

IN THE SUPREME COURT OF FLORIDA

KAREN CAPONE, etc.,

Petitioner,

v.

Case No. SC11-849

L.T. No. 3D09-3331

PHILIP MORRIS USA INC.,

Respondent.

**ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA**

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Table of Contents	i
Table of Citations	ii
Statement of the Case and Facts.....	1
Summary of the Argument	2
Argument	3
I. The Court Has Conflict Jurisdiction.	3
A. The Decision Below Conflicts With <i>Niemi v. Brown & Williamson Tobacco Corp.</i> , 862 So. 2d 31 (Fla. 2d DCA 2003), as to Whether a Personal Injury Complaint May Be Amended to Add a Wrongful Death Claim When the Plaintiff Dies.	4
B. The Decision Below Conflicts With <i>Totura & Co. v. Williams</i> , 754 So. 2d 671 (Fla. 2000), as to Whether a Claim Is Commenced for Limitations Purposes When a Plaintiff Seeks Leave to Add the Claim to a Pending Lawsuit.....	5
C. The Decision Below Conflicts With <i>Migliore v. Migliore</i> , 717 So. 2d 1077 (Fla. 4th DCA 1998), and <i>Harris v. Harris</i> , 670 So. 2d 1187 (Fla. 5th DCA 1996), as to Whether the Timeliness of a Motion for Rehearing Is Judged by When the Motion Was Filed or When It Was Served.....	6
II. The Court Should Accept Jurisdiction.	7
Conclusion	8
Certificate of Service.....	9
Certificate of Compliance	10

TABLE OF CITATIONS

CASES

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

Arthur v. Unicare Health Facilities, Inc., 602 So. 2d 596 (Fla. 2d DCA 1992)7

Baione v. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla. 2d DCA 1992).....7

Barwick, Dillian & Lambert, P.A. v. Ewing, 646 So. 2d 776 (Fla. 3d DCA 1994).....7

Bruce v. Byer, 423 So. 2d 413 (Fla. 5th DCA 1982).....7

Capone v. Philip Morris U.S.A. Inc., 56 So. 3d 34 (Fla. 3d DCA 2011) (rehearing denied March 23, 2011).....1

Corbin Well Pump & Supply, Inc. v. Koon, 482 So. 2d 525 (Fla. 5th DCA 1986).....7

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

First Protective Ins. Co. v. Featherston, 906 So. 2d 1242 (Fla. 2d DCA 2005).....7

Harris v. Harris, 670 So. 2d 1187 (Fla. 5th DCA 1996).....3, 6

Humana Health Plans, Inc. v. Durant, 650 So. 2d 203 (Fla. 4th DCA 1995)7

Jaylene, Inc. v. Steuer, 22 So. 3d 711 (Fla. 2d DCA 2009).....7

Johnson v. Mullee, 385 So. 2d 1038 (Fla. 1st DCA 1980).....7

Martinez v. IpoX, 925 So. 2d 448 (Fla. 2d DCA 2d DCA 2006)7

Migliore v. Migliore, 717 So. 2d 1077 (Fla. 4th DCA 1998).....3, 6

Murray v. Regier, 872 So. 2d 217 (Fla. 2002).....4

Niemi v. Brown & Williamson Tobacco Corp., 862 So. 2d 31 (Fla. 2d DCA 2003)2, 4, 5

Ruble v. Rinker Material Corp., _ So. 3d _, 36 Fla. L. Weekly D237 (Fla. 3d DCA Feb. 2, 2011)8

Totura & Co. v. Williams, 754 So. 2d 671 (Fla. 2000).....3, 5, 6

Williams v. Bay Hospital, Inc., 471 So. 2d 626 (Fla. 1st DCA 1985).....7

CONSTITUTIONAL PROVISIONS AND RULES OF COURT

Art. V, § 3(b)(3), Fla. Const.....3

Fla. R. App. P. 9.030(a)(2)(A)(iv)3

Fla. R. Civ. P. 1.530(b).6

STATEMENT OF THE CASE AND FACTS

Karen Capone, as the personal representative of the estate of her deceased husband, Frank Capone, invokes this Court's conflict jurisdiction to determine whether, on the death of the plaintiff in a personal injury case, the personal representative should be substituted for the plaintiff and allowed to amend the complaint to assert a survival claim, a wrongful death claim, or both (as alternative claims), as the Second District has held, or whether the case must be dismissed and the personal representative required to file an entirely new lawsuit, as the Third District held below. *Capone v. Philip Morris U.S.A. Inc.*, 56 So. 3d 34 (Fla. 3d DCA 2011) (rehearing denied March 23, 2011). (Appendix ("App.") 1-6.)

In 2005, the Capones sued Philip Morris USA Inc. and other tobacco companies for personal injuries that Mr. Capone suffered from smoking. (App. 2.) Mr. Capone died in July 2006, and in January 2008, Mrs. Capone moved to substitute herself as the estate's personal representative and to add a wrongful death claim. (App. 2-3.) The motions were heard after July 2008, and the trial court ultimately denied them and dismissed the case. (App. 2-3.) The trial court granted Mrs. Capone's motion for reconsideration, but a successor judge vacated that order on the ground that the motion for reconsideration had not been "timely filed." (App. 3.)

In affirming, the Third District made three rulings, each of which forms a separate basis for conflict. First, it concluded that “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 – it cannot be brought as an amendment to a personal injury action.” (App. 4.) Second, the Third District held that it was too late for Mrs. Capone to assert a wrongful death claim because, although she filed her motion to amend before the two-year statute of limitations had run, the trial court did not rule on the motion until after the period expired. (App. 3-4, 6.) Finally, it noted that the successor trial judge correctly vacated the order granting the motion for reconsideration because the motion “was not timely filed.” (App. 6.)

SUMMARY OF THE ARGUMENT

This Court has conflict jurisdiction because the decision below conflicts with decisions of other district courts of appeal or this Court in three, independent regards. First, the holding that a personal injury complaint must be dismissed upon the death of the plaintiff and that a wrongful death action may not be brought as an amendment to a personal injury action directly conflicts with the decision in *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So.2d 31 (Fla. 2d DCA 2003). Second, the holding that the statute of limitations had run on the wrongful death claim even though the court acknowledged that Mrs. Capone filed the motion to

amend to add that claim before the limitations period expired directly conflicts with this Court's holding in *Totura & Co. v. Williams*, 754 So. 2d 671 (Fla. 2000). Finally, the holding that the motion for reconsideration was not timely filed directly conflicts with the decisions in *Migliore v. Migliore*, 717 So. 2d 1077 (Fla. 4th DCA 1998), and *Harris v. Harris*, 670 So. 2d 1187 (Fla. 5th DCA 1996), which holds that the date of service, not filing, controls.

The Court should exercise its discretion to accept jurisdiction because the legal effect of the death of the plaintiff in a personal injury case is an extremely important issue. The decision below calls into question the historic practice of allowing the personal representative to be substituted as the plaintiff and, if appropriate, to amend the complaint to state a wrongful death claim. Because plaintiffs die every day, the decision affects thousands of cases.

ARGUMENT

I. THE COURT HAS CONFLICT JURISDICTION.

This Court has jurisdiction because the Third District's decision expressly and directly conflicts with decisions of other district courts of appeal or this Court in three regards, any one of which would be sufficient to establish jurisdiction. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); *see also Murray v. Regier*, 872 So. 2d 217, 223 n.5 (Fla. 2002) ("Once this Court accepts

jurisdiction over a cause in order to resolve a legal issue in conflict, we have jurisdiction over all issues.”).

A. The Decision Below Conflicts With *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003), as to Whether a Personal Injury Complaint May Be Amended to Add a Wrongful Death Claim When the Plaintiff Dies.

The primary holding in the decision below is that “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 – it cannot be brought as an amendment to a personal injury action.” (App. 4.) This holding expressly and directly conflicts with *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003), which is on all fours. The Niemis sued tobacco companies for personal injuries sustained by Mr. Niemi, and he died before trial. *Id.* at 32. The co-personal representatives of Mr. Niemi’s estate moved to be substituted as plaintiffs, but the trial court denied the motion “apparently concluding that the action had automatically abated at the time of Mr. Niemi’s death.” *Id.* at 33. The Second District held that this was a departure from the essential requirements of the law. *Id.* at 34.

Writing for the court, Judge Altenbernd acknowledged that the Wrongful Death Act provides that an action “abates” when the plaintiff’s injuries lead to his or her death, but explained that this abatement “does not automatically terminate a lawsuit, which is represented by a physical file in the courthouse. A pending

lawsuit does not simply self-destruct like the secret message on a rerun of ‘Mission Impossible.’ ” *Id.* at 33. He further noted that the personal injury claim would not abate until there had been a final determination that the death was caused by the complained-of injuries, as opposed to some unrelated cause. *Id.* at 33. The court accordingly held:

The only way to resolve whether this action should be abated is to permit Mr. Niemi’s co-personal representatives to appear in the action and to permit them to amend the pleadings. Unless the parties agree upon a cause of death, 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. at 34. Thus, directly contrary to the Third District’s express holding in this case, the Second District expressly held that the personal injury complaint can be amended to state a claim for wrongful death when there is any concern that the death was caused by the tort.

B. The Decision Below Conflicts With *Totura & Co. v. Williams*, 754 So. 2d 671 (Fla. 2000), as to Whether a Claim Is Commenced for Limitations Purposes When a Plaintiff Seeks Leave to Add the Claim to a Pending Lawsuit.

The Third District recognized that Mrs. Capone moved to amend the complaint to add the wrongful death claim within the limitations period, but held that the claim was untimely because the trial court did not rule on the motion until after the limitations period ended. (App. 3-4, 6.) This express holding directly conflicts with this Court’s decision in *Totura & Co. v. Williams*, 754 So. 2d 671

(Fla. 2000). In that case, this Court held that a claim is commenced for limitations purposes upon the filing of a motion to amend a pending complaint to add the claim. *Id.* at 680. As long as the motion to amend is filed within the limitations period, the statute of limitations is satisfied even if the trial court does not rule on the motion to amend until after the limitations period expires. *Id.*

C. The Decision Below Conflicts With *Migliore v. Migliore*, 717 So. 2d 1077 (Fla. 4th DCA 1998), and *Harris v. Harris*, 670 So. 2d 1187 (Fla. 5th DCA 1996), as to Whether the Timeliness of a Motion for Rehearing Is Judged by When the Motion Was Filed or When It Was Served.

Finally, the Third District held that the trial court properly vacated an order granting Mrs. Capone’s motion for reconsideration of the prior dismissal order because the motion was “not timely filed.” (App. 6.) Directly contrary to this holding, other district courts expressly hold that the timeliness of a motion for rehearing is governed by the service of the motion, not its filing.¹ *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).

¹ The parties dispute the date of service, but agree on the date of filing. Earlier in its opinion, the Third District noted, “Capone 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.) Mrs. Capone submits that the record does not support this assertion, but it is immaterial to the jurisdictional question because the district court made clear that it approved the trial court’s conclusion because the motion “was not timely filed.” (App. 6; *see also* App. 3 (noting that the trial court “correctly determined that, in fact, the record did not show that Capone’s Motion to Reconsider was timely filed”).)

II. THE COURT SHOULD ACCEPT JURISDICTION.

The issue of what happens to a personal injury action when the plaintiff dies is extremely important because it is a common occurrence. The Southern Reporter is replete with opinions that demonstrate that the usual course is to substitute the personal representative of the plaintiff's estate and allow the personal representative to amend the complaint to (1) continue pursuing the personal injury claim if the death was not caused by the complained-of injuries, (2) substitute a wrongful death claim if it was, or (3) pursue both avenues in the alternative if there is any doubt on the cause of death.² But the opinion below calls this practice into substantial doubt. And since the opinion speaks in terms of the trial court's authority, it casts doubt on the validity of thousands of final judgments. *See, e.g., Corbin Well Pump & Supply, Inc. v. Koon*, 482 So. 2d 525, 527 (Fla. 5th DCA 1986) ("While parties and their successors in title or interest are generally bound by final judgments in suits in which they appeared as parties, they are not bound if

² *E.g., Jaylene, Inc. v. Steuer*, 22 So. 3d 711, 713 (Fla. 2d DCA 2009); *Martinez v. Ipo*, 925 So. 2d 448, 449 (Fla. 2d DCA 2006); *First Protective Ins. Co. v. Featherston*, 906 So. 2d 1242, 1243 (Fla. 2d DCA 2005); *A.W. Chesterson v. Fisher*, 655 So. 2d 170, 170-171 (Fla. 3d DCA 1995); *Humana Health Plans, Inc. v. Durant*, 650 So. 2d 203, 204 (Fla. 4th DCA 1995); *Davies v. Owens-Illinois, Inc.*, 632 So. 2d 1065, 1066 (Fla. 3d DCA 1994); *Barwick, Dillian & Lambert, P.A. v. Ewing*, 646 So. 2d 776, 778 (Fla. 3d DCA 1994); *Arthur v. Unicare Health Facilities, Inc.*, 602 So. 2d 596, 598 (Fla. 2d DCA 1992); *Baione v. Owens-Illinois, Inc.*, 599 So. 2d 1377, 1378 (Fla. 2d DCA 1992); *Williams v. Bay Hospital, Inc.*, 471 So. 2d 626, 628 (Fla. 1st DCA 1985); *Bruce v. Byer*, 423 So. 2d 413, 414 (Fla. 5th DCA 1982); *Johnson v. Mullee*, 385 So. 2d 1038, 1039 (Fla. 1st DCA 1980).

the judgment being attacked is void because the court rendering the judgment lacked subject matter jurisdiction.”).

Indeed, because of the wide-ranging importance of this issue, the Florida Justice Association has already filed a notice of its intention to seek leave to file an amicus brief if jurisdiction is granted. And lest there be any thought that this is an issue unique to tobacco litigation, shortly after issuing the decision in this case, the Third District reached the same conclusion in an asbestos case. *Ruble v. Rinker Material Corp.*, _ So. 3d _, 36 Fla. L. Weekly D237 (Fla. 3d DCA Feb. 2, 2011). The issue is just as likely to arise in an automobile accident case, a medical malpractice case, or any other tort case where the plaintiff dies before trial.

Does the court file “self-destruct” requiring an entirely new lawsuit be filed? Or is it a simple matter of substituting in the personal representative to continue the personal injury claim, convert it to a wrongful death claim, or pursue both claims in the alternative? The bar needs a definitive answer, and the rights of thousands of Floridians hang in the balance.

CONCLUSION

For the foregoing reasons, this Court has conflict jurisdiction and should exercise its discretion to grant review of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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