IN THE SUPREME COURT OF FLORIDA

KAREN CAPONE, individually
and as personal representative of
the Estate of Frank Capone,

Petitioner,

v.

Case No. SC11-849
L.T. No. 3D09-3331

PHILIP MORRIS U.S.A. INC.,

Respondents.

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

REPLY BRIEF OF PETITIONER

THE MILLS FIRM, P.A.

John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Courtney Brewer
Florida Bar No. 0890901
cbrewer@mills-appeals.com
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES OF COURT

SECONDARY SOURCES

REPLY ARGUMENT

I. Just Because a Personal Injury Claim Abates on the Death of the Plaintiff as a Result of the Tort Does Not Mean the Complaint Cannot Be Amended.

Philip Morris concedes the case by admitting, as it must, that "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." (Ans. Br. at 26.) Even if it were correct that Mrs. Capone did not seek to do this, this concession still requires the district court's opinion to be quashed because it held that "[t]he original complaint for personal injury could not be amended, on Frank's death, to **include** a new wrongful death claim." (R2.407 (emphasis added).) Because its opinion makes no suggestion that Mrs. Capone abandoned an alternative survival action, the district court's opinion cannot be read as allowing a new wrongful death claim to be included as long as a survival claim is also asserted.

Philip Morris's concession not only shows that the district court's reasoning was wrong, but that the result was too. If the complaint can be amended to state the wrongful death claim in the alternative, then there is no reason it cannot be amended to state that claim as the only theory of relief. Philip Morris's argument to the contrary only raises more difficult questions that it makes no attempt to answer. Why should a trial court allow a wrongful death claim to be added to a personal

injury complaint only if the personal representative is "uncertain as to the cause of death"? What policy or logic could possibly support this result? And if it is ultimately determined (whether by trial or summary judgment) that the death was caused by the tort, then does all of the litigation since the death become a nullity because the action necessarily "abated" as of the plaintiff's death?

In addition to failing to answer the questions raised by its concession, Philip Morris fails to address, much less attempt to refute, Mrs. Capone's arguments that the district court's holding would result in unnecessary inefficiencies and unfairness. For example, Philip Morris does not explain why all of the progress that might have been made in the personal injury litigation until the plaintiff died would have to be wiped away, requiring the parties and the court to start from scratch in a new wrongful death lawsuit, even if the plaintiff died during the personal injury trial just before the verdict was rendered. (*See generally* Init. Br. at 25-28.) The Florida Justice Association developed this policy argument further in its amicus brief (Amicus Br. at 4-6), but Philip Morris fails to offer any rebuttal whatsoever.

Nor does Philip Morris address the fact that both courts to address the issue since the Third District's decision have condemned it as not "consistent with the law in Florida addressing the unique relationship between a personal injury claim and a wrongful death claim or … regarding the liberal amendment of pleadings,"

Skyrme v. R.J. Reynolds Tobacco Co., 75 So. 3d 769, 772-73 (Fla. 2d DCA 2011) (footnote omitted), and "inconsistent with existing practice, illogical, and … a restrictive interpretation of a remedial statute," *Starling v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10027-J-37JBT, 2011 WL 6965854, at *13-15 (M.D. Fla. Nov. 2, 2011).[1] Philip Morris ignores these opinions and the thoughtful analyses provided by these three state appellate judges and one federal trial judge. Instead, it raises three arguments that are easily dispatched.

A. The Wrongful Death Act's Use of the Term "Abate" Does Not Mean That a Wrongful Death Action Cannot Proceed as an Amendment to a Personal Injury Complaint

Philip Morris's primary argument is that the plain meaning of the word "abate," as used in the wrongful death act,[2] is that the "action is utterly dead and cannot be revived except by commencing a new action." (Ans. Br. at 19 (quoting Black's Law Dictionary 16 (4th ed. rev. 1968)).) As an initial matter, even if that were true, that does not answer the question presented in this case. Philip Morris cites no authority for the proposition that when the form of action pled in the

[1] Though not directly addressing the issue, the First and Second District have both issued recent opinions noting that the personal injury complaint had been amended on the plaintiff's death to convert the case to a wrongful death action. *Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, No. 1D10-2019, 2012 WL 1232730, at *2 (Fla. 1st DCA Apr. 13, 2012); *Philip Morris USA, Inc. v. Douglas*, No. 2D10-3236, 2012 WL 1059048, at *1 n.1 (Fla. 2d DCA Mar. 30, 2012).

[2] "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. (2006).

complaint terminates (whether by death of the plaintiff, mootness of the action, or whatever), the litigation cannot be "revived" by amending the complaint to "commence a new action." As the Second District has explained,

> As a matter of legal theory, "abatement" may bring a pending action to an end or extinguish it, but this theoretical event 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." In some fashion, it must be dismissed by court order.

Niemi v. Brown & Williamson Tobacco Corp., 862 So. 2d 31, 33 (Fla. 2d DCA 2003). Nothing is to prevent the court from allowing the complaint to be amended to state a wrongful death action instead of dismissing it.

Indeed, the very definition on which Philip Morris relies gives an example of how the term "abate" is used with regard to what happens "[o]n plaintiff's death":

> Mere lapse of time between the death of a party and the taking of necessary steps **to continue the action** by or against the heir or personal representative does not work an abatement.

Black's Law Dictionary 16 (4th ed. rev. 1968) (emphasis added). Thus, even this source makes clear that a personal injury action only "abates" in the sense of being "utterly dead" where it is not continued by the personal representative as a wrongful death action.

Philip Morris's blind reliance on the quoted definition of "abate" also fails because there simply is no single "plain meaning" for that term. As emphasized in *Niemi*, this term "is a common-law term with **various definitions**." 862 So. 2d at

33 (emphasis added). As the example cited in Black's indicates, the term "abate" might mean that the lawsuit may never be revived or it might mean that the lawsuit simply stops until the personal representative appears to continue it as a survival action, a wrongful death action, or both in the alternative. Indeed, Black's Law Dictionary now defines the term with relation to litigation as "[t]he **suspension or defeat** of a pending action for a reason unrelated to the merits of the claim." Black's Law Dictionary 2 (7th ed. 1999) (emphasis added).

More importantly, this is how Florida courts have long used the term with regard to pending litigation, as Mrs. Capone pointed out in her initial brief. (Initial Br. at 37 (citing *Floyd v. Wallace*, 339 So. 2d 653, 654 (Fla. 1976), *Worly v. Dade Cnty. Sec. Co.*, 42 So. 527, 529 (Fla. 1906), and *Schaeffler v. Deych*, 38 So. 3d 796, 801 (Fla. 4th DCA 2010)).) For example, the Third District has explained:

> If an indispensable party to an action dies, "the action abates until the deceased party's estate, or other appropriate legal representative, has been substituted pursuant to rule 1.260(a)(1)."

Schaeffler, 38 So. 3d at 799 (quoting *Cope v. Waugh*, 627 So. 2d 136, 136 (Fla. 1st DCA 1993)).

Thus, the term "abate" means, in this context, that the pending personal injury action must be stopped upon the death of the plaintiff to allow the personal representative to appear and determine how, if at all, the claims will proceed. If a personal representative timely appears to prosecute the claims as a survival action,

a wrongful death action, or both in the alternative, the case resumes accordingly. If no personal representative timely appears or the nature of the relief sought logically dies with the plaintiff (for example, a declaratory action to invalidate a non-compete provision in an employment agreement), then the lawsuit would be "utterly dead." Otherwise, allowing the complaint to be amended and the litigation to continue through the personal representative does not run afoul of the wrongful death act's directive that the action abates.

B. The Plaintiff's Allegation That the Tort Caused the Death Is Not Dispositive as to Whether That Is So.

Having conceded that a personal representative is entitled to amend a personal injury complaint to state a wrongful death action in the alternative (Ans. Br. at 26), Philip Morris rests its entire argument on its assertion that Mrs. Capone did not do that. Ignoring the fact that the complaint clearly does allege the actions in the alternative, Philip Morris argues that this should be disregarded because Mrs. Capone believes that her husband died from smoking and only asserted the survival action "in the event one or more of the Defendants contend that [he] died of some cause unrelated to smoking." (Ans. Br. at 27-28 (quoting R1:70).)

It argues that this "bare contingent allegation is plainly not sufficient to plead the elements of a survival action" (Ans. Br. at 28), but provides no support for this proposition. Its argument on this point would only make sense if the personal representative had the right to bind the defendant on the issue simply by

pleading the cause of death with sufficient certainty. But pleading practice (not to mention due process) simply does not work that way. An allegation in a complaint establishes nothing, and the defendant is always free to deny a factual allegation.

Philip Morris's argument begs the question of what would have happened if Mrs. Capone had allowed the complaint to be dismissed and filed a separate wrongful death action only to see Philip Morris file an answer claiming that Mr. Capone died from something other than smoking. Would she be able to retroactively reinstate the personal injury claim as a survival action? If not, how would an alternative survival action be timely? Because a personal representative cannot always predict what position the defendant will take on the cause of death, prudence will often require pleading in the alternative. And that is all Mrs. Capone did. Under Philip Morris's concession that a personal injury complaint can be amended to include alternative survival and wrongful death actions, the district court erred in affirming the dismissal of Mrs. Capone's case.

C. Philip Morris's Assurance That Tobacco Companies Will Not Assert the *Engle* One-Year Period as a Defense Is Contradicted by the Record and Irrelevant.

The only policy argument raised by Mrs. Capone and the amicus that Philip Morris even addresses is the argument that the rule of law announced by the district court is especially unfair in *Engle* litigation in light of the one-year period for bringing claims. Philip Morris first suggests that this will not be a problem

because it "and other tobacco defendants have stated in prior pleadings in the wake of *Capone*, [that] 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." (Answer Brief at 25 n.10.) But hoping that litigants will not seek inequitable results is no way to develop the law.

Even if it were, Philip Morris's representation rings hollow. Not only does it lack the authority to bind other tobacco companies, but it successfully took the exact opposite position in this very case.[3] (R2:235-36 (Tr. 4-6) (argument in trial court on Philip Morris's motion to dismiss making clear that this case is about the one-year deadline since Mrs. Capone moved to amend the day before the deadline, too late to file a separate action); R2:408 (district court's holding that Mrs. Capone's claim is time barred because the amended complaint with the wrongful death claim was filed three days after expiration of the *Engle* one-year period).)

[3] As related in Philip Morris's footnote, Mrs. Capone does not believe that judicial notice of positions taken in other litigation is appropriate. But if the Court disagrees and accepts evidence of the position Philip Morris and its coconspirators have taken in other *Engle* cases, then Mrs. Capone requests the opportunity to rebut Philip Morris's "evidence" with the motion for § 57.105 sanctions that it served on Mrs. Capone's trial counsel when he filed a separate lawsuit following the district court's opinion. In that motion Philip Morris contends that Mrs. Capone should be **sanctioned** for asserting that her claim was timely under the *Engle* one-year period.

While Philip Morris suggests that "this Court can remedy any problem by creating a tolling period similar to the *Engle* one-year tolling period" (Ans. Br. at 26 n.10) that would not alleviate any of the other problems articulated by Mrs. Capone and the amicus regarding the inefficiencies and inequities the district court's decision will create for personal injury litigation generally. (Init. Br. at 25-28; Amicus Br. at 4-6.) Again, Philip Morris ignores these serious problems and offers no credible argument to support the district court's opinion, which itself was bereft of any reasoning.

II. Mrs. Capone Accepts Philip Morris's Concession That Her Amended Complaint Was Timely if She Is Allowed to Amend.

Philip Morris contends that the Court need not address the relation back argument in Part II of the initial brief because it concedes that, if the complaint could be amended to add wrongful death claims, Mrs. Capone's proposed amended complaint was timely. (Ans. Br. at 29-30.) Mrs. Capone respectfully disagrees with Philip Morris's argument on the merits of the relation back issue in Part II(B) of its brief, but relying on Philip Morris's concession, she has no reason to belabor the point. The Court should make clear in its opinion that the amended complaint is timely to prevent Philip Morris from contending on remand that her claims are barred by the statute of limitations or *Engle* one-year limitations period.

III. Mrs. Capone Timely Appealed the Dismissal of Her Case.

Philip Morris argues that the district court lacked jurisdiction because Mrs. Capone failed to timely appeal the dismissal of her case because (A) her September 2008 motion for reconsideration was untimely so the original dismissal order became final and was not appealed and (B) her September 2009 motion for reconsideration was not authorized so it did not toll rendition of the order effectively reinstating the original dismissal order. Neither argument has merit.

A. The September 2008 Motion for Reconsideration Was Timely Served.

Philip Morris's scurrilous accusations that Mrs. Capone's trial counsel, Mr. Fitzgerald, committed perjury regarding the service of the motion for rehearing and its suggestion that he must have tampered with the record on appeal are insupportable and provide no grounds for approving the district court's opinion or dismissing this proceeding as improvidently granted.

The **only** competent evidence in the record is Mr. Fitzgerald's sworn statements that the motion was timely served on both of Philip Morris's lawyers. (R1:212-14, 222-23.) Philip Morris offered nothing in response to this testimony. All it points to now as "proving" Mr. Fitzgerald committed perjury is the prior, unsworn statements by one if its lawyers at a hearing below that he received his service copy in an envelope bearing a later date. This argument is unavailing, if not frivolous, for several reasons.

As an initial matter, this statement is not inconsistent with Mr. Fitzgerald's subsequent sworn statements. True, at the time it was made, it was at tension with Mr. Fitzgerald's (also unsworn) statements that he was sure he had mailed it on time. But their statements were not mutually exclusive, as Mr. Fitzgerald's subsequent sworn testimony revealed. Philip Morris never offered any argument below, much less any evidence, to rebut Mr. Fitzgerald's explanation for why one of Philip Morris's lawyers received the motion late in a different envelope.

Second, unsworn statements by counsel are not competent substantial evidence that can support a trial court's finding of fact. *See Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) ("[U]nsworn statements [by counsel] do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record."); *accord H.K. Dev., LLC v. Greer*, 32 So. 3d 178, 181 n.4 (Fla. 1st DCA 2010); *Hitt v. Homes & Land Brokers, Inc.*, 993 So. 2d 1162, 1166 (Fla. 2d DCA 2008); *cf. Centennial Ins. Co. v. Fulton*, 532 So. 2d 1329, 1331 (Fla. 3d DCA 1988) (declining to follow *Leon Shaffer* fully but concluding, "Obviously, a lawyer's unsworn statement cannot overcome actual testimony to the contrary.").

Third, comparing the record in this case with Philip Morris's appendix should remove any lingering doubt that Mr. Fitzgerald's practice during much of

this litigation was to send the signed original to the clerk of the court and send the trial judge and opposing counsel unsigned copies.[4] The record reveals that the original of every filing by Mrs. Capone in the trial court was signed, including the motion for reconsideration. (R1:106.) The transcript below established that the courtesy copy that Mr. Fitzgerald sent to the trial judge along with a cover letter was unsigned. (R2:288-89.) And the appendix to Philip Morris's answer brief demonstrates that except for the pleadings that it copied from the clerk's office (as reflected by the file stamps), most of Mrs. Capone's pleadings in its possession were unsigned.[5] Thus, either Mr. Fitzgerald snuck into the courthouse and changed out all of the pleadings and is perpetrating a monumental fraud on the courts, or Philip Morris's accusations are simply unfounded. If Philip Morris truly wishes to push these unwarranted accusations, then it should do so either in an evidentiary hearing below or through a bar complaint.

---

[4] Though perhaps not the most prudent course, this is simply a matter of printing multiple copies on a printer instead of printing a single copy, signing it, and then photocopying it. As indicated by the briefs he served on appeal, Mr. Fitzgerald learned from the experience and began using a signature stamp on his service copies. (Philip Morris App. BB at 16-17, DD at 13-14.)

[5] (*Compare* PM App. C, *with* R1:63 (motion to amend); PM App. D at 11, *with* R1:74 (amended complaint); PM App. E, *with* R1:75 (motion to substitute parties); PM App. K at 2, *with* R1:104 (motion to extend time for filing memorandum of law); PM App. L at 2, *with* R1:106 (motion for reconsideration); PM App. M at 13-14, *with* R1:119-20 (memorandum of law); PM App. Y at 2, *with* R1:223 (verified supplement to motion to vacate).)

Ironically, in its zeal to attack Mr. Fitzgerald's veracity in the answer brief, Philip Morris appears to have misrepresented what happened at oral argument in the district court.[6] Philip Morris claims that "Mr. Fitzgerald … conceded … that, for purposes of this appeal, he would proceed as though it were unsigned" and "stated that the operative motion for reconsideration filed in the trial court was unsigned." (Ans. Br. at 13, 15.) This is not a fair characterization of the oral argument. Mr. Fitzgerald made clear that when the trial judge and counsel for the parties looked at the **judge's copy** of the court file, the only copy of the motion they could find was an unsigned service copy attached to his letter to the trial judge. (R5:510.) He did admit that he could not remember whether he signed because this occurred during a difficult time in his life when a family member was seriously ill. (R5:510-11.) He admitted that he had operated under the "feeling" that he had not signed the motion in the trial court (R5:510), but he never suggested that he was agreeing to proceed on appeal as if he had not signed it or that he had not in fact signed it. To the contrary, he explained:

---

[6] Mrs. Capone does not intend to accuse Philip Morris's appellate counsel of making these misrepresentations intentionally. They were apparently based on a quick review of the recording of the oral argument, because the transcript of that argument was not prepared until after the answer brief was filed.

Upon reading Philip Morris's representations, Mrs. Capone successfully moved for leave to have the recording transcribed. She has submitted a copy of the transcript as an appendix to a motion filed herewith to accept it as a supplemental record. She cites the transcript as it if were the fifth volume of the record.

> I can only assume that when the clerk was preparing the record on appeal they found it, because they did docket it in on the 29th of the month, which would have indicated it was mailed on the –

(R5:511.) Although this answer was interrupted, it is clear that he was about to say that because the signed original was docketed in Miami on the 29th, it could not have been mailed from his office in Virginia that same day. In any event, he never told the appellate court that the motion "filed in the trial court was unsigned."

Because this motion for reconsideration was served within ten days of the original order dismissing Mrs. Capone's case, the trial court had jurisdiction to grant that motion and reinstate this lawsuit. Thus, Mrs. Capone had no occasion to appeal the original dismissal order.

B. The September 2009 Motion to Reconsider Was Authorized by Rule 1.530

Philip Morris alternatively contends that even if Mrs. Capone's motion for reconsideration filed in September 2008 was timely, her September 2009 motion for reconsideration did not toll rendition of the dismissal of her case because that motion "sought either a second reconsideration of the Final Dismissal Order or reconsideration of the denial of her motion for reconsideration." (Ans. Br. at 46-47.) The appellate judges below correctly rejected this argument out of hand at oral argument. (R5:520-22.)

First, the September 2009 motion was not a "second reconsideration" of the September 2008 original dismissal order. Instead, it plainly sought rehearing of an

entirely different order, the "Order entered by this Court on August 28, 2009." (R1:212.) Nor did it address the merits of the September 2008 dismissal order. Instead, it addressed the issue of whether the motion to reconsider that order had been timely served.

Second, the August 28, 2009, order that was the subject of this motion was not a "denial of her motion for reconsideration." Instead, the order granted the motion to vacate filed by Philip Morris. (R1:211.) The only previous motion for reconsideration filed by Mrs. Capone had been granted.

At bottom, the August 28, 2009, order was the first time the trial court ruled that Mrs. Capone's motion for reconsideration was not timely served. Florida Rule of Civil Procedure 1.530 gave Mrs. Capone the right to seek reconsideration of that final order. Under Florida Rule of Appellate Procedure 9.020(h), it tolled rendition of the August 28, 2009, order, so Mrs. Capone's appeal was timely.

Respectfully submitted,

THE MILLS FIRM, P.A.

John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Courtney Brewer
Florida Bar No. 0890901
cbrewer@mills-appeals.com

203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(860) 765-0897
(850) 270-2474 facsimile

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by U.S. Mail, this 30th day of April, 2012:

Gary L. Sasso
Joseph Hagedorn Lang, Jr.
Leah A. Sevi
Carlton Fields, P.A.
4221 West Boy Scout Blvd.
P.O. Box 3239
Tampa, FL 33601-3239

Counsel for Appellee/Respondent

Bruce Allen Weil
Boies, Schiller & Flexner, L.L.P.
100 Southeast Second St., Suite 2800
Miami, FL 33131-2150

Counsel for Appellee/Respondent

William P. Geraghty
Shook, Hardy & Bacon, L.L.P.
201 South Biscayne Blvd., Ste. 2400
Miami, FL 33131-4332

Counsel for Appellee/Respondent

Celene H. Humphries
Brannock & Humphries
100 South Ashley Drive, Suite 1130
Tampa, FL 33602

Counsel for Amicus Florida Justice Association

_____
Attorney

CERTIFICATE OF COMPLIANCE

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

_____

Attorney