2008 Final Dismissal Order.

E. Petitioner's Second Round of Post-Judgment Motions

Petitioner did not, at this juncture, appeal either the Final Dismissal Order or the Vacatur Order, despite having already attacked the Final Dismissal Order by way of post-judgment motions. Instead, Petitioner filed a second round of post-judgment motions:

First, Petitioner filed a Rule 1.540 motion for relief from the Final Dismissal Order, arguing that the trial court inadvertently signed the order. R. 1:219-220 [App. Tab V]. Petitioner contended that the court would not have granted her an extension of time to file a memorandum after entering the Final Dismissal Order if it had meant to enter the Final Dismissal Order in the first place. *Id*.

Second, Petitioner filed a motion to correct scrivener's error, stating that Mr. Fitzgerald had placed Petitioner's prior motion to reconsider and/or vacate in the mail without an original signature and without a signed certificate of service. R. 1:221 [App. Tab W].

Third, Petitioner filed a verified motion to vacate and/or reconsider the September 2, 2009 Vacatur Order. This motion stated that Mr. Fitzgerald had in fact served the motion for reconsideration on September 24, 2008. R. 1:212-218

[App. Tab X at 1]. Mr. Fitzgerald attempted to explain the September 29 postmark as follows:

> The original envelope containing the Motion to Reconsider was mailed on September 24, 2008. On Monday, September 29, 2008, [he] received a telephone call from Jack Brumbaugh of the Richman Greer firm. The envelope had been mis-delivered to Kenneth Weil, a shareholder of that firm. Mr. Brumbaugh put the pleadings in another envelope and had them mailed to Bruce Weil of Boies Schiller [PM USA's counsel].
>
> I do not know if the mistake was made by the United States Post Office or if our office put the wrong address on the original envelope.
>
> I have spoken to Jack Brumbaugh and he has no recollection of the events. He has also advised me that the Hasler postage meter number on the envelope is not assigned to his firm.

Id. at 3.[7] Two weeks later, Petitioner filed an additional, verified supplement to her motion to vacate, in which Mr. Fitzgerald averred that "Hasler, the postage meter company, ha[d] confirmed that the meter in question had been assigned to the Richman Greer firm," and that "Jack Brumbaugh of the Richman Greer firm ha[d] confirmed that the meter in question was used by that firm in 2008." R. 1:222-225 [App. Tab Y at 1].

* * *

[7] Each Hasler postage meter is assigned a unique number that allows metered mail metered on it to be traced back to it.

On November 3, 2009, the trial court denied Petitioner's second round of post-judgment motions. R. 1:228 [App. Tab Z at 1].

II. Proceedings Before the Third District Court of Appeal

A. The Notice of Appeal

On December 4, 2009, Petitioner filed a notice of her appeal of "the order of [the trial court] rendered November 03, 2009." R. 1:226-227 [App. Tab AA]. The notice stated that "[t]he nature of the order is a final order denying [her] Motion for Relief from Judgment, Motion to Correct Scrivener's Error and Verified Motion to Vacate and/or Reconsider." *Id.*

B. The Arguments Below

1. Petitioner's Opening Brief

In Petitioner's opening brief, she argued only the merits of her motions to amend the complaint and to substitute parties. None of her arguments related in any way to the trial court's November 3, 2009 Order denying her three post-judgment motions.

First, Petitioner again conceded that a personal injury cause of action abates upon the death of the personal injury plaintiff under the Wrongful Death Act and that any wrongful death action must be brought in a separate complaint. [App. Tab BB at 3–4]. Petitioner nevertheless contended—for the very first time—that this Court's *Engle* decision created a new cause of action for class members that "was not pending at the time of [Mr. Capone's] death and therefore was not abated by

his death." *Id.* at 4. Petitioner emphasized that "the wrongful death claim asserted in the . . . amended complaint was **a new cause of action**," *id.* at 4, 6, and "not an attempt to 'convert an existing personal injury claim into a wrongful death action,'" *id.* at 4, 6.

Second, Petitioner argued that Mr. Capone's personal injury action did not abate upon his death because (a) "a survival action remains available as to the personal injuries suffered by the decedent which did not directly cause the death," and (b) the complaint and the proposed amended complaint "clearly distinguish[ed] between the conditions and diseases, not all of which are necessarily fatal," from which he suffered during life, and the "one or more cigarette-related diseases" that allegedly killed him. [App. Tab BB at 4–5].

Third, Petitioner argued that her motion to substitute parties was not untimely filed for failure to lodge a suggestion of death with the trial court within 90 days of Mr. Capone's death. [App. Tab BB at 5, 13–15].

2. PM USA's Answer Brief

PM USA argued that Petitioner had waived all her arguments concerning the merits of her motions to amend and to substitute parties because she had failed to appeal the Final Dismissal Order at all, let alone in a timely manner. [App. Tab CC at 13, 14–17]. PM USA further asserted that Petitioner had abandoned the arguments she made in her second round of post-judgment motions (which could

have been relied upon to attack the timely-appealed Vacatur Order) by failing to raise them in her initial brief. *Id.* at 13.

PM USA also argued that the trial court's Final Dismissal Order was substantively correct, and noted that any separate complaint that Petitioner might now file would be barred by the statute of limitations. [App. Tab CC at 13–20].

3. Petitioner's Reply Brief

In her reply, Petitioner argued for the first time on appeal that the trial court had erroneously entered the September 2, 2009 Vacatur Order because she had, in fact, timely served her motion to reconsider and/or vacate the trial court's September 16, 2008 Final Dismissal Order. [App. Tab DD at iv–vi]. She further argued that the Third District had jurisdiction because her second round of post-judgment motions "tolled the period for appeal" of the Final Dismissal Order under Florida Rule of Civil Procedure 1.530. *Id.* at vi.

4. PM USA's Motion to Treat Petitioner's Motion to Reconsider and/or Vacate as It Originally Appeared in the Trial Court

After Petitioner appealed, PM USA discovered that the certificate of service on the copy of Petitioner's motion for reconsideration (of the Final Dismissal Order) in the appellate record was inexplicably signed and dated September 24, 2008. Before oral argument, PM USA moved for the Third District to treat Petitioner's motion for reconsideration and certificate of service as they appeared

in the trial court, *i.e.*, unsigned and undated. R. 4:411-418 [App. Tab EE]. PM USA's motion highlighted that Petitioner's counsel, PM USA, and the trial court below had all agreed that the as-filed motion and certificate of service were unsigned and undated. *Id.* at 4–6. The Third District ordered the parties to address the motion at oral argument. R. 4:419 [App. Tab FF].

5. Oral Argument

At argument, Mr. Fitzgerald conceded that, under the facts of this case, he could not seek relief based on a survival claim with a "straight face." R. 4:475-487 [App. Tab HH at 2 (quoting Oral Arg. Video at 9:22)]. Mr. Fitzgerald further conceded that he did not know whether he signed the motion for reconsideration and that, for purposes of this appeal, he would proceed as though it were unsigned. *Id.* at 2; R. 4:420-439 [App. Tab GG at 16–17].

C. The Third District's Decision

The Third District affirmed on alternative grounds.

First, the court held that the original personal injury complaint could not be amended upon Mr. Capone's death to assert a wrongful death action in light of Petitioner's contention that Mr. Capone expired from the underlying personal injuries: "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 . . . [not] as an amendment to a personal injury

action." *Capone v. Philip Morris USA Inc.*, 56 So. 3d 34, 36 (Fla. 3d DCA 2010). The court did not decide whether Petitioner's wrongful death claim arose out of the *Engle* decision itself, rather than the Wrongful Death Act, as Petitioner moved to amend the complaint more than a year after the January 11, 2007 *Engle* mandate. *Id.*

Second, the Third District affirmed the trial court's finding that Petitioner's first round of post-judgment motions was untimely: "Capone's Motion for Reconsideration was not timely filed." *Id.* at 36–37. The court necessarily based this holding on the trial court's finding that the certificate of service for the motion "was, in fact, in blank," and that "[Petitioner] could not point to anything to show that the motion was served within the ten-day time period specific by Florida Rule of Civil Procedure 1.530(b)." *Id.* at 35.

D. Petitioner's Motion for Rehearing or Certification

Petitioner—with the help of new counsel—moved for rehearing or, in the alternative, certification of conflict and a question of great public importance. This motion was longer than Petitioner's entire initial brief and raised new arguments, including arguments that flatly contradicted positions taken in Petitioner's prior appellate briefing and at oral argument. For example:

1. At oral argument, Mr. Fitzgerald argued that this case was one of "first impression." R. 4:475-487 [App. Tab HH (quoting Oral Arg. Video at 4:41)]. But in her rehearing motion, Petitioner purported to identify

cases with which the Third District's decision conflicted. R. 4:420-439 [App. Tab GG at 4, 8 & n.2].

2. At oral argument, Mr. Fitzgerald acknowledged that he could not seek relief based on a purported survival claim with a "straight face," yet Petitioner contended in her rehearing motion that alternative pleading principles demanded a different result than that reached by the Third District's decision. R. 4:420-439 [App. Tab GG at 4–8].

3. At oral argument, Mr. Fitzgerald stated that the operative motion for reconsideration filed in the trial court was unsigned, yet Petitioner in her rehearing motion relied upon a signed copy of her motion for reconsideration (which inexplicably appeared in the appellate record) to show that the motion had been timely served. R. 4:420-439 [App. Tab GG at 16].

Moreover, despite never before seeking an evidentiary hearing on the issue of timely service of her motion for reconsideration, Petitioner requested in her rehearing motion that the court order such a hearing on remand. *Id.* at 11, 16–18.

The *Capone* panel denied Petitioner's motion for rehearing or certification, and the Third District denied her motion for rehearing en banc. R. 2:410 [App. Tab II].

SUMMARY OF THE ARGUMENT

I. The Third District correctly held that Petitioner could not convert Mr. Capone's personal injury complaint into her own wrongful death action by amending the complaint and substituting herself as plaintiff. Florida's Wrongful Death Act mandates that "[w]hen a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the

time of death ***shall abate***." § 768.20, Fla. Stat. (emphasis added). An abated action for monetary damages "is utterly dead and cannot be revived except by commencing a new action." Black's Law Dictionary 16 (4th ed. rev. 1968). Thus, under the Wrongful Death Act's statutory scheme, Petitioner was required to file a new and separate wrongful death action. *See Capone v. Philip Morris USA Inc.*, 56 So. 3d 34, 36 (Fla. 3d DCA 2010); *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31, 33–34 (Fla. 2d DCA 2003); *ACandS, Inc. v. Redd*, 703 So. 2d 492, 493–94 (Fla. 3d DCA 1997); *Taylor v. Orlando Clinic*, 555 So. 2d 876, 878 (Fla. 5th DCA 1989). Petitioner's reliance on her purported alternative survival action is unavailing, as Petitioner's proposed amended complaint did not adequately plead such an action, instead asserting only claims for wrongful death.

II. The Court should not reach Petitioner's argument that the wrongful death action in her proposed amended complaint would have related back to the filing of the original complaint because any opinion on that issue would be merely advisory. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991). Petitioner, PM USA, and the Third District all agree that Mrs. Capone filed her motion to amend "within two years of Mr. Capone's death." *Capone*, 56 So. 3d at 35; *accord* Pet. Br. at 39. As such, her wrongful death action would have been timely filed for purposes of the wrongful death statute of limitations if the amendment were allowed. Florida's relation-back doctrine is not implicated on these facts.

Should the Court address the question, however, it should hold that an amended complaint asserting a wrongful death action more than two years after death does not relate back to a prior personal injury complaint so as to defeat the two-year wrongful death statute of limitations. *See Cox v. Seaboard Coast Line R.R. Co.*, 360 So. 2d 8 (Fla. 2d DCA 1978); *Sch. Bd. of Broward Cnty. v. Surette*, 394 So. 2d 147, 154 (Fla. 4th DCA 1982). This Court has long held that amended pleadings stating new, distinct causes of action than those originally set forth do not relate back. *See Livingston v. Malever*, 137 So. 113, 117 (Fla. 1931). And this Court has repeatedly noted that a wrongful death action is a new, wholly distinct cause of action from a personal injury action. *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109, 111 (Fla. 2002); *Ake v. Birnbaum*, 25 So. 2d 213, 219 (Fla. 1945). Indeed, a wrongful death action is different from a personal injury action in its (1) statutory basis; (2) time of accrual; (3) mutually exclusive theory of relief; and (4) introduction of novel and different compensatory liability to a new party. *Taylor*, 555 So. 2d at 878.

III. Regardless of the merits of the first two issues presented by Petitioner, the Court should either (i) dismiss its jurisdiction as improvidently granted; or (ii) approve the Third District's decision on the basis of its alternative holding. The Third District did not have jurisdiction to address the merits of the trial court's denial of Petitioner's motion to amend because Petitioner did not timely appeal the

Final Dismissal Order. As the Third District held, the trial court did not clearly err in determining that Petitioner's motion for reconsideration was not timely served and therefore did not toll rendition of the Final Dismissal Order. Moreover, Petitioner did not timely appeal the order denying her motion for reconsideration—the Vacatur Order. Instead, she filed an unauthorized second round of post-judgment motions, which did not toll the rendition of either the Final Dismissal Order or the Vacatur Order. The Third District therefore lacked authority to reach the merits of the trial court's holding in the Final Dismissal Order that Petitioner could not convert Mr. Capone's personal injury action into her own wrongful death action—the very issue supporting this Court's putative conflict jurisdiction.

ARGUMENT

I. A Personal Injury Action Abates Where the Plaintiff Dies from His Alleged Injuries, and Any Wrongful Death Action Must Be Brought by Way of a Separate Complaint.

A. The Text and Structure of the Florida Wrongful Death Act Support the Decision Below.

"The plain meaning of the statute is always the starting point in statutory interpretation." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). Where the language of the statute is clear and controlling, it is also the ending point. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992) ("When the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning."); *Holly v.*

Auld, 450 So. 2d 217, 219 (Fla. 1984) ("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." (quotation omitted)).

The relevant text of the Wrongful Death Act could not be clearer: "When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." § 768.20, Fla. Stat. The plain meaning of abatement for an action for monetary damages is that the "action is utterly dead and cannot be revived except by commencing a new action." Black's Law Dictionary 16 (4th ed. rev. 1968).[8] *See, e.g.*, *Asociacion De Empleados Del Area Canalera v. Panama Canal Comm'n*, No. 01-1154-CIV, 2005 WL 6109012, at *5 (S.D. Fla. Mar. 25, 2005) ("Abatement is . . . 'an entire overthrow or destruction of the suit so that it is quashed an[d] ended.'" (quoting Black's Law Dictionary (6th ed. 1990))); *U.S. Bank, N.A. v. Ramjit*, No. 17027/08, 2011 WL 6153703, at *4 (N.Y. Sup. Ct. Dec. 12, 2011) ("The plain meaning of the word 'abated' . . . is the ending of an action . . . . An action which has been abated is dead, and any further enforcement of the cause of action requires the bringing of a new action, provided that a cause

[8] This was the operative edition of Black's in 1973, when the statute was passed.

of action remains." (quotation omitted)); *Jansen v. Westrich*, 95 S.W.3d 214, 219 (Mo. Ct. App. S.D. 2003) ("Webster's Dictionary defines abatement as, 'end; termination.'"); *Cross v. Lynch*, No. CV940533407, 1997 WL 192686, at *2 (Conn. Super. Ct. 1997) ("Ballantine's Law Dictionary, Third Edition, defines 'abate' as 'to quash or to destroy.' The phrase abatement of action is defined: A suit of law, when it abates . . . is absolutely dead; any further enforcement of the cause of action necessitates the bringing of a new action.").

This personal injury action was pending when Mr. Capone died, allegedly from his personal injuries. Under the plain text of the statute, once Petitioner took the position that the "personal injury to the decedent result[ed] in death," the pending action did not "survive," and instead "abate[d]." The action thus became subject to dismissal upon proper motion. *See Pollock v. Pollack*, 116 So. 2d 761, 761 (Fla. 1959) (holding that abatement of an action for lack of prosecution is not self-executing, but requires an affirmative motion for dismissal). Indeed, given the mandatory nature of the statute, which uses the word "shall" twice in its abatement provision, the trial court had no choice but to dismiss this case upon proper motion. *See Musculoskeletal Inst. Chartered v. Parham*, 745 So. 2d 946, 953 n.9 (Fla. 1999) (the word "shall" in a statute is mandatory language); *State v. DiGuilio*, 491 So. 2d 1129, 1133 (Fla. 1986) (same).

Petitioner attempts to avoid the plain language of the statute by arguing that "[w]hether 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 the rules of practice and procedure in all courts." Pet. Br. at 15. Petitioner's attempt to re-cast the relevant question as being one of procedure as opposed to substance fails for two reasons.

First, a cause of action exists after the death of a plaintiff only by grace of the Legislature, which enacted both the Survival Statute and the Wrongful Death Act. As with any statutory cause of action, it is within the Legislature's power—and not that of the Courts—to determine under what circumstances a cause of action can be brought. *See Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, --- So. 3d ----, No. SC11-285, 2012 WL 301029, at *3 (Fla. Feb. 2, 2012) ("*Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which *fix and declare the primary rights of individuals with respect towards their persons and property.*" (emphases in original)); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) ("The establishment or elimination of [claims] is clearly a substantive, rather than procedural, decision of the legislature because such a decision does, in fact, grant or eliminate a right or entitlement.").

At common law, no right to recovery survived the death of a tort plaintiff, regardless of the cause of the plaintiff's death. *See, e.g., State ex rel. H.E. Wolfe Constr. Co. v. Parks*, 175 So. 786, 788 (Fla. 1939) ("At common-law a cause of action for personal injuries resulting from negligence does not survive the death of either party."); *Jacksonville St. Ry. Co. v. Chappell*, 1 So. 10, 10 (Fla. 1886) ("At the common law the death of either party to an action abated it."). Florida's Wrongful Death Act abrogates the common law, creating a purely statutory cause of action on behalf of the decedent's estate for the benefit of the survivors when a personal injury results in death. *See Cruz v. Broward Cnty. Sch. Bd.*, 800 So. 2d 213, 217 (Fla. 2001) ("The common law recognized no civil cause of action for the wrongful death of a human being; such a right is purely a creature of statute."); 17 Fla. Jur. 2d, *Death* § 1 (2d ed. 2012) ("[T]he right to bring an action for damages for wrongful death exists solely by virtue of statute; *all claims for wrongful death are created and limited by the Florida Wrongful Death Act.*" (emphasis added)).

In the case of a "legislatively created cause of action," the Legislature has "the authority both to determine the extent of the statutory right and to prescribe or limit the remedies available for a violation of the right." *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 9 (Fla. 2004). That general proposition applies in the case of the Wrongful Death Act: "[A]ll claims for wrongful death are created

and limited by the Florida Wrongful Death Act." *Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1006 (Fla. 2003) (quotation omitted). The Legislature here acted within its authority by limiting the continuation of an action for personal injuries when the plaintiff dies from the alleged injuries, and by prescribing that the statutory cause of action for wrongful death must be brought by way of a new action by the personal representatives.

Second, far from conflicting with the Wrongful Death Act's abatement provision, the Rules of Procedure align with it. Under Rule 1.260(a)(1), the court can order substitution of a new party only where "a party dies and the claim is not thereby extinguished." Fla. R. Civ. P. Rule 1.260(a)(1). By accounting for the potential for claims to be extinguished upon the death of a party, the Rule contemplates that certain claims will be abated either by common law or by statute.

Petitioner further argues that in providing that "any such action pending at the time of death shall abate," the Florida Legislature intended only that "the act merely extinguishe[s] the right to recover damages for the personal injury." Pet. Br. at 23. Petitioner is partly correct in this statement, but fails to accept the necessary result of the extinguishment of a pending cause of action: Once the right to recover damages for the personal injury abates, *nothing remains with respect to the plaintiff's personal injury action*. *See supra* at 19–20 (citing definitions of abatement). This is precisely why it is incumbent upon the personal representative

of a deceased plaintiff's estate to file a new wrongful death action in order to recover the only damages that she may recover—wrongful death damages under the Wrongful Death Act.

B. *Niemi* Addresses a Different Factual Scenario.

Petitioner's argument that *Niemi* "should have put the issue to rest in favor of the long-standing practice of allowing the personal representative to be substituted upon the death of the plaintiff to continue the claims as a . . . wrongful death action" misreads both *Niemi* and the Third District's decision below.[9] The two decisions are complementary, not contradictory.

When a plaintiff with a pending personal injury case dies, the personal representative of the estate may take one of three paths depending on what she alleges concerning the cause of the decedent's death. *Capone* and *Niemi* discuss two of these paths; and Petitioner below took the *Capone* path, meaning that she needed to file a separate wrongful death complaint.

First, if the personal representative alleges that the decedent died of something *other than* the injuries alleged in the personal injury action, the personal representative may move to substitute herself as the plaintiff and continue with a survival action. *See* § 46.021, Fla. Stat.; Fla. R. Civ. P. 1.260(a)(1) ("If a party

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[9] While Petitioner cites numerous opinions that note amendment of personal injury actions to add wrongful death claims, *see* Pet. Br. at 29, none of those opinions addresses the referenced amendments' propriety.

dies *and the claim is not thereby extinguished*, the court may order substitution of the proper parties." (emphasis added)); *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 770 (Fla. 1975). This scenario was not the case in either *Capone* or *Niemi*.

Second, if the personal representative alleges that the decedent died as a result of the injuries alleged in the personal injury suit, then the personal injury suit abates and the personal representative must bring a wrongful death action by way of a new complaint. *See* § 768.20, Fla. Stat.; *see also, e.g.*, *ACandS*, 703 So. 2d at 493 (plaintiff's personal injury action abated when those same injuries were the cause of death, even where death occurred in the middle of trial). This is the path that Petitioner was required to follow once she decided to assert that Mr. Capone died from his alleged smoking-related injuries.[10]

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[10] Application of this rule will not produce unfair results in *Engle* progeny cases, where this Court required that plaintiffs file suit within one year of its mandate. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006) ("[W]e remand with directions that the class should be decertified without prejudice to the class members filing individual claims within one year of the issuance of our mandate in this case."). As PM USA and other tobacco defendants have stated in prior pleadings in the wake of *Capone*, they will not argue that the one-year *Engle* deadline requires dismissal of a plaintiff's newly-filed wrongful death complaint where the underlying personal injury complaint was filed prior to the expiration of the one-year period (while preserving the right to raise *other* limitations defenses). *See, e.g.*, Resp. to Pet. for Writ of Cert., *Skyrme v. R. J. Reynolds Tobacco Co., et al.*, No. 2D11-1986 (June 3, 2011), at 10 n.3 (stating that defendants will not make such an argument); Respondents Liggett Grp. & Vector Grp. Ltd., Inc.'s Joinder in Respondents' Resp. to Pet. for Writ of Cert., *Skyrme* (June 3, 2011). PM USA requests that the Court take judicial notice of these

Third, if the personal representative is uncertain as to the cause of death, the personal representative may plead in the alternative, amending the personal injury complaint to add a wrongful death claim as an alternative to the survival action. This is precisely the procedural posture in *Niemi*.

In *Niemi*, the plaintiff brought a personal injury lawsuit and died while that lawsuit was pending. The co-personal representatives moved to substitute as plaintiffs, but did not move to amend the complaint. The Second District described the pleadings as "not currently claim[ing] that [decedent's] death was either the result of his personal injury or the result of some independent cause." *Niemi,* 862 So. 2d at 34. Under those circumstances, the court found that "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.* The court therefore granted a writ to allow them potentially to plead alternative causes of action. *Id.* The court

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pleadings under § 90.202, Fla. Stat. PM USA has contacted Petitioner regarding this request and, while Petitioner believes that the pleadings are not subject to judicial notice, she has no objection to PM USA's citation of, or reference to, the pleadings.

Moreover, to the extent that this Court is concerned that unfair results may arise in the context of statutes of repose, this Court can remedy any problem by creating a tolling period similar to the *Engle* one-year tolling period—*i.e.*, providing that new complaints filed obtain a tolling effect from a personal injury action that was pending at the time of death provided that they are filed within two years of death. *See* § 95.11(4)(d), Fla. Stat. (creating a two year limitations period for wrongful death actions).

expressly stated, however, that the personal injury action would abate once it was "determined that the personal injury resulted in the plaintiff's death." *Id.* at 33.

Here, Petitioner did not adequately plead any such alternative survival action. While Petitioner now claims that she has pled a survival claim in the alternative, her counsel expressly disclaimed any viable survival claim in front of the Third District at oral argument, conceding that he could not advocate for a survival claim with a "straight face." [Oral Arg. video at 9:22].

Even apart from this waiver, it is clear that Petitioner did not adequately plead an alternative survival claim. Pleadings in the alternative must be "made in good faith and with genuine doubt as to which contradictory allegation is true." 71 C.J.S. *Pleading* § 73 (2012); *see also, e.g.*, *Shaw v. Jason Soda Sys.*, No. CV 970402436S, 1998 WL 695264, at *3 (Conn. Super. Ct. Sept. 18, 1998) (noting the existence of "a limitation of good faith upon" alternative pleading and that "alternative pleading is justified only when the pleader does not know all the facts necessary to make an election"); *Heastie v. Roberts*, 877 N.E.2d 1064, 1090 (Ill. 2007) (litigants may "plead alternative grounds for recovery, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true").

Here, Petitioner did not express genuine doubt as to which contradictory allegation was true. Rather, Petitioner unequivocally asserted that Mr. Capone died as a result of his smoking-related injuries. She unambiguously alleged that "Decedent was a Florida citizen or resident who suffered *and died* from diseases and/or medical conditions caused by Decedent's addiction to cigarettes that contained nicotine." R. 1:64-74 [App. Tab D at ¶ 2] (emphasis added). Each count further alleged that, as a result of PM USA's conduct, "Plaintiff's Decedent was injured *and died*." *Id.* at ¶¶ 29, 32, 35, 38, 41, 44 (emphasis added). While Petitioner purported to plead an alternative claim for survival damages, she did so only in a single paragraph that pled no causes of action. Moreover, Petitioner's supposed alternative survival claim was entirely contingent upon a position that the opposing party might take in the future: "Alternatively, **in the event one or more of the Defendants** contend that Decedent died of some cause unrelated to smoking cigarettes, Plaintiff asserts a claim for survival damages pursuant to Section 46.021, Florida Statutes." *Id.* at ¶ 24 (emphasis added). That bare contingent allegation is plainly not sufficient to plead the elements of a survival action.

Thus, the decision below is wholly consonant with *Niemi*, citing it twice and applying *Niemi*'s correct statement of law that a personal injury action only "'abates' [under the Wrongful Death Act] if it is first determined that the personal injury resulted in the plaintiff's death." *Capone*, 56 So. 3d 35 n.2 (quoting *Niemi*,

862 So. 2d at 33). It is simply that Petitioner's deficient proposed alternative survival claim is nothing like *Niemi*, where the plaintiff's position as to cause of death was truly unknown and therefore could not have abated the decedent's underlying personal injury action.

II. This Court Need Not Address the Timeliness of Petitioner's Motion to Amend.

A. This Court Need Not Address Whether the Wrongful Death Action in Petitioner's Proposed Amended Complaint Would Have Related Back to the Original Complaint.

Even if this Court disapproves of the decision below, it should not address whether a wrongful death action inserted into a personal injury action through a motion to amend filed outside the two-year limitations period relates back to the filing of the personal injury complaint. That question is not implicated by this case. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991) (holding that a case must present "some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction" because it is improper for the court's opinion to "be advisory only").

Petitioner, PM USA, and the Third District all agree that Mrs. Capone filed her motion to amend "within two years of Mr. Capone's death." *Capone*, 56 So. 3d at 35; *see* Pet. Br. at 39.[11] Her action therefore would have been timely with

[11] Contrary to Petitioner's characterization, the Third District did not hold that "Mrs. Capone's wrongful death action was too late under [] the two-year wrongful

respect to the wrongful death statute of limitations if the motion to amend were granted without any need for relation back. *See* § 95.11(4)(d), Fla. Stat.; *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60, 66 & n.9 (Fla. 3d DCA 1985) (amended complaint is "considered filed at the time of filing the motion for leave to amend" but only if the court subsequently grants the motion for leave to amend.).[12]

B. A Wrongful Death Cause of Action is a New, Distinct Cause of Action that, if Brought by Amendment, Obtains No Tolling Effect From the Previously Pending Personal Injury Action.

Should the Court nevertheless reach the question of whether a wrongful death action brought by amendment relates back to the filing of a pending personal injury action, it should answer in the negative. New, distinct causes of action added by amendment cannot relate back to a prior complaint, and a wrongful death action is an entirely new, distinct action from a personal injury action. *See Ake v. Birnbaum*, 25 So. 2d 213, 219 (Fla. 1945) (amendment of a wrongful death complaint to state a survival action "state[d] a cause of action entirely different in

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death statute of limitations." Pet. Br. at 38. Rather, the Third District found that the underlying personal injury action was properly dismissed as abated, and noted in *dicta* that Petitioner did not file a separate wrongful death suit within the "two-year statute of limitation for that cause of action." *Capone*, 56 So. 3d at 36.

[12] Nor does the Court need to consider relation back in the context of the one-year *Engle* deadline, in light of PM USA's agreement not to argue that the one-year *Engle* deadline bars Petitioner's action should this Court disapprove of the decision below. *See supra* at n.10.

theory from that expressed in the original declaration"); *Toombs*, 833 So. 2d at 111 (stating that the Court "has long characterized the [Wrongful Death] Act as creating a new and distinct right of action from the right of action the decedent had prior to death.").

Under Florida Rule of Civil Procedure 1.190(c),[13] "an amendment which merely makes more specific what has already been alleged generally, or which changes the legal theory of the action, will relate back." *Kiehl v. Brown*, 546 So. 2d 18, 19 (Fla. 3d DCA 1989). Although courts interpret this Rule liberally, that "rule of liberality does not authorize [relation back of] a new cause of action." *Surette*, 394 So. 2d at 154. Rather, this Court has long held that "when a cause of action set forth in an amended pleading in a pending litigation is new, different, and distinct from that originally set up, there is no relation back." *Livingston v. Malever*, 137 So. 113, 117 (Fla. 1931). Indeed, each Florida district has recognized the rule that amendments that add new, distinct causes of action do not relate back.[14]

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[13] Rule 1.190(c) provides:

> When the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

[14] *See Page v. McMullan*, 849 So. 2d 15, 16 (Fla. 1st DCA 2003) ("It is well-settled, however, that such amendment may not be used to avoid the statute of limitations if the amendment sets forth a new and distinct cause of action."); *Cox v.*

This Court has repeatedly identified a wrongful death action as a new, distinct cause of action relative to the personal injury action the decedent maintained prior to death. For example, in *Ake v. Birnbaum*, 25 So. 2d 213 (Fla. 1945), the plaintiff's original declaration stated only a wrongful death cause of action stemming from the defendant's alleged negligent operation of an automobile. *Id.* at 218. The defendant consented to the plaintiff's first amendment, which added a survival cause of action. Four years later, the plaintiff sought to file a second amendment, and the defendant argued that the survival action was untimely. *Id.* at 219.

The Court found that the defendant waived his limitations plea by failing to object to the plaintiff's first amendment. It nevertheless made clear that "the

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Seaboard Coast Line R. Co., 360 So. 2d 8, 9 (Fla. 2d DCA 1978) ("[I]t is equally well established that [the liberal construction of Rule 1.190(c)] does not authorize a plaintiff, under the guise of an amendment, to state a new and different cause of action."); *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009) ("[W]hen a cause of action set forth in an amended pleading in a pending litigation is new, different, and distinct from that originally set up, there is no relation back."); *Surette*, 394 So. 2d at 154 ("Although amendments should be permitted liberally, one cannot defeat the bar of the statute of limitations by filing a new cause of action labelled as an amended complaint."); *W. Volusia Hosp. Auth. v. Jones*, 668 So. 2d 635, 636 (Fla. 5th DCA 1996) ("An amendment to a complaint relating back to the original complaint after the statute of limitations has run will not be permitted where it brings new parties into a lawsuit. Nor will it be permitted where it states a new and distinct cause of action from that set forth in the original pleading.").

second re-amended declaration did state a cause of action ***entirely different in theory*** from that expressed in the original declaration." *Id.* The Court explained:

> It will be observed that the [wrongful death] statute gives a right of action to certain statutory beneficiaries for the recovery of damages suffered ***by them by reason of the death*** of the party killed; but it makes no provision for the recovery of the damages suffered by ***the injured person by reason of the injury inflicted upon him***. Nor was the death by wrongful act statute ever intended to afford such remedy. It was not the purpose of the [wrongful death] statute to preserve the right of action which the deceased had and might have maintained had he simply been injured and lived; but to create in the expressly enumerated beneficiaries an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by ***them***, not the decedent, as a consequence of the wrongful invasion of ***their*** legal right by the tortfeasor.

Id. (emphases in original). In light of the distinct nature of a survival/personal injury action from a wrongful death action, this Court found that the survival action in the plaintiff's second re-amended declaration related back only because it "did not depart from the theory of the case" of the first amended complaint (to which objection had been waived). *Id.*

Relying on *Ake* and other cases, this Court recognized in *Toombs v. Alamo Rent-A-Car, Inc.*, that it "has long characterized the [Wrongful Death] Act as creating a new and distinct right of action from the right of action the decedent had prior to death." 833 So. 2d at 111. For support, the Court quoted *Florida East Coast Railway v. McRoberts*, 149 So. 631, 632 (Fla. 1933):

> [T]he Florida death by wrongful act statutes[] do not purport to transfer to the statutory representatives of a person killed by another's wrongful act the right of action which the injured party might have maintained for his injury had he lived, ***but those sections gave to such statutory representatives, subject to terms, conditions and limitations of the statute, a totally new right of action for the wrongful death, and that on different principles***.

Id. at 112 (emphasis in *Toombs*). The Court also cited nine other cases in accord with its view that a wrongful death action has a completely distinct nature from a personal injury action.[15]

The Fifth District neatly summed up the reasons for the wrongful death action's unique nature in *Taylor*:

> The personal injury cause of action for negligence is based on the common law; the cause of action for wrongful death is provided by statute (§ 768.19, Fla. Stat.). 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

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[15] *See Bilbrey v. Weed*, 215 So. 2d 479 (Fla. 1968); *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Moragne v. State Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968); *Shearn v. Orlando Funeral Home, Inc.*, 88 So. 2d 591 (Fla. 1956); *Brailsford v. Campbell*, 89 So. 2d 241 (Fla. 1956); *Klepper v. Breslin*, 83 So. 2d 587 (Fla. 1955); *Parker v. City of Jacksonville*, 82 So. 2d 131 (Fla. 1955); *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955); *Epps v. Ry. Express Agency, Inc.*, 40 So. 2d 131 (Fla. 1949).

> the damages provided by section 768.21, Florida Statutes, for a wrongful death.

555 So. 2d at 878.

In sum, a wrongful death action is different from a personal injury action in its statutory origin, time of accrual, mutually exclusive theory of relief, and introduction of novel and different compensatory liability to a new party. These substantial disparities distinguish the wrongful death/personal injury context from others where courts have permitted amendment because the plaintiff merely sought to change the theory of recovery. *See, e.g.*, *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 872 (Fla. 2d DCA 2010) (amendment which consolidated prior claims into one count and stated a cause of action for nondelegable duty, for which plaintiff had previously alleged the applicable facts, was proper); *C.H. v. Whitney*, 987 So. 2d 96, 99 (Fla. 5th DCA 2008) (permitting substitution of mother of child for guardian and amendment of "wrongful life" cause of action to wrongful birth).

Accordingly, the two Florida cases to consider the relation back doctrine in the wrongful death/personal injury context have each found it inapplicable.

In *Cox v. Seaboard Coast Line Railroad Co.*, the Second District held that a minor's proposed amendment adding his own personal injury action to his pending wrongful death action for his father's death would not relate back. 360 So. 2d at 9–10. Though the minor's injuries were caused by the same train accident that killed his father, the Second District held that the minor's personal injury cause of

action was "different" from his pending wrongful death action and "would have introduced new issues and varied grounds for relief." *Id.* at 9. The Second District explained that, while it was aware of the liberality to be accorded in applying Rule 1.190(c), the rule should not "be so liberally construed as to allow a plaintiff to circumvent the statute of limitations on the plaintiff's separate cause of action which could have been asserted by separate suit brought at any time within the statutory period." *Id.*

Likewise, in *School Board of Broward County v. Surette*, the Fourth District held that an amendment asserting a personal injury survival action on behalf of a minor's estate would not relate back to a complaint filed by the minor's parents for wrongful death. 394 So. 2d at 154. The amended complaint concerned the same underlying incident in which a minor was struck and killed by an automobile while waiting for a school bus, but stated an additional survival action on behalf of the estate seeking damages "for the decedent's pain and suffering, loss of prospective earnings, and funeral expenses." *Id.* at 149, 153. The court concluded that the amendment was barred because "one cannot defeat the bar of the statute of limitations by filing a new cause of action labelled [sic] as an amended complaint." *Id.* at 154. The court explained:

> It is obvious that the amended complaint in the present case not only alleged a different cause of action from that alleged in the original complaint, but it was also filed by a different party. The original complaint was filed by the

> parents of the deceased for their own damages; the amended complaint was filed by the estate for different damages. We hold that the bar of the statute of limitations was apparent on the face of the complaint.

Id.

For similar reasons, Florida courts have repeatedly held that amendments that seek to bring a new party into the case (as do amendments that purport to add claims on behalf of survivors) do not relate back. *See W. Volusia Hosp. Auth.*, 668 So. 2d at 635; *Lee v. Simon*, 885 So. 2d 939, 954 (Fla. 4th DCA 2004); *Patel v. Sch. Bd. of Volusia Cnty.*, 813 So. 2d 135, 136 (Fla. 5th DCA 2002); *Johnson v. Taylor Rental Ctr., Inc.*, 458 So. 2d 845, 846 (Fla. 2d DCA 1984); *Daniels v. Weiss*, 385 So. 2d 661, 663 (Fla. 3d DCA 1980); *Louis v. S. Broward Hosp. Dist.*, 353 So. 2d 562, 563 (Fla. 4th DCA 1977).

Indeed, *Cox*, *Surette*, and these numerous other Florida holdings reflect that permitting the addition of an entirely new claim or party through relation back would eviscerate applicable statutes of limitation. The purposes of limitations statutes, such as timely prosecution of claims and repose, are compromised by the gamesmanship of filing a new case as an "amendment." *See, e.g.*, *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074–75 (Fla. 2001) ("A prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims . . . ."). For these reasons, the *Surette* court held that a plaintiff cannot

"defeat the bar" set by the statute of limitations simply by styling her suit as an amendment. 394 So. 2d at 154.[16]

Totura & Co. v. Williams, 754 So. 2d 671 (Fla. 2000), cited by Petitioner, lends her no support. In that case, which did not involve the Florida Wrongful Death Act, this Court held that the filing of a "full and comprehensive" motion to amend could substitute for an actual amendment when evaluating the proposed amendment's timeliness. *Id.* at 679–80. But *Totura* is of no moment where the motion to amend is itself filed outside the statutory period. *Totura* addressed a fundamentally different situation from *Cox* and *Surette*, and has no application here.[17]

Finally, Petitioner's contention that the "overwhelming majority" of jurisdictions permit relation back in the wrongful death/personal injury context is wrong. Petitioner and her *amicus* point to six states as permitting relation back of wrongful death actions to pending personal injury actions. However, at least five

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[16] Because of all the differences in the actions discussed above, a pending personal injury action does not give a defendant sufficient notice of a wrongful death action so as to render the limitations bar a meaningless technicality.

[17] Petitioner's additional argument that *Totura* somehow saves her proposed amendment insofar as it stated new fraudulent concealment and breach of warranty claims "even if they do not relate back," Pet. Br. at 43, has no basis. Her fraudulent concealment and breach of warranty claims are asserted as counts within her wrongful death claim, and, as such, are subject to the two-year limitations period. Petitioner presents no explanation or authority suggesting otherwise.

states—California,[18] Georgia, Louisiana, Missouri, and Pennsylvania—do not permit relation back in the wrongful death/personal injury context. *See Pope v. Goodgame*, 478 S.E.2d 636, 640 (Ga. Ct. App. 1996); *Smith v. Cutter Biological*, 770 So. 2d 392, 412-13 (La. Ct. App. 4 Cir. 2000); *Caldwell v. Lester E. Cox Med. Ctrs.–South, Inc.*, 943 S.W.2d 5, 8 (Mo. Ct. App. S.D. 1997); *Frey v. Pa. Elec. Co.*, 607 A.2d 796, 798 (Pa. Super. Ct. 1992). Thus, to the extent that other states' decisions have any import here given the variation in wrongful death regimes[19] and legal standards for relation back, there is no clear-cut majority view.

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[18] The FJA's argument that California law permits relation back where the plaintiff asserting a wrongful death action had a pending loss of consortium claim, FJA Br. at 8, is accurate only where the decedent had no other heirs and therefore "amendment [does] not impose any greater liabilities on the defendants." *See Wachtel v. Regents of Univ. of Cal.*, No. B221419, 2011 WL 5222863 (Cal. App. 2d Dist. Nov. 3, 2011) (unpublished). California otherwise rejects relation back in the personal injury/wrongful death context for the same reasons this Court should: because such an action concerns a different injury, plaintiff, and set of damages than one for wrongful death. *See Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222, 238–39 (Cal. Ct. App. 6th Dist. 2006) (finding that a survival action did not relate back to a prior wrongful death action because it was brought by plaintiff in a different capacity, stated a different injury, and sought different damages).

[19] States' wrongful death regimes vary widely. For instance, New York permits relation back in part because a state statute ***specifically provides*** that the personal representative may enlarge a pending personal injury complaint with a wrongful death action. *See Caffaro v. Trayna*, 319 N.E.2d 174, 175 (N.Y. 1974) ("By this provision the Legislature has given the personal representative the right, if an action has already been brought for conscious pain and suffering, to join the related cause of action for wrongful death."). Florida's Wrongful Death Act has no such provision. Two states cited by Petitioner—Delaware and Ohio—allow a wrongful death action to be brought by survivors despite the decedent's prior recovery for personal injury. *See Coulson v. Shirks Motor Exp. Corp.*, 107 A.2d

III. The Court Should Discharge Jurisdiction or Approve of the Decision Below on the Basis of the Third District's Alternative Holding.

The Third District lacked jurisdiction to consider Petitioner's attack on the trial court's denial of her motions to amend and to substitute parties. The Court should therefore either (a) discharge jurisdiction over the entire case as improvidently granted, in light of the lack of appellate jurisdiction; or (b) approve the decision below on the basis of the Third District's alternative untimeliness holding.

The trial court's Final Dismissal Order resolved Petitioner's motions to amend and to substitute parties. Petitioner had 30 days from the rendition of that final order to seek appellate review. *See generally* Fla. R. App. P. 9.110(b). This 30-day deadline is jurisdictional. *See Peltz v. Dist. Court of Appeal, Third Dist.*, 605 So. 2d 865, 866 (Fla. 1992) ("The untimely filing of a notice of appeal

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922, 924–25 (Del. Super. Ct. 1954); *Thompson v. Wing*, 637 N.E.2d 917, 922–23 (Ohio 1994). Florida allows no such suit. *See Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1011 (Fla. 1983) (A "judgment for personal injuries rendered in favor of the injured party while living bar[s] [a] subsequent wrongful death action based on the same tortious conduct."). Moreover, each state cited by Petitioner permits a plaintiff to recover simultaneously on a wrongful death action ***and*** a survival action for the decedent's conscious pain and suffering. *See Murphy v. Martin Oil Co.*, 308 N.E.2d 583, 588–87 (Ill. 1974); *Wilburn v. Cleveland Elec. Illuminating Co.*, 599 N.E.2d 301, 303 (Ohio Ct. App. 1991); *Jump v. Facelle*, 739 N.Y.S.2d 730, 730–31 (N.Y. App. Div. 2002); *Magee v. Rose*, 405 A.2d 143, 146 (Del. Super. Ct. 1979); *Farrington v. Stoddard*, 115 F.2d 96, 99 (1st Cir. 1940) (applying Maine law); *Frances v. Plaza Pac. Equities, Inc.*, 847 P.2d 722, 724 (Nev. 1993). By contrast, wrongful death and survival actions are mutually exclusive in Florida. *See supra* at 32–35.

precludes the appellate court from exercising jurisdiction."). Because Petitioner did not file a notice of appeal until more than a year after the Final Dismissal Order was rendered—even ignoring the fact that she did not actually appeal that order at all, *see infra* at 45–47—her appeal was untimely on its face.

Petitioner tried to circumvent this "irremediable jurisdictional defect," *Miami-Dade Cnty. v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003) (per curiam), by stringing together two flawed arguments: (1) her motion to reconsider and/or vacate the Final Dismissal Order was timely served under Rule 1.530(b), meaning that it tolled rendition of the Final Dismissal Order; and (2) her second round of post-judgment motions continued to toll rendition of the Final Dismissal Order. Each of these arguments fails.

1. Petitioner's Untimely Motion for Reconsideration Did Not Delay Rendition of the Final Dismissal Order.

Under Florida Rule of Appellate Procedure 9.020(h), only the timely service of a motion for reconsideration under Florida Rule of Civil Procedure 1.530(b) will toll the time for filing an appeal. *See Dann v. Dann*, 24 So. 3d 791, 791 (Fla. 5th DCA 2009) ("[A] motion for rehearing served in a civil case more than ten (10) days from the entry of judgment is insufficient to extend the date of rendition of judgment." (citations omitted)); *Bramblett v. State*, 15 So. 3d 839, 840 (Fla. 1st DCA 2009) (per curiam) ("Only timely motions for rehearing toll the rendition of

the final order for purposes of the thirty-day time limit to commence an appeal of the final order." (citations omitted)).

The timeliness of Petitioner's motion to reconsider and/or vacate turns on an issue of fact—whether Petitioner served the motion before the expiration of the 10-day window for service under Rule 1.530(b). In entering the Vacatur Order, the trial court made a factual determination that Petitioner did not. R. 1:210-211 [App. Tab U]. This factual determination is "clothed with a presumption of correctness on appeal . . . and will not be disturbed unless the appellant can demonstrate that [it] [is] clearly erroneous." *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009) (quotation and citations omitted); *see also Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1034 (Fla. 1999) ("The findings of a trial court are presumptively correct and must stand unless clearly erroneous." (citation omitted)).

As the Third District correctly concluded, the trial court's timeliness finding was not clearly erroneous.[20] Petitioner's motion was sent to PM USA's counsel in an envelope postmarked September 29, 2008—several days after the September 26, 2008 date for timely service. The certificate of service accompanying each

[20] Petitioner faults the Third District for stating that the motion "was not timely filed," as opposed to being not timely served. Pet. Br. at 44. However, the Third District correctly recited Rule 1.530's 10-day service deadline and focused its analysis on evidence (or lack thereof) of timely service. *Capone*, 56 So. 3d at 35.

copy of Petitioner's motion was admittedly unsigned and undated, as was the motion (in violation of Fla. R. J. Admin. 2.515(a)[21]). And when pressed by the trial court at the August 28, 2009 hearing, Petitioner's trial counsel could say only that his failure to sign and date the certificate of service had been "error on [his] part" and that he remembered mailing a copy of the motion **to the judge** on September 24, 2008. R. 2:232-402 [App. Tab T at 17].

Only after the trial court had rejected Petitioner's version of events by entering its Vacatur Order did Petitioner change her story. She claimed that trial counsel (perhaps because of alleged family-related stress or a purported Post Office error) had inexplicably sent a copy of the motion to another attorney at a different law firm on September 24, 2008, who then purportedly forwarded the motion to PM USA's counsel—events of which Petitioner would have been fully aware in September 2008, yet neglected to raise at the November 2008 hearing on her motion for reconsideration. Petitioner further claimed in opposing the Vacatur Order—again for the first time, and without any corroborative evidence—that she also served PM USA's other counsel of record. These self-serving statements, that Petitioner made simply to overcome the adverse Vacatur Order and that the trial court ultimately did not believe, do not render clearly erroneous the factual finding

[21] "Every pleading and other paper of a party represented by an attorney shall be signed by at least 1 attorney of record."

underlying the Vacatur Order. Nor does the signed and timely dated version of the Petitioner's motion for reconsideration—that mysteriously appeared in the appellate record only after the November 3, 2009 order denying Petitioner's post-Vacatur Order motions, and that Petitioner's trial counsel disavowed at oral argument before the Third District—overcome the substantial competent evidence of untimely service on which the trial court based its Vacatur Order.

Petitioner's requested evidentiary hearing would be pointless at best. Pet. Br. at 45, 47. All that Petitioner could elicit at such a hearing would be a "sworn" statement by her trial counsel that he timely sent the motion for reconsideration in the mail to PM USA's counsel. But Petitioner's trial counsel made representations as an officer of the court to the trial court detailing this version of the story, and the trial court was not persuaded.[22] It is unlikely that the trial court at a future evidentiary hearing will be won over by a mere rehash of the same story "sworn to" by trial counsel nearly four years after the events in question. *Cf. Nehme v. SmithKline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 209 (Fla. 2003) ("As time passes, memories fade, documents are destroyed or lost, and witnesses disappear.").

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[22] Without citation, Petitioner claims that "the record shows timely service to Philip Morris's counsel at Shook Hardy." Pet. Br. at 45. On the contrary, setting aside the signed certificate of service that belatedly appeared in the appellate record (and which Petitioner below disavowed), the record is bereft of evidence that would demonstrate timely service on any of PM USA's counsel.

In sum, the trial court correctly concluded that Petitioner did not timely serve her motion for reconsideration within the 10-day window provided by Rule 1.530(b). Accordingly, her motion did not toll the time for filing her notice of appeal. Because Petitioner filed her notice of appeal more than a year after rendition of the Final Dismissal Order, her appeal was untimely under Rule 9.110(b). The Third District therefore did not have jurisdiction to review the Final Dismissal Order.[23]

2. Petitioner's Second Round of Post-Judgment Motions Did Not Continue to Toll the Rendition of the Final Dismissal Order Because the Motions Were Not "Authorized."

Even assuming that Petitioner's time to appeal the Final Dismissal Order were tolled while the trial court resolved a timely served motion for reconsideration, the Vacatur Order resolved that motion adversely to Petitioner, meaning that her appellate clock ran from the date of that order. *See* Rule 9.110(b). Thus, the Third District would have had jurisdiction over the Vacatur Order and, derivatively, the Final Dismissal Order, only if Petitioner had filed a

[23] To the extent it was unclear from the record whether Petitioner timely served her motion for reconsideration because of the blank, undated certificate of service, the appeal still should have been dismissed for lack of appellate jurisdiction. *See, e.g.*, *McNair v. Daffin*, 997 So. 2d 1117, 1117 (Fla. 1st DCA 2008) (per curiam) ("[B]ecause the appellant's March 18, 2008, motion **contains no certificate of service**, the Court is unable to determine whether the motion was timely served pursuant to Florida Rule of Civil Procedure 1.530(b). Consequently, it is unclear whether the motion delayed rendition of the underlying final order. Accordingly, the appeal is hereby dismissed." (emphasis added) (internal citation omitted)).

notice of appeal within 30 days of the Vacatur Order. However, Petitioner did not file her notice of appeal until December 4, 2009, three months after the trial court entered the Vacatur Order on September 2, 2009. Her notice of appeal was thus two months too late under Rule 9.110(b).

Petitioner could not toll or otherwise reset the time for filing her notice of appeal from the Vacatur Order by filing a second round of post-judgment motions. The Vacatur Order amounted to a denial of Petitioner's initial motion for reconsideration. Accordingly, the three motions that Petitioner filed after the Vacatur Order essentially sought either a second reconsideration of the Final Dismissal Order or reconsideration of the denial of her motion for reconsideration. Viewed either way, her motions were not proper, and certainly were not "authorized" for purposes of delaying rendition of the Vacatur Order under Rule 9.020(h). *See, e.g.*, *Pennywell v. Dep't of Revenue ex rel. Woodard*, 62 So. 3d 19, 20 (Fla. 1st DCA 2011) (per curiam) (finding no appellate jurisdiction where the notice of appeal was filed 32 days after rendition of final judgment following the denial of appellant's first motion for rehearing, because "[t]he second motion for rehearing was unauthorized and did not further delay rendition of the final judgment" (citations omitted)); *De Ardila v. Chase Manhattan Mortg. Corp.*, 826 So. 2d 419, 421 (Fla. 3d DCA 2002) (finding no appellate jurisdiction because the appellant only "filed a Notice of Appeal within thirty days of the denial of a

request for a rehearing of a ruling on rehearing, which, of course, is not authorized"), *review denied*, 845 So. 2d 888 (Fla. 2003); *Arleo v. Garcia*, 695 So. 2d 862, 862 (Fla. 4th DCA 1997) (per curiam) ("Upon entering the order on respondent's first motion for rehearing, the trial court lost jurisdiction to rule on the second motion for rehearing and to consider the merits of the case." (citation omitted)).[24]

In sum, Petitioner's repeated missteps in the trial court ensured that the Third District would lack jurisdiction to grant her the relief she sought below and continues to seek here regarding the amendment of her complaint and her substitution as plaintiff. After chiseling away all the jurisdictional defects plaguing this case, it is clear that the Third District lacked authority to review the denial of Petitioner's motions to amend and to substitute parties—the very issues animating this Court's potential conflict jurisdiction here. This Court should therefore dismiss its jurisdiction as improvidently granted or approve of the decision below

[24] To the extent Petitioner filed a timely and authorized Rule 1.540 motion for relief from the Final Dismissal Order, she could not properly seek appellate review of the Final Dismissal Order by timely appealing the denial of that motion because the time for appealing the Final Dismissal Order had long passed. As this Court emphasized in *Bland v. Mitchell*, 245 So. 2d 47 (Fla. 1970), "a denial (or granting) of a motion to vacate a final judgment cannot on appeal bring up for review the merits of the final judgment sought to be vacated." *Id.* at 48. Rather, "[t]he inquiry must be confined to determining whether in ruling on the motion the trial court abused its discretion on the facts and circumstances asserted in the motion's behalf." *Id*.

based on the Third District's alternative timeliness holding. *See, e.g., Akien v. State*, 78 So. 3d 1319, 1319 (Fla. 2012) (per curiam) ("We initially accepted jurisdiction to review the decision of the Fourth District Court of Appeal . . . based on express and direct conflict. Upon further consideration, we have determined that jurisdiction was improvidently granted. Accordingly, we hereby discharge jurisdiction and dismiss this review proceeding." (internal citation omitted)).[25]

Indeed, the Court has also accepted conflict jurisdiction over another case, *Ruble v. Rinker Materials Corp.*, No. SC11-1173 (now fully briefed and pending), which presents precisely the same substantive issues concerning abatement in wrongful death cases—but which does not appear to suffer from all the jurisdictional problems present here.

CONCLUSION

Based on the foregoing, Respondent PM USA requests that the Court approve the opinion on review or, alternatively, dismiss jurisdiction as improvidently granted.

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[25] The Court also may decline discretionary jurisdiction when it determines that the District Court lacked appellate jurisdiction in the first place. *See, e.g., Polk Cnty. v. Sofka*, 702 So. 2d 1243, 1243–44 (Fla. 1997) (per curiam) (refusing to address question certified by the district court as one of great public importance "because . . . the district court lacked jurisdiction to hear the appeal").

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Answer Brief and accompanying appendix were served via United States Mail upon **John S. Mills**, The Mills Firm, P.A., 203 North Gadsden Street, Suite 1A, Tallahassee, Florida 32301, Counsel for Petitioner; **J. Michael Fitzgerald**, Fitzgerald & Associates, P.A., Post Office Box 6246, Charlottesville, Virginia 22906, Counsel for Petitioner; **Celene H. Humphries**, Brannock & Humphries, 100 South Ashley Drive, Suite 1130, Tampa, Florida 33602, Counsel for Amicus Florida Justice Association; **Bruce Alan Weil**, Boies, Schiller & Flexner LLP, 100 Southeast Second Street, Suite 2800, Miami, Florida 33131-2150, Counsel for Philip Morris USA Inc.; and **William P. Geraghty**, Shook, Hardy & Bacon L.L.P., 201 South Biscayne Boulevard, Suite 2400, Miami, Florida 33131-4332, Counsel for Philip Morris USA Inc., this 26th day of March, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Respondent hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: March 26, 2012

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