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 BRIEF OPPOSING JURISDICTION

Gary L. Sasso
Florida Bar Number: 622575
Joseph Hagedorn Lang, Jr.
Florida Bar Number: 059404
Leah A. Sevi
Florida Bar Number: 087283
CARLTON FIELDS, P.A.
Corporate Center Three
at International Plaza
4221 W. Boy Scout Boulevard
P.O. Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

Geoffrey J. Michael
Florida Bar Number: 86152
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

STATEMENT OF THE CASE

Karen Capone ("Petitioner") and her husband Frank Capone filed this personal injury action against Philip Morris USA Inc. ("PM USA") in 2005, alleging that Mr. Capone sustained personal injuries from smoking cigarettes. App. 1. Mr. Capone died in July 2006, beginning what the Third District referred to as "a needless procedural labyrinth" of litigation created by Petitioner's failure "to timely file a wrongful death action" within two years. App. 2 n.1.

On January 14, 2008, Petitioner filed two motions in this personal injury action – one seeking to amend the complaint to assert a claim under the Wrongful Death Act (the "Act"), and another to substitute herself as plaintiff in her capacity as the estate's representative. App. 2. PM USA opposed both motions, arguing that the personal injury suit abated upon Mr. Capone's death by operation of the Act's direction that "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." App. 2, 4 (quoting § 768.20, Fla. Stat.). PM USA asked the trial court to dismiss the personal injury action, leaving Petitioner to bring a wrongful death claim, if any, in a new and separate lawsuit. App. 2.

What followed was the so-described "procedural labyrinth," resulting in a series of rulings by the trial court. The court initially denied Petitioner's motions, and ordered the case dismissed. The court later granted her motion for

reconsideration and vacated the dismissal, despite the absence of any evidence that Petitioner's "motion was served within the ten-day time period specified by Florida Rule of Civil Procedure 1.530(b)." App. 3. Then the court granted PM USA's motion to vacate the order granting reconsideration – reinstating the dismissal order – and, ultimately, denied Petitioner's motions for relief from judgment, to correct a scrivener's error, and to vacate and/or reconsider the reinstatement of the dismissal order. App. 1, 3.

The Third District affirmed, on two alternative grounds. First, the court held that "[t]he original complaint for personal injury could not be amended, on [Mr. Capone's] death, to include a new wrongful death claim because Florida law establishes that a personal injury claim is extinguished upon the death of the plaintiff [from his alleged personal injuries], and any surviving claim must be brought as a new and separate wrongful death action." App. 4; *see also* App. 4 n.2 ("[I]f there is a claim for personal injuries that caused the decedent's death, there is no survival of the decedent's personal injury claim."). The court concluded that the "trial court correctly dismissed the amended complaint because Frank Capone's personal injury claim had abated upon his death and Karen Capone was required to file a separate Wrongful Death claim, which she did not do prior to the expiration of the two-year statute of limitation[s] for that cause of action." App. 5-6.

Second, the court held that the trial court correctly deemed as untimely Petitioner's initial motion for reconsideration of the trial court's order dismissing this case. App. 5.

SUMMARY OF THE ARGUMENT

I. The Third District Court of Appeal's decision does not create a conflict with any of the cases cited by Petitioner. *See* Art. V, § 3(b)(3), Fla. Const. First, there is no conflict with *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003). The decision below holds that a personal injury action abates when a plaintiff's pleadings allege that the underlying injuries caused the decedent's death, and properly cites *Niemi* in support of this holding. The decision below does not address, let alone conflict with, the alternative pleading procedure described in *Niemi* concerning cases where a plaintiff is "uncertain whether the alleged personal injury resulted in death" and the pleadings are silent on that issue. Second, the decision does not contravene *Totura & Co., Inc. v. Williams*, 754 So. 2d 671 (Fla. 2000), which rested on relation-back principles not implicated in this case. Finally, the decision adheres to the holdings in *Migliore v. Migliore*, 717 So. 2d 1077 (Fla. 4th DCA 1998), and *Harris v. Harris*, 670 So. 2d 1187 (Fla. 5th DCA 1996), in that Petitioner failed entirely to establish that she timely served her motion for reconsideration.

II. Even assuming that any of Petitioner's three unavailing theories of conflict had merit, the Third District's decision nonetheless does not warrant review because such conflict is ill-developed and unripe for resolution, and its resolution would have no effect on the outcome of Petitioner's case.

ARGUMENT

I. THIS COURT LACKS CONFLICT JURISDICTION.

Jurisdiction under Article V, section 3(b)(3) of the Florida Constitution is limited to decisions that "expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law," meaning that the holdings of two cases are "irreconcilable." *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006). The Third District's decision in this case does not create any such conflict and is wholly reconcilable with the cases Petitioner cites in a flawed attempt to manufacture jurisdiction.

A. The Third District's Decision Does Not Conflict With *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003).

Petitioner's first jurisdictional argument misreads both *Niemi* and the decision below. The Third District's decision addresses only the case where a plaintiff's pleadings clearly allege that the underlying injuries resulted in death. Accordingly, the decision below does not conflict with – let alone give conflicting guidance on – a case like *Niemi*, in which a plaintiff was "uncertain whether the alleged personal injury resulted in death," and the pleadings were silent on that

issue. *Niemi*, 862 So. 2d at 34. Moreover, even though the two decisions address factually distinct scenarios, 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." App. 4 n.2 (quoting *Niemi*, 862 So. 2d at 33).

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 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.

In contrast, the Third District below held that, in view of the state of the pleadings, the personal injury action abated by application of the principle under Florida's Wrongful Death Act that "if there is a claim for personal injuries that

caused the decedent's death, there is no survival of the decedent's personal injury claim." App. 4 & n.2 (citing § 768.20, Fla. Stat. ("[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.")). Accordingly, the decision below does not conflict with *Niemi* because the two decisions applied complementary principles of law to materially different factual scenarios. *Cf. Wallace v. Dean*, 3 So. 3d 1035, 1039 n.4 (Fla. 2009) (explaining conflict jurisdiction as involving "the application of a rule of law to produce a different result in a case that involves *substantially similar controlling facts* as a prior case disposed of by this Court or another district court" (emphasis added)). Thus, no one reading both the decision below and *Niemi*, side by side, would find "conflict" between the two cases. And the fact that the Third District's decision twice cites *Niemi* as support, *see* App. 4 n.2, 5, should disabuse readers of any perceived disharmony.[1]

[1] Moreover, in none of the cases cited by Petitioner in footnote 2 on page 7 of her brief does it appear that the parties raised the issue presented here. Nor did the courts in those cases rule that a plaintiff, through amendment of the complaint, may simply sidestep the abatement of a personal injury claim when the pleadings show that the plaintiff contends that an alleged personal injury resulted in death.

B. The Third District's Decision Does Not Conflict With This Court's Decision In *Totura & Co., Inc. v. Williams*, 754 So. 2d 671 (Fla. 2000).

Petitioner next contends that the decision below conflicts with this Court's ruling in *Totura & Co., Inc. v. Williams*, 754 So. 2d 671 (Fla. 2000), that an amended complaint can relate back to the filing of a motion to amend. *Id.* at 680. *See* Pet'r's Br. at 5-6. But the decision below has nothing to do with relation-back of amended complaints, and *Williams* did not address the operation of the Florida Wrongful Death Act. In applying this legislation, the Third District held that Petitioner "was required to file a *separate* Wrongful Death claim," as opposed to including such a claim in an amended complaint, and noted that "she did not do [so] prior to the expiration of the two-year statute of limitation[s] for that cause of action." App. 6 (emphasis added); *see also* App. 4 ("[A]ny surviving [wrongful death] claim must be brought as a new and separate wrongful death action."). Consequently, *Totura* is not only not "irreconcilable" with the decision below, *Aravena*, 928 So. 2d at 1166, it is wholly inapposite.

C. The Third District's Decision Does Not Conflict With *Migliore v. Migliore*, 717 So. 2d 1077 (Fla. 4th DCA 1998), Or With *Harris v. Harris*, 670 So. 2d 1187 (Fla. 5th DCA 1996).

Petitioner finally asserts that the Third District's decision conflicts with two cases from the Fourth and Fifth Districts holding that "the service date, not the filing date, is critical for determining whether the motion [for rehearing] is timely."

Migliore v. Migliore, 717 So. 2d 1077, 1079 (Fla. 4th DCA 1998); *Harris v. Harris*, 670 So. 2d 1187, 1187-88 (Fla. 5th DCA 1996). Petitioner ignores the Third District's detailed description of the dispute arising from the fact that "the motion's *certificate of service* . . . was not dated or signed," as well as its statement that Petitioner "could not point to anything to show that the motion was *served* within the ten-day time period specified by Florida Rule of Civil Procedure 1.530(b)." App. 3 (emphases added). The Third District's later reference to the motion being "[un]timely filed," App. 6, was – as even the *Migliore* court itself recognized – a common but harmless misnomer. *See Migliore*, 717 So. 2d at 1080 & n.2 (citing cases from the Third, Fourth, and Fifth Districts in which the courts "use[d] . . . the word 'filing,' rather than 'service'" but the imprecision did not "result in an incorrect disposition"). It is clear from the entirety of the decision that the court below did not hold that the timeliness of a motion for rehearing is governed by filing rather than service.

II. IN ANY EVENT, THE DECISION DOES NOT WARRANT REVIEW.

Given the lack of any express and direct conflict between the decision below and the decision of another District Court of Appeal or of this Court, this Court does not have jurisdiction. But even assuming that any of Petitioner's three unavailing theories of conflict created jurisdiction, the Third District's decision nonetheless would not warrant review by this Court. Petitioner argues that only

the purported conflict with *Niemi* is important enough to warrant review. *See* Pet'r's Br. at 7-8. However, the decision below will not affect "the rights of thousands of Floridians," as Petitioner contends: It simply requires a personal representative to file a new complaint – as opposed to filing a motion to substitute, then a motion to amend, and then an amended complaint – within two years of a decedent's death whenever he or she has alleged or intends to allege solely that a plaintiff in a pending personal injury action has died from the alleged injury.

Moreover, the alternative holding – affirming the dismissal of Petitioner's case because her motion for reconsideration was untimely – makes this decision a particularly poor vehicle for conflict review; reversal of the Third District's holding on the propriety of amendment ultimately will have no effect on the rights of Petitioner here.[2] And, if Petitioner is correct that this issue is likely to recur, then it makes sense to let the District Courts of Appeal further develop the law on this issue and, if need be, crystallize any conflict for later review by this Court. Until then, this Court should decline jurisdiction to review this case.

[2] In fact, the Third District did not even reach all of the possible bases for affirming the trial court's dismissal of Petitioner's complaint, which included Petitioner's untimely filing of her notices of appeal, as well as her waiver and/or abandonment of certain issues for failure to raise them first in the trial court or in her initial brief before the Third District.

CONCLUSION

Based on the foregoing, Respondent PM USA requests that this Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

Gary L. Sasso
Florida Bar Number: 622575
Joseph Hagedorn Lang, Jr.
Florida Bar Number: 059404
Leah A. Sevi
Florida Bar Number: 087283
CARLTON FIELDS, P.A.
Corporate Center Three
at International Plaza
4221 W. Boy Scout Boulevard
P.O. Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

Geoffrey J. Michael
Florida Bar Number: 86152
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief Opposing Jurisdiction and attached appendix was served via United States Mail upon **John S. Mills** and **Gregory J. Philo**, 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; **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 7th day of July, 2011.

Joseph Hagedorn Lang, Jr.
Florida Bar Number: 059404
E-Mail: jlang@carltonfields.com

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: July 7, 2011

Joseph Hagedorn Lang, Jr.
Florida Bar Number: 059404
E-Mail: jlang@carltonfields.com