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

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

What are the proper procedures for handling a personal injury lawsuit when the plaintiff dies? Consistent with existing practice, the Second District has held that the personal representative of the decedent's estate should be substituted as the plaintiff and allowed to amend the complaint (1) to continue the personal injury claims through a survival action if the alleged torts did not cause the decedent's death, (2) to continue the claims through a wrongful death action if the alleged torts did cause the death, or (3) to pursue both actions in the alternative if the parties have not agreed on the cause of death. *Niemi v. Brown & Williamson Tobacco Co.*, 862 So. 2d 31, 33-34 (Fla. 2d DCA 2003). After the petitioner elected the last of these three options, the Third District held that the lawsuit must be dismissed and "any surviving claim must be brought as a new and separate wrongful death action." *Capone v. Philip Morris U.S.A. Inc.*, 56 So. 3d 34, 36 (Fla. 3d DCA 2011). This Court granted review to exercise its discretionary jurisdiction to resolve this conflict. Art. V, § 3(b)(3), Fla. Const. Two additional issues presented are the applicability of the statute of limitations and whether a motion for rehearing was timely served below.

Proceedings Below

Frank Capone and his wife Karen sued Philip Morris U.S.A. Inc. and other defendants for his smoking-related injuries and her loss of consortium. (R1:4-33.)

After Mr. Capone died, Mrs. Capone, as the personal representative of her husband's estate, moved to be substituted as the sole plaintiff and to amend the complaint to convert the case to a wrongful death action or, alternatively, a survival action should the defendants deny that his death was caused by smoking. (R1:63-75.) The trial court initially denied the motion and dismissed the case, but later granted Mrs. Capone's motion for rehearing and allowed the case to proceed on the amended complaint. (R1:101, 130.) Philip Morris moved to vacate that order, arguing that Mrs. Capone had not timely served her motion for rehearing. (R1:131-206.) The trial court vacated the order granting rehearing and denied Mrs. Capone's motion to reconsider that ruling. (R1:210-11, 228.)

On appeal, the Third District affirmed for three reasons: (1) a personal injury complaint cannot be amended to pursue a wrongful death action upon the death of the plaintiff, (2) the statute of limitations had run on the wrongful death action, and (3) Mrs. Capone did not timely "file" her motion for rehearing from the original order of dismissal. (R2:404-09.) This Court granted Mrs. Capone's petition to invoke its discretionary jurisdiction primarily based on conflict with *Niemi*.

Facts Relevant to Motions to Substitute and Amend

The Capones initiated this case in 2005 by filing a complaint against Philip Morris U.S.A. Inc. and other defendants, asserting negligence, strict liability, and conspiracy claims to recover damages for injuries he suffered from smoking

cigarettes and for her loss of consortium. (R1:4-33.) Philip Morris moved to dismiss for failure to state a claim (R1:34-62), but that motion was never heard and Philip Morris never filed an answer.

Mr. Capone died in July of 2006, and in January of 2008, Mrs. Capone moved to amend the complaint and to be substituted as the sole plaintiff. (R1:63, 75, 85.) She served the motion to amend along with the proposed amended complaint on January 9, and they were docketed as filed on January 14. (R1:1, 63, 74.) Her proposed amended complaint kept the claims for negligence, strict liability, and conspiracy but added claims for fraudulent concealment and breach of warranty and sought the benefit of the class findings this Court approved for res judicata effect in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). (R1:64-65, 69-73.) Paragraph 23 alleged that Mr. Capone had died as a result of his addiction to the defendants' cigarettes and sought damages on behalf of his estate and survivors under the Wrongful Death Act. Paragraph 24 alternatively stated that if the defendants contend that Mr. Capone "died of some cause unrelated to smoking cigarettes," Mrs. Capone sought to recover her husband's damages for the estate's benefit and her own damages for loss of consortium. (R1:70-71.) These alternative allegations were part of the general allegations incorporated into each count. (R1:70-73.)

Philip Morris opposed these motions and asked the trial court to dismiss the action. (R1:76-100.) It contended that Mr. Capone's death required the complaint to be dismissed because the court lacked the authority "to 'convert' this personal injury action into a wrongful death action" or to allow Mrs. Capone to be substituted for Mr. Capone. (R1:77-81.)

At a November 2008 hearing, more than two years after her husband's death, Mrs. Capone emphasized that she was both "bringing the usual survivor claim … as well as a wrongful death claim." (R2:235:5.) She suggested that Philip Morris sought to require a separate lawsuit because it was too late to file a new action seeking the benefit of the *Engle* findings. (R2:235:4-5.) Philip Morris promptly confirmed that this was the underlying issue. (R2:236:6.)

The trial court denied Mrs. Capone's motions and dismissed the case as "barred by the Wrongful Death Act." (R1:101.) Subsequent proceedings focused on the merits and timeliness of Mrs. Capone's motion for rehearing of this order.

Facts Relevant to Mrs. Capone's Motion for Rehearing

The order denying the motions to amend and substitute and dismissing the case was rendered on September 16, 2008. (R1:101.) The clerk docketed Mrs. Capone's motion for rehearing on September 29, 2008. (R1:105-20.) In addition to renewing its arguments on the merits, Philip Morris argued that the motion for rehearing had not been timely served by the September 26, 2008, deadline imposed

by Florida Rule of Civil Procedure 1.530(b). (R2:302-402.) It represented that its copy of the motion for rehearing bore an unsigned and undated certificate of service and arrived in an envelope with a metered postmark of September 29, 2008. (R2:309, 358-61.)

At a hearing on the motion, Mrs. Capone's lawyer insisted that he had served the motion on September 24. (R2:263-65.) After the hearing, he filed a supplement that repeated his assertion that the motion was served on September 24, but acknowledged that it appeared he had forgotten to sign or date the motion. (R1:129.) In fact, however, the original motion was signed and the certificate of service indicated that it had been served "on all counsel of record by U.S. mail on September 24, 2008." (R1:106.) The trial court ultimately granted the motion and allowed the case to proceed on the amended complaint. (R1:130.)

Philip Morris moved to vacate this ruling on two grounds: (1) the motion for rehearing was untimely and (2) the original ruling was correct. (R1:131-35.) At a subsequent hearing in front of a new judge, Mrs. Capone's lawyer insisted that he had served the motion for rehearing on September 24 and offered to testify under oath. (R2:287, 290, 294, 296, 298.) He noted that the September 29 metered envelope provided by Philip Morris could not have come from him because he does not use a postage meter. (R2:298.)

The judge allowed counsel to look through her file in chambers, and Mrs. Capone's lawyer found a copy of the motion that accompanied a cover letter he had sent to the prior judge, which indicated that the motion for rehearing was enclosed. (R2:288-89.) The letter was dated September 24, but the accompanying copy of the motion was unsigned and undated. (R2:289.) The record does not disclose why counsel did not find the original signed and dated motion received by the clerk.

The court indicated that the prior judge "was in error when he allowed this amendment" and that there was "no reason to believe" that the motion for rehearing had been timely served. (R2:299.) It subsequently entered an order on September 2, 2009, that vacated the prior judge's order without stating whether the basis was that the amendment should not have been allowed, that the motion for rehearing was untimely, or both. (R1:210-11.)

On September 8, 2009, Mrs. Capone served a verified motion asking the court to reconsider this ruling because the only dispute involved service of Philip Morris's lawyers at the Boies Schiller firm and not the lawyers at Shook Hardy.[1]

[1] Shook Hardy lawyers had filed both the motion to dismiss the original complaint and the opposition to the motions to amend and substitute. (R1:44, 82.) A Boies Schiller lawyer appeared for Philip Morris at the hearing on the motion to amend, (R2:235:2), and Boies Schiller lawyers filed Philip Morris's subsequent pleadings, but continued to list a Shook Hardy lawyer as additional counsel for Philip Morris in the certificates of service. (R1:135-36; R2:310-11.)

(R1:212-18.) Her lawyer averred under oath that he had mailed copies of the original motion for rehearing on September 24, 2008, to both firms. (R1:213.) While there had never been any claim that Shook Hardy did not receive its copy, Mrs. Capone's lawyer remembered receiving a call from another law firm reporting that the copy he mailed to Boies Schiller had been misdelivered, placed into a new envelope, and mailed to Boies Schiller. (R1:213-14.) He further noted that the envelope provided by Philip Morris, which was addressed to Boies Schiller, was not the kind of envelope he uses. (R1:213.) In a verified supplement, he averred that the postage meter used for the envelope had been assigned to the firm that reported mailing the misdelivered copy to Boies Schiller. (R1:222-23.) Philip Morris did not respond. When the court entered an order summarily denying this motion, Mrs. Capone filed a notice of appeal thirty days later. (R1:226-28.)

Appellate Proceedings

On appeal, Mrs. Capone argued that she should have been allowed to proceed on the amended complaint and that her motion for reconsideration had been timely served. (R3:A:6-16; R3:C:1-9.) On the merits, she noted that her amended complaint pled wrongful death and survival actions in the alternative, and she cited *Niemi* as establishing that she had a right to be substituted as the plaintiff to resolve the issue of whether her husband's death abated his original claims and to amend the pleadings to pursue the applicable relief. (R3:A:6-11.) As to the

service issue, she argued that the trial court failed to conduct an evidentiary hearing, and in any event, the record established that she timely served Philip Morris on September 24, 2008, because there was no dispute that her lawyer had properly served Philip Morris's counsel at Shook Hardy on that date. (R3:C:2.)

On the eve of oral argument, Philip Morris filed a motion with the district court advising that its appellate counsel had discovered for the first time that the original motion for rehearing in the record on appeal was signed and dated September 24, 2008. (R4:411-18.) Philip Morris contended that because the parties and the trial court believed the motion had been unsigned and undated, the district court should pretend that were true. (R4:413-16.) The district court directed the parties to address this issue during oral argument (R4:419), but it never ruled on the motion.

The district court ultimately affirmed the trial court's decision, concluding 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." (R2:407.) It further reasoned that it was too late to bring a wrongful death action because Mrs. Capone had not filed an independent wrongful death action within two years of her husband's death. (R2:408-09.) It also declined to address any argument that the wrongful death claim was timely under the *Engle* one-year period because her

amended complaint was filed on January 14, 2008, three days after the period expired on January 11, 2007. (R2:408.)

Although the opinion did not reference the dispute over the date the motion for rehearing was served, it concluded that the "the record did not show that Capone's Motion to Reconsider was timely *filed*." (Opinion at 3 (emphasis added).) The court therefore concluded its opinion with the alternative holding that the trial court had correctly vacated the order granting the motion for rehearing because that motion "was not timely *filed*." (Opinion at 6 (emphasis added).)

Mrs. Capone timely moved for rehearing, raising the issues argued in this brief, including the point that it is service, not filing, that controls the time for a motion for rehearing. (R4:420-39.) The district court denied rehearing without comment, and Mrs. Capone timely invoked this Court's jurisdiction. (R2:410.)

SUMMARY OF ARGUMENT

The Court should reject the district court's primary holding because, on the death of the plaintiff, the Florida Rules of Civil Procedure clearly authorize a trial court to substitute the personal representative of the plaintiff's estate so he or she can amend the complaint to continue the claims as a survival action, a wrongful death action, or both in the alternative.

Instead of considering the rules of procedure, the district court erroneously concluded that the Wrongful Death Act forecloses these procedures. As an initial

matter, because this is purely a procedural issue, if the rules and the act conflict, the rules prevail because the Florida Constitution vests this Court with exclusive authority to regulate practice and procedure in the courts. But the Court need not decide the case on constitutional grounds because the Wrongful Death Act does not purport to prohibit a personal injury action from being converted to a wrongful death action. To the contrary, the history of the law in this area shows that the Legislature intended to promote, not hinder, the orderly prosecution of the plaintiff's claims.

Before the Wrongful Death Act, Florida law authorized both a survival action by the estate and wrongful death actions by the survivors when an alleged tort resulted in death. The Legislature intended the act to merge those claims into a single lawsuit as part of a remedial scheme that it directed be liberally construed to shift the losses resulting from the death from the survivors to the wrongdoer.

Since passage of the act, the routine practice of the trial bar and courts has been to substitute the personal representative upon the plaintiff's death to continue the claims as a survival action, wrongful death action, or both in the alternative. The lone exception until the district court's decision below was a 1989 Fifth District decision that erroneously interpreted the substitution rule to not apply in the wrongful death context because the main provision of the rule refers to instances where the claims are not "extinguished" upon the party's death. The

court overlooked the fact that the wrongful death act does not extinguish the plaintiff's substantive claims, it merely transforms them into a wrongful death action so the same claims can be pursued by the estate on behalf of the survivors. It also overlooked other provisions in the rules that make clear that when a party's interest in a claim is transferred, the party receiving the interest should be allowed to continue the claim.

The Fifth District also overlooked the patent unfairness and inefficiencies that would result from applying its holding to a case like this where the personal representative seeks to continue the claims alternatively as a survival action or a wrongful death action. Requiring separate lawsuits to proceed on the alternative actions would not only risk conflicting result, but would undermine the remedial purposes of both the Wrongful Death Act and the rules of civil procedure. Even where the parties agree the tort caused the death so there can be no survival action, requiring the wrongful death action to be pursued as a separate lawsuit would be extremely inefficient and unfair, especially since the personal injury action will often have progressed through discovery, dispositive motions, and possibly even part of a trial before the plaintiff's death.

In any event, the Fifth District's decision was routinely ignored and courts continued to allow substitution of the personal representative to pursue a wrongful death action. The Second District even issued an opinion explaining why this must

be allowed. Ironically, the Third District cited that Second District decision as support for its contrary holding in this case. In the short time since the decision below was entered, the Second District and a federal court in Florida have thoroughly rejected its reasoning. This Court should, too, and it should clarify that, on timely motion, the personal representation must be substituted and allowed to continue the claims as a survival action if the parties agree the tort did not cause the death, a wrongful death action if they agree it did cause the death, or both in the alternative if they do not agree.

The Court should reject the district court's second holding, that Mrs. Capone's wrongful death action is untimely, because the amended complaint relates back to the date of the original complaint. All of the claims arise from the same conduct by Philip Morris. The lone Florida appellate opinion holding that a wrongful death action cannot relate back to a personal injury action should be disapproved because it overlooks that a wrongful death action is not independent from the personal injury action and, regardless, the relation back rule was intended to allow a new cause of action to relate back to a different, original cause of action that arose from the defendant's same conduct. Alternatively, the wrongful death action is timely because Mrs. Capone filed the motion to amend within two years of Mr. Capone's death. This Court has held that an action is commenced for limitations purposes when a motion to amend describing the action is filed.

Finally, the Court should reject the district court's holding that Mrs. Capone's motion for rehearing from the original dismissal order was untimely. The district court erroneously looked to whether the motion was **filed** within ten days of the dismissal order, but **service** governs the timeliness question. The record demonstrates that Mrs. Capone served the motion, at least on one of Philip Morris's attorneys within ten days, which should end the inquiry. To the extent the timeliness of service to the other attorney is relevant, the case should be remanded for an evidentiary hearing on the issue.

ARGUMENT

The Court should quash the district court's decision because all three of its dispositive legal conclusions are fatally flawed: (I) the personal representative should be substituted upon the plaintiff's death so he or she can amend the complaint to continue the claims through a survival action, a wrongful death action, or both in the alternative, (II) the statute of limitations did not run on any claim in this case, and (III) the date the motion for rehearing was filed is irrelevant.

I. Upon the Death of the Plaintiff in a Personal Injury Action, the Personal Representative of the Plaintiff's Estate Should Be Substituted as the Plaintiff and Permitted to Amend the Complaint to Continue the Claims Through a Survival Action, a Wrongful Death Action, or Both in the Alternative.

Standard of Review. Because the district court ruled that a personal injury complaint can never be amended to pursue a wrongful death action, this issue turns

on a question of law and is reviewed de novo. *E.g., Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 567-68 (Fla. 2005); *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. 4th DCA 2005).

Contrary to the district court's holding, trial courts may – and should on upon proper motion – substitute the personal representative of the plaintiff's estate to continue the claims as a survival action, a wrongful death survival action, or both in the alternative. The Florida Rules of Civil Procedure expressly authorize exactly what Mrs. Capone sought to do: Rule 1.260(a)(1)[2] authorized the trial court to substitute her as the plaintiff to pursue his pending negligence, strict liability, and conspiracy claims; Rule 1.190(a)[3] authorized it to allow her to amend the complaint to add claims for fraudulent concealment and breach of warranty and to seek the benefit of the *Engle* findings; and Rule 1.110(g)[4] authorized her to include inconsistent demands for wrongful death damages or survival damages.

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[2] "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties." Fla. R. Civ. P. 1.260(a).

[3] "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served …. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party. …. Leave of court shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a).

[4] "A pleader may set up in the same action as many claims or causes of action … in the same right as the pleader has, and claims for relief may be stated in the alternative if … if 2 or more causes of action are joined. …. A party may also state as many separate claims … as that party has, regardless of consistency …." Fla. R. Civ. P. 1.110(g).

Instead of analyzing the issue under the rules of civil procedure, however, the district court based its decision on its conclusion that the Wrongful Death Act prohibits a personal injury complaint from being amended to assert a wrongful death action when the plaintiff dies. As an initial matter, the court erred in looking to Wrongful Death Act for the answer. Whether 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."[5] Art. V, § 2(a), Fla. Const. Procedural requirements of a statute are unconstitutional. *E.g., Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

But the issue need not be decided on constitutional grounds because nothing in the Wrongful Death Act purports to grant defendants the substantive right to insist on a separate wrongful death lawsuit being filed rather than simple amendment of the pending personal injury complaint to continue the pending claims as wrongful death action on the death of the plaintiff. *Cf.* § 768.72(1), Fla. Stat. (2011) (providing defendants with the substantive right to avoid a claim for

[5] The term "practice and procedure" encompasses "the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) (quoting *In re Fla. R. Crim. P.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)). The method by which a substantive claim may be prosecuted in court is a classic issue of practice and procedure. *Avila South Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977).

punitive damages without a proper evidentiary showing but acknowledging that the rules of civil procedure govern the procedure for amending a complaint to seek punitive damages)

A review of the history of how Florida law has handled the death of the plaintiff in a personal injury lawsuit demonstrates that the Legislature had no intention to erect procedural obstacles to the assertion of a wrongful death action. To the contrary, the Legislature replaced harsh common-law rules with a remedial statutory scheme designed to ensure that defendants will be held accountable when their tortious acts kill people.

At common law, there was no cause of action for tortious acts that ultimately resulted in death. *Ake v. Birnbaum*, 25 So. 2d 213, 220 (Fla. 1945). Judge Sawaya has traced this rule to Lord Ellenborough's 1808 decision in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Reprint 1033 (1808). Thomas D. Sawaya, *Florida Personal Injury Law & Practice With Wrongful Death Actions*, § 16.1 (2011-12 ed.); *see also Morgane v. States Marine Lines, Inc.*, 398 U.S. 375, 382-83 (1970) (providing a similar history of the common-law rule but refusing to adopt it as a matter of federal maritime law because no court had yet "to produce any satisfactory justification for applying the rule in this country").

While this harsh rule was implicitly adopted in Florida as part of the common law, it took only twenty years after Lord Ellenborough's decision in

Baker for the Legislature to supplant it, at least in part, by enacting the predecessor to today's survival statute. *State ex rel. H.E. Wolfe Const. Co. v. Parks*, 175 So. 786, 787-90 (Fla. 1937) (citing § 4211 (2571), Fla. Comp. Gen. Laws (1828)). The original survival statute provided that causes of action would survive the death of the plaintiff, except for claims for assault and battery, slander, false imprisonment, and malicious prosecution. *Id.* Those exceptions have since been eliminated and the current version of the survival statute, unaltered in the last fifty years, provides:

> No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law.

§ 46.021, Fla. Stat. (2011). The survival statute originally applied even where the tort caused the death, and it authorized the personal representative of the decedent's estate to maintain a survival action to recover damages for the decedent's pain and suffering, medical expenses, lost earnings up to the time of death, funeral expenses, and punitive damages. *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 767 (Fla. 1975).

Florida's original wrongful death statutes, which were enacted in 1833 and remained in effect for nearly a century and a half, created an additional right of action on behalf of certain beneficiaries of the decedent's estate to recover their own economic and non-economic damages when they lost a loved one due to the tortious actions of another. §§ 768.01-.03, Fla. Stat. (1971); *Moragne v. State*

Marine Lines, Inc., 211 So. 2d 161, 164 (Fla. 1968). *See generally Martin*, 315 So. 2d at 767-68 (describing available damages).

The survival and wrongful death statutes created "two separate and independent causes of action [that] could be brought for a negligently caused death." *Id.* at 767. The presence of these dual remedies resulted in "considerable litigation and judicial construction," *id.* at 766, as well as "a multiplicity of suits that resulted from each survivor bringing an independent action" and problems with "survivors racing to get the first judgment." *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 64 So. 3d 1187, 1191 (Fla. 2011) ("*Wagner*").

These problems led the Legislature to pass the Florida Wrongful Death Act in 1972. Ch. 72-35, § 1, Laws of Fla. (creating § 768.16-.26, Fla. Stat. (1973)). In passing the act, the Legislature intended to "merge the survival action for personal injuries and the wrongful death action into one lawsuit." *Martin*, 314 So. 2d at 768. It accomplished this by repealing the prior wrongful death statutes, Ch. 72-35, § 2, and effectively superseding the survival statute in cases where the tort causes death. *See* § 768.20, Fla. Stat. ("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." (emphasis added)); *Martin*, 314 So. 2d at 770 (holding that this language supplants § 46.021 where the tort caused the death).

The rights of the estate to pursue a survival action and of the survivors to bring their own wrongful death actions were replaced with the right of the estate to bring a single action to pursue the decedent's claims and recover all compensable damages to the estate and survivors arising from his or her death. § 768.20, Fla. Stat.; *Wagner*, 64 So. 3d at 1191.

> In merging the two actions, the legislature transferred the items of damage for loss of earnings, medical expenses, and funeral expenses from the survival statute to the new Wrongful Death Act. The claim for pain and suffering of the decedent from the date of injury to the decedent was eliminated. Substituted therefor was a claim for pain and suffering of close relatives, the clear purpose being that any recovery should be for the living and not for the dead.

Martin, 314 So. 2d at 769.

The Legislature explained that the policy behind the act is "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoers" and that the act is "remedial and shall be liberally construed." § 768.17, Fla. Stat. This Court has emphasized that the act must be liberally construed to effectuate the Legislature's intent "to prevent a tortfeasor from evading liability for his or her misconduct when such misconduct results in death." *Wagner*, 64 So. 3d at 1191.

Following passage of the act, the routine practice of the trial bar when the plaintiff died has been to substitute the personal representative and amend the personal injury complaint to continue the claims as a survival action, a wrongful

death action, or both in the alternative.[6] This practice is reflected by numerous appellate opinions, including at least one by this Court, noting the amendment of a personal injury complaint to seek damages under the survival statute, the Wrongful Death Act, or both in the alternative. *E.g., Celotex Corp. v. Meehan*, 523 So. 2d 141, 147 (Fla. 1988); *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); *Lewis v. Gauzens*, 318 So. 2d 174, 174-75 (Fla. 3d DCA 1975).

For example, in *Celotex Corp.*, this Court noted that the decedent had filed a personal injury action for asbestos-related injuries, but after he died "the personal representative of his estate was substituted as a party plaintiff and filed an amended complaint for wrongful death." 523 So. 2d at 147. This Court did not call that procedure into question; instead, it approved the reversal of summary judgment for the defense and remanded the case for a determination of whether the underlying personal injury claim was untimely. *Id.*

Until the Third District decided the case below, the only published Florida appellate decision to call into question the practice of amending a personal injury

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[6] Even before the Wrongful Death Act, courts presiding over personal injury actions when the plaintiff died allowed the personal representative to be substituted and to amend the complaint to both continue the personal injury action and also add a wrongful death claim. *E.g., Whitman v. Red Top Sedan Serv., Inc.*, 218 So. 2d 213, 215 (Fla. 3d DCA 1969).

complaint to continue the claims as a wrongful death action was *Taylor v. Orlando Clinic*, 555 So. 2d 876 (Fla. 5th DCA 1989). In that case, a patient and his wife had filed a medical malpractice lawsuit against his health care providers for his damages and her loss of consortium. *Id.* at 877. When the patient died, a suggestion of death was filed. *Id.* Over 90 days later, in her capacity as the personal representative of the patient's estate, the patient's wife moved to amend the complaint to continue her husband's malpractice claim as a wrongful death action, and she also filed a separate wrongful death lawsuit. *Id.* The trial court denied the motion to amend and dismissed the original lawsuit altogether under Florida Rule of Civil Procedure 1.260(a)(1) because a motion for substitution had not been filed within 90 days of the suggestion of death. *Id.* at 877-78. Concluding that a separate lawsuit "constitute[d] an impermissible splitting of the cause of action," dismissed the separate wrongful death action. *Id.* at 878.

On appeal, the Fifth District analyzed the two cases as involving three claims. First, it considered the patient's original personal injury claim and concluded, with no analysis, that it "was extinguished by the patient's death." *Id.* Second, it considered the wife's loss of consortium claim and concluded that the trial court had erred in dismissing that claim because a "cause of action for loss of consortium, while derived from the personal injury to the husband, survives the

death of her husband-patient, whose own personal injury action did not survive his death."[7] *Id.*

Third and more importantly for this case, the court considered the wrongful death claim. *Id.* at 879. It rejected the trial court's conclusion that Rule 1.260(a)(1) applied. *Id.* That rule begins, "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties." The court reasoned that the rule did not apply because the patient's malpractice claim did not survive his death and was "extinguished" by section 768.20. *Id.* It concluded that although the trial court's reasoning was wrong, the court correctly dismissed the complaint because the personal representative "erroneously attempted to substitute a wrongful death action for the abated personal injury negligence action." *Id.* The court also reversed the dismissal of the independent wrongful death action, finding no "impermissible splitting of the previously filed and abated personal injury negligence action" because that action was "essentially different and distinct from the statutory wrongful death action." *Id.*

[7] The district courts are split on whether a claim for loss of consortium survives when the spouse dies from the personal injury. *See ACandS, Inc. v. Redd*, 703 So. 2d 492, 494 (Fla. 3d DCA 1997) (rejecting the holding in *Taylor* and concluding that the consortium claim is extinguished); *Bravo v. United States*, 532 F.3d 1154, 1170 n.10 (11th Cir. 2008) (recognizing that this inter-district split remains).

The Fifth District misinterpreted Rule 1.260(a)(1) in reaching the bizarre result of requiring the same malpractice claim to be tried in two separate lawsuits prosecuted by the same person, one in her personal capacity for the loss of consortium damages and another as personal representative for the wrongful death damages. The Wrongful Death Act did not "extinguish" the negligence claim against the hospital. It eliminated neither the estate's right to proceed on the decedent's negligence claims to recover damages to the estate (*e.g.*, funeral expenses) nor the survivors' rights to recover for their losses caused by the same negligence.

Instead, the act merely extinguished the right to recover damages "for the personal injury." § 768.20, Fla. Stat. As this Court has explained, the act "merge[s] the survival action for personal injuries and the wrongful death action into one lawsuit." *Martin*, 314 So. 2d at 768. Or, as the Fifth District has more recently – and accurately – explained, the plaintiff's death "transform[s] a personal injury claim into one for wrongful death." *Laizure v. Avante at Leesburg, Inc.*, 44 So.3d 1254, 1258 (Fla. 5th DCA), *rev. granted by* 51 So. 3d 465 (Fla. 2010).[8] In short, while some claims are truly "extinguished" upon a party's death, such as a claim

[8] In *Laizure*, the Fifth District held that an agreement by the decedent to arbitrate personal injury claims also required arbitration of a wrongful death action even though the personal representative of the estate was not a party to the agreement. *Id.* It certified the question to be of great public importance, and this Court has accepted jurisdiction, but not yet ruled. 51 So. 3d 465.

for dissolution of marriage[9] or a claim seeking personal injunctive relief when the defendant dies,[10] a tort claim for damages is transformed into either a survival action or a wrongful death action.

Even putting Rule 1.260(a)(1) aside, several other rules of procedure contemplate that the lawsuit should continue in the name of the personal representative. For example, another part of Rule 1.260 provides that where the original party's interest in a claim is transferred, the court may order that the person receiving that interest be substituted as the new party plaintiff. Fla. R. Civ. P. 1.260(c). Other rules provide that anyone "having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs" and that a plaintiff may be added by amending the complaint "at any stage of the action and on such terms as are just." Fla. R. Civ. P. 1.210(a); Fla. R. Civ. P. 1.250(c).

When properly understood, these rules clearly mean that when a plaintiff dies as a result of the alleged torts, the personal representative should be substituted as the plaintiff contrary to the Fifth District's holding in *Taylor*. This is especially true where, as in both *Taylor* and this case, the personal representative

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[9] *See generally Gaines v. Sayne*, 764 So. 2d 578, 581-82 (Fla. 2000) (explaining rule that the death of a party before entry of a judgment dissolving a marriage precludes the trial court from continuing jurisdiction).

[10] For example, an employer's claim seeking to enjoin a former employee from violating a non-compete agreement would logically be extinguished upon the former employee's death.

was already a plaintiff because Rule 1.260 also provides, "In the event of the death of one or more of the plaintiffs … in an action in which the right sought to be enforced survives only to the surviving plaintiffs …, the action shall not abate. The death shall be suggested upon the record and the action shall proceed in favor of … the surviving parties." Fla. R. Civ. P. 1.260(a)(2).

In addition to its inherent flaws, the Fifth District's decision in *Taylor* is also distinguishable on its facts because there the personal representative had already filed a separate wrongful death action when her motion to amend the personal injury action was denied. Thus, the Fifth District was not confronted with a situation where the estate and survivors would be left with no remedy if amendment were not allowed.

Moreover, the personal representative in *Taylor* apparently did not plead survival and wrongful death claim in the alternative, so the Fifth District did not have occasion to consider the impact its holding would have when the cause of death is disputed. If the personal representative were allowed to be substituted to pursue a survival claim but had to pursue an alternative wrongful death claim in a separate action, there would be a serious risk of inconsistent results. If both juries were to find that the defendant's negligence injured the decedent, the estate and survivors would be denied any recovery if the jury in the survival action found that

the injuries caused by the defendant did not result in the decedent's death, but the jury in the wrongful death action found to the contrary.

While consolidation of the two lawsuits under Florida Rule of Civil Procedure 1.270(a) might be a partial solution, the rules should be "construed to secure the just, speedy, and inexpensive determination of every action." Fla. R. Civ. P. 1.010. Having to pay a new filing fee and starting all over in the pleading stage is hardly speedy or inexpensive.

Similar concerns guided this Court when it clarified the procedures for a plaintiff seeking to amend a complaint to add a new defendant just before the statute of limitations expires who does not have time to obtain a ruling or serve process on the new defendant within the limitations period. The Fourth District had noted that a plaintiff in that position might avoid the problem by filing a separate lawsuit before the limitations period expired. *Frew v. Poole & Kent Co.*, 654 So. 2d 272, 275 (Fla. 4th DCA 1994), *quashed*, *Totura & Co. v. Williams*, 754 So. 2d 671, 678 (Fla. 2000) (approving the statute of limitations holding in *Frew* but rejecting an unrelated holding). Concluding that "[i]t makes no sense to us to require a plaintiff to clog the courts with a separate law suit," the Fourth District determined that the filing of the motion to amend should constitute commencement of the action for limitations purposes. *Id.* On review, this Court approved that holding as "well reasoned." *Totura & Co.*, 754 So. 2d at 679-81.

Even more delays, expense, and clogging of the courts will certainly arise if a separate wrongful death action must be filed where the original lawsuit had progressed very far. The parties and the trial court may have devoted substantial resources to discovery, dispositive motions, and other pretrial matters. The plaintiff might not die until the midst of the trial, possibly even when the jury is deliberating after a multi-week trial. Under the *Taylor* approach, all the time and expense going into those proceedings would be wasted and the parties and court would have to start from scratch in the new lawsuit.

Worse, one can easily envision several scenarios where requiring a new lawsuit to be filed would be extremely unjust. Cases, like this one, seeking the benefit of the *Engle* findings are a perfect example. If a class member filed a personal injury action within the one-year *Engle* limitations period but died after the period expired, the personal representative would not be able to file a separate wrongful death action within limitations period. This happens frequently. *See Starling v. R.J. Reynolds Tobacco Co.*, Case No. 3:09-cv-10027-RBD-JBT, 2011 WL 6965854 at *8 & n.16 (M.D. Fla. Nov. 2, 2011) (noting that "*Engle* smokers [have been] dying at a fairly constant rate," most were already elderly when their lawsuits were filed, and "thousands of *Engle* progeny … plaintiffs are literally dying while waiting for their cases to be tried").

But the problem is not limited to *Engle* cases. For example, actions for fraud filed just before the statute of repose period expires would present the same problem. *See* § 95.031(2)(a), Fla. Stat. (2003) ("An action founded upon fraud … must be begun within 12 years after the date of the commission of the alleged fraud …."). If the plaintiff dies shortly thereafter, the personal representative will be unable file a new wrongful death action within the repose period.

These kinds of results are the antithesis of the remedial policies behind both the Wrongful Death Act and Rule 1.260. *See Wagner*, 64 So. 3d at 1191 (noting that the purpose of the Wrongful Death Act is "to prevent a tortfeasor from evading liability for his or her misconduct when such misconduct results in death"); *Scott v. Morris*, 989 So. 2d 36, 37 (Fla. 4th DCA 2008) (noting that the purpose of Rule 1.260 is to facilitate the preservation of substantive rights "so that otherwise meritorious actions will not be lost"); *Bermudez v. Florida Power & Light Co.*, 433 So. 2d 565, 567 (Fla. 3d DCA 1983) ("It seems clear to us that the [Wrongful Death Act was enacted] with the intention of simplifying the process by which survivors could recover their losses … and not to convolute further the procedural morass of the earlier statute.").

Perhaps because of all of these problems, the Fifth District's flawed suggestion that the personal representative may not be substituted for the plaintiff to pursue wrongful death damages was largely ignored. Numerous appellate

opinions from across the state continued to recognize the practice of allowing a personal injury complaint to be amended upon the plaintiff's death to pursue a wrongful death action. *E.g.*, *Jaylene, Inc. v. Steuer*, 22 So. 3d 711, 713 (Fla. 2d DCA 2009); *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 684 (Fla. 2d DCA 2009); *Maritinez v. Ipox*, 925 So. 2d 448, 449 (Fla. 2d DCA 2006); *First Protective Ins. Co. v. Featherston*, 906 So. 2d 1242, 1243 (Fla. 2d DCA 2005); *Humana Health Plans, Inc. v. Durant*, 650 So. 2d 203, 204 (Fla. 4th DCA 1995); *Barwick, Dillian & Lambert, P.A. v. Ewing*, 646 So. 2d 776, 777-78 (Fla. 3d DCA 1994); *Davies v. Owens-Illinois, Inc.*, 632 So. 2d 1065, 1066 (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).

And it was not just district courts; even this Court recognized the practice without questioning its propriety. For example, in *Safecare Health Corp. v. Rimer*, 620 So. 2d 161 (Fla. 1993), a patient sued two healthcare providers for medical malpractice. She settled with one of the defendants but died before resolving her claim against the other. *Id.* at 162. Upon her death, the personal representative of her estate was substituted as the plaintiff and amended the complaint to seek wrongful death damages against the remaining defendant. *Id.* Although it did not directly address the propriety of amending the complaint to convert the personal injury action to a wrongful death claim, this Court held that the settlement as to the

first defendant did not prevent the wrongful death claim from proceeding against the remaining defendant. *Id.* at 163-64.

The need to allow a personal representative to be substituted to amend the complaint upon the plaintiff's death to seek damages under the survivor statute, the Wrongful Death Act, or both in the alternative was eventually explained by a pair of opinions by Judge Altenbernd. First, in *Diamond v. Whaley, Chapman & Hannah, M.D.'s, P.A.*, 550 So. 2d 54 (Fla. 2d DCA 1989), a husband and wife filed a medical malpractice action and the wife later died. The husband, as personal representative, continued the claim as a survival action under section 46.021 and also filed an amended complaint to add a claim in the alternative for wrongful death. *Id.* at 55. The trial court ordered the claims to be tried separately and directed the husband to choose which one to try first. *Id.* The husband sought certiorari review in the district court, arguing that the trial court's order forced a premature election of remedies. *Id.* The district court denied relief because it concluded that the order "does not prevent the [husband] from pursuing both remedies" and instead permissibly bifurcated the claims for trial. *Id.* Though not directly addressing the issue in this case, Judge Altenbernd's opinion in *Diamond* presupposed adding a wrongful death claim upon the death of the plaintiff was appropriate.

To the extent there was any question on this point, Judge Altenbernd cleared it up in *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31 (Fla. 2d DCA 2003). Just as in the present case, the plaintiffs in *Niemi* were a married couple who sued several tobacco companies for the husband's personal injuries and the wife's loss of consortium. *Id.* at 32. After the husband died, the trial court denied a motion to substitute the wife and another individual as co-personal representatives of the husband's estate. *Id.* at 32-33.

Writing for the court on review, Judge Altenbernd observed that "the transition from life to death for a personal injury action is not as simple as [the tobacco companies] wish it to be" and discussed the interplay between the survival and wrongful death statutes. *Id.* He recognized that, under the Wrongful Death Act, "a personal injury action only 'abates' if it is first determined that the personal injury resulted in the plaintiff's death. Such a determination may be established by the pleadings or by the finder of fact. No such determination has been made by the circuit court in this case." *Id.* Judge Altenbernd went on to explain,

> In this case, [the husband] died during the pendency of his lawsuit. As a result, the pleadings do not currently claim that his death was either the result of his personal injury or the result of some independent cause. Thus, the pleadings do not permit the personal injury action to be abated under section 768.20, and the action cannot be dismissed in light of section 46.021. This is not a case in which the plaintiffs ignored a suggestion of death and failed to timely move for substitution of parties, thus requiring the dismissal of the personal injury action. The only way to resolve whether this action should be abated is to permit [the husband'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-representatives will be required to plead both a personal injury action and an alternative wrongful death action.

Id. at 34 (citation omitted and emphases added). The district court thus determined that the trial court had departed from the essential requirements of the law in denying the substitution motion and granted a writ of certiorari. *Id.* It summarily distinguished *Taylor*'s approval of a separate lawsuit as limited to situations where "the plaintiffs ignored a suggestion of death and failed to timely move for substitution of parties, thus requiring the dismissal of the personal injury action." *Id.* (citing *Taylor*, 555 So. 2d at 879).

This well-reasoned opinion 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 survival action, wrongful death action, or both in the alternative. Except for a few stray trial court opinions with scant reasoning,[11] that appeared to be true until the Third District's opinion in this case.

The Third District's reasoning on this point was limited to a single sentence followed by a string of citations to decisions that only undermine its holding:

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[11] Philip Morris attached three Miami-Dade circuit court decisions to its motion to dismiss below. (R1:89-100.) These decisions contain no original analysis and merely rely on *Taylor* and/or Rule 1.260.

> The original complaint for personal injury could not be amended, on Frank'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, 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. *See* § 768.20 ("[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"); *Martin v. United Security Servs., Inc.*, 311 So. 2d 765, 770 (Fla. 1975) (upholding section 768.20, and explaining that, "a separate lawsuit for death resulting personal injuries cannot be brought as a survival action"); *ACandS, Inc. v. Redd*, 703 So. 2d 492, 494 (Fla. 3d DCA 1997) (plaintiff's personal injury action is extinguished and abated even when the plaintiff's death occurs during the trial of his/her case); *Niemi*, 862 So. 2d at 31 (holding that, when death is the result of a personal injury, the law of Florida essentially substitutes a statutory wrongful death action for the personal injury action that would otherwise survive under section 46.021).

(Opinion at 4-5.) *See also Ruble v. Rinker Material Corp.*, 59 So. 3d 137, 137-38 (Fla. 3d DCA 2011) (affirming by citing the decision in this case and copying the citations quoted above), *rev. granted*, _ So. 3d _, 2011 WL 5346342 (Fla. Oct. 17, 2011).

The court discussed neither *Taylor*, which is the only other appellate decision in Florida to question the propriety of amending a personal injury action to add a wrongful death claim, nor Rule 1.260, which was the basis for the decision in *Taylor*. None of the authorities cited by the district below even remotely support its holding. This Court's decision in *Martin* recognized the Legislature's intent to "merge the survival action for personal injuries and the wrongful death action into

one lawsuit." *Martin*, 314 So. 2d at 768. *Niemi*, of course, directly conflicts with the Third District's holding. And *ACandS* not only fails to address the issue, but it actually rejects (albeit on other grounds) *Taylor*. *See ACandS*, 703 So. 2d at 494 (rejecting *Taylor*'s holding that a loss of consortium claim does not survive the death of the injured spouse).

The Third District's decision has met with extreme skepticism. In *Skyrme v. R.J. Reynolds Tobacco Co.*, _ So. 3d _, 2011 WL 5832338 (Fla. 2d DCA Nov. 18, 2011), the Second District considered a petition for writ of certiorari to review an order denying a personal representative's motion to substitute herself for the decedent in an *Engle* case and amend the complaint to pursue wrongful death damages. Although the court determined it lacked certiorari jurisdiction and dismissed the petition, it noted "we do not see how the result in *Capone* is consistent with the law in Florida addressing the unique relationship between a personal injury claim and a wrongful death claim or how it is supported by the law in Florida regarding the liberal amendment of pleadings." *Id.* at *3 (footnotes omitted).

Similarly, Judge Dalton of the United States District Court for the Middle District of Florida has declined to follow the Third District's decision because "it would be inconsistent with existing practice, illogical, and would constitute a restrictive interpretation of a remedial statute." *Starling*, 2011 WL 6965854 at *13.

He concluded that the decision in this case "defies all logic and, while perhaps a boon to the judicial coffers from the standpoint of filing fees, would create a needless administrative hoop that is not contemplated by the [Wrongful Death] Act." *Id.* In determining how this issue will be handled in the scores of *Engle* cases pending in the Middle District of Florida, Judge Dalton ruled:

> The Court finds that the Wrongful Death Act's loss shifting goal is best served by allowing the *Engle* Smokers' personal representatives to amend the decedents' personal injury complaints to state a cause of action for wrongful death, whether outright or as an alternative to a survival action for a decedent's personal injuries, rather than forcing the personal representatives to file a new lawsuit. This interpretation not only spares the personal representatives the burdens of filing a new lawsuit and paying another filing fee, but it also ensures that they will benefit from any preclusive effects of the *Engle* findings that may have been provided to the *Engle* Smoker had he or she lived through the duration of his or her personal injury action.

Id. at *15.

That is exactly what this Court should do. Respectfully, the Court should consider providing explicit guidance as to three different scenarios: (1) where the parties agree the death was not caused by the tort, (2) where the parties have not agreed whether the death was caused by the tort, and (3) where the parties agree the death was caused by the tort.

If the decedent's death was not caused by the alleged tort, the trial court must allow the personal representative to be substituted as the plaintiff and continue the lawsuit as a survival action. As long as the motion to substitute is

properly filed within 90 days of a suggestion of death, Rule 1.260(a)(1) should require this result. Neither Philip Morris nor any Florida court appears to have ever suggested that a trial court may deny a timely motion to substitute the proper personal representative in these circumstances.

If the parties have not agreed whether the decedent's death was caused by the alleged tort, the trial court must (on timely motion) allow the personal representative to be substituted as the plaintiff to pursue the claims alternatively under the survival statute and the Wrongful Death Act. While these two statutory bases for continuing the underlying substantive claims are mutually exclusive, the rules of civil procedure expressly authorize pleading inconsistent claims in the alternative. Fla. R. Civ. P. 1.110(g); *see also Smith v. Lusk*, 356 So. 2d 1309, 1311 (Fla. 2d DCA 1978) (noting that pleading inconsistent and alternative claims is "a time honored practice" and a complaint that seeks both wrongful death and survival damages "classically sets up inconsistent and alternative pleadings").

That is exactly what happened in this case. Although Mrs. Capone affirmatively pled that her husband died as a result of his addiction to Philip Morris's cigarettes, she prudently anticipated that one or more defendants might challenge the cause of death. Until the defendant files an answer setting forth its position on the cause of death, a personal representative would be taking a risk in not pursuing a survival action in the alternative. As Judge Altenbernd warned in

Niemi, at the time a plaintiff dies, a complaint does not establish anything, and until the "pleading**s**" – plural – address this issue, they "do not permit the personal injury action to be abated under section 768.20, and the action cannot be dismissed in light of section 46.021." 862 So. 2d at 34 (emphases added). Thus, as a general matter, it may be wise for the personal representative to do as Mrs. Capone did and prepare for the possibility that the defendant will file an answer denying that the death was caused by the alleged tort.

Finally, even if the parties agree that the plaintiff's death was caused by the alleged tort, the trial court would abuse its discretion by not allowing the personal representative to be substituted as the plaintiff (on a timely motion) and convert the lawsuit to a wrongful death action. While section 768.20 provides that a personal injury action "pending at the time of death shall abate," the term "abate" does not mean that the lawsuit immediately ends. Instead, it is a term of art with a long history in Florida law meaning that upon learning of the death of a party, the court should take no further action in the case until the personal representative is appointed, at which point any claims that are not extinguished may continue. *E.g.*, *Floyd v. Wallace*, 339 So. 2d 653, 654 (Fla. 1976); *Worly v. Dade County Security Co.*, 42 So. 527, 529 (Fla. 1906); *Schaeffler v. Deych*, 38 So. 3d 796, 801 (Fla. 4th DCA 2010). As Judge Altenbernd correctly 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."

Niemi, 862 So. 2d at 33.

In sum, when Mr. Capone died, his negligence, strict liability, and conspiracy claims were not "extinguished" and his lawsuit did not "self-destruct." The personal injury action was transformed into either a survival action or a wrongful death action, and Mrs. Capone, as the personal representative of his estate, should have been allowed to proceed in this lawsuit on either theory (or both in the alternative). To further the remedial scheme established by the Wrongful Death Act and the civil procedure rules' goals of promoting the "just, speedy, and inexpensive determination of every action," the decision below should be quashed.

II. Mrs. Capone's Wrongful Death Claims Were Timely Under Both the Wrongful Death Statute of Limitations and This Court's Opinion in *Engle*.

Standard of Review. Whether a claim in an amended complaint relates back to the original complaint for limitations purposes is reviewed de novo. *E.g.*, *Flores v. Riscomp Industries, Inc.*, 35 So. 3d 146, 148 (Fla. 3d DCA 2010).

In addition to holding that a personal injury complaint may not be amended to include a wrongful death action, the district court held that Mrs. Capone's wrongful death action was too late under both the two-year wrongful death statute

of limitations, § 95.11(4)(d), Fla. Stat. (2006), and the one-year period provided in *Engle*. (R2:408-09.) The court erred in this regard because the amended complaint would have related back to the date of the original complaint. Regardless, the motion to amend was filed before the limitations period expired, which should eliminate any argument that the wrongful death action was untimely.

For purposes of limitations periods, both the wrongful death action itself and the invocation of the *Engle* findings should be deemed filed as of the date of the original personal injury complaint by operation of the rules of civil procedure. "When the claim … 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." Fla. R. Civ. P. 1.190(c). Because the original complaint and the amended complaint arise out of the same conduct by Philip Morris, the wrongful death action and invocation of the *Engle* findings in the amended complaint must relate back to 2005, when the original personal injury complaint was filed.

As demonstrated in more detail in the Amicus Brief of the Florida Justice Association, the jurisdictions with similar relation back rules hold that a wrongful death claim in an amended complaint relates back to the date of the filing of the

original personal injury complaint,[12] and this Court should disapprove the only Florida decision directly on point, which holds to the contrary. *Cox v. Seaboard Coast Line R.R.*, 360 So. 2d 8, 9-10 (Fla. 2d DCA 1978). *Cox* is based on that court's conclusion that a wrongful death action is wholly independent from the original personal injury action, a conclusion rejected by this Court in *Celotex Corp. v. Meehan*, 523 So. 2d 141, 147 (Fla. 1988). Other Florida decisions make clear that an amendment that merely substitutes the party having the proper capacity to continue the original substantive claims will relate back to the original complaint. *E.g., Griffin v. Workman*, 73 So. 2d 844, 847 (Fla. 1954); *Talan v. Murphy*, 443 So. 2d 207, 208-09 (Fla. 3d DCA 1983); *Lindy's of Orlando, Inc. v. United Electric Co.*, 239 So. 2d 69, 72-73 (Fla. 4th DCA 1970).

Cox was also wrongly decided because, even if a wrongful death action were a completely independent cause of action, the relation back provision in Rule 1.190(c) was promulgated specifically to **remove** the prior requirement that an amended complaint not state new causes of action. The 1967 author's comment to Rule 1.190 explains,

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[12] *Lewin v. American Export Lines, Inc.*, 224 F.R.D. 389, 397-98 (N.D. Ohio 2004); *Frances v. Plaza Pacific Equities, Inc.*, 847 P.2d 722, 726-27 (Nev. 1993); *Sompolski v. Miller*, 608 N.E.2d 54, 56-59 (Ill. Ct. App. 1992); *Bernier v. Keene Building Prods.*, No. 78-98P (D. Me. Feb. 25, 1985) (unpublished opinion quoted in *Knauer v. Johns-Manville Corp.*, 638 F. Supp. 1369, 1384 (D. Md. 1986)); *Reyes v. Kent General Hosp., Inc.*, 487 A.2d 1142, 1146 (Del. 1984) (dicta); *Caffaro v. Trayna*, 319 N.E.2d 174, 176 (N.Y. 1974).

> The principle of relation back of amended pleadings existed in prior law, but it was limited to an amendment which did not state a new cause of action. The harshness of the rule was modified by a liberal construction of a "cause of action." In accord with this liberal application of the principle, the rule requires only that the amendment arise out of the "conduct, transaction, or occurrence" set forth in the original pleading.

Cf. Lewin v. American Export Lines, Inc., 224 F.R.D. 389, 397-98 (N.D. Ohio 2004) (holding that adoption of Fed. R. Civ. P. 15(c), which is nearly identical to Rule 1.190(c) in relevant part, superseded earlier United States Supreme Court decision that held that a wrongful death action could not relate back to the original personal injury complaint) (citing *Baltimore & Ohio Southwestern Railroad Co. v. Carroll*, 280 U.S. 491, 494-95 (1930)).

And contrary to the reasoning in *Cox*, Florida courts have long held that even a claim by a new plaintiff will relate back to the original complaint if it arises from the same conduct, transaction, or occurrence so long as the new and former plaintiffs have a sufficient identity of interest to avoid prejudicing the defendant. *E.g., C.H. v. Whitney*, 987 So. 2d 96, 99-100 (Fla. 5th DCA 2008); *Ron's Quality Towing, Inc. v. Southeastern Bank of Fla.*, 765 So. 2d 134, 135-36 (Fla. 1st DCA 2000); *City of Miami v. Cisneros*, 662 So. 2d 1272, 1274 (Fla. 3d DCA 1995). This is true even in the wrongful death context. *Peters v. Mitchell*, 423 So. 2d 983, 983-84 (Fla. 3d DCA 1982); *Handley v. Anclote Manor Foundation*, 253 So. 2d 501, 502 (Fla. 2d DCA 1971).

Because Philip Morris has long been on notice of the claims against it, the district court's holding is inconsistent with the purposes of the rules of civil procedure and the statute of limitations. As this Court has explained:

> [T]he interaction of the rules of procedure and the purpose of a statute of limitations … is 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' Moreover, it elevates form over substance if a party's compliance with a procedural or statutory predicate renders the suit time-barred under a statute of limitations defense.

Totura & Co. v. Williams, 754 So. 2d 671, 680-81 (Fla. 2000) (citations omitted) (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Accordingly, the wrongful death action must relate back to the original complaint.

That Mrs. Capone's invocation of the *Engle* findings should relate back is even more clear, and this Court should reject the district court's suggestion that she cannot benefit from the *Engle* findings because she filed the amended complaint after the one-year period. (R2:408.) This Court explained, "Individual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants, provided such action is filed within one year of the mandate in this case." *Engle*, 945 So. 2d at 1277. Because the negligence, strict liability, and conspiracy claims had been filed well before the *Engle* mandate

issued,[13] Mrs. Capone is entitled to the benefit of the *Engle* findings upon proving she is a member of the class.

Finally, while the relation back issue is particularly important with regard to the substantive claims for fraudulent concealment and breach of warranty, which were not asserted in the original complaint and might otherwise be time-barred under their own statutes of limitations, the wrongful-death statute of limitations should not bar Mrs. Capone's claims even if they do not relate back. She filed the motion to amend and amended complaint less than two years following Mr. Capone's death, and this Court has held that the filing of a motion to amend that sufficiently describes the new claims constitutes the commencement of those claims for purposes of the statute of limitations. *Tortura*, 754 So. 2d at 679-80.

Importantly, the Court did not limit that holding to instances where the motion to amend was granted. Its reasoning should equally apply if the motion is denied and the amended complaint is filed as a separate lawsuit. Thus, under any reasonable view of the law, Mrs. Capone timely asserted the wrongful death action in this case.

[13] The *Engle* mandate issued on January 11, 2007. Case No. SC03-1856. Mrs. Capone filed her proposed amended complaint on January 14, 2008. (R1:1.)

III. Because the Personal Representative's Motion for Rehearing Was Timely Served, the Case Should Be Reinstated.

Standard of Review. Whether the timeliness of a motion for rehearing is governed by service or filing is a purely legal question reviewed de novo. *Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963).

The district court's alternative ground for affirmance – that Mrs. Capone's motion for rehearing from the order dismissing her case "was not timely filed" – was clearly erroneous. Motions for rehearing are governed by Florida Rule of Civil Procedure 1.530. That rule does not provide a deadline for filing a motion for rehearing; instead, it provides, "A motion for new trial or for rehearing shall be *served* not later than 10 days after … the date of filing of the judgment in a non-jury action." Fla. R. Civ. P. 1.530(b) (emphasis added). As the Fourth District has explained, "the service date, not the filing date, is critical for determining whether the motion is timely." *Migliore v. Migliore*, 717 So. 2d 1077, 1079 (Fla. 4th DCA 1998); *see also Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963) ("We do not find in the rules a requirement for *filing* within the critical 10 day service period …."); *Harris v. Harris*, 670 So. 2d 1187, 1187-88 (Fla. 5th DCA 1996) ("[T]he date of filing is insignificant. Service is the critical act which must be done within 10 days of the filing of the judgment.").

In anticipation that Philip Morris will argue that the record establishes that the motion was not timely served, Mrs. Capone notes that the trial court never held

an evidentiary hearing to resolve this issue and never accepted sworn testimony. Thus, at the very least, the case should be remanded for the trial court to determine the issue based on evidence and not merely conflicting representations of counsel.

> It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements 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.

Sonson v. Hearn, 17 So. 3d 745, 747 n.1 (Fla. 4th DCA 2009) (quoting *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982)). Thus, to the extent Philip Morris continues to disbelieve Mrs. Capone's trial lawyer's sworn explanation regarding the initial misdelivery to Philip Morris's counsel from Boies Schiller, an evidentiary hearing may be required.

But that should not be necessary because the record shows timely service to Philip Morris's counsel at Shook Hardy. Service by mail is complete upon mailing, and a certificate of service is prima facie proof of service. Fla. R. Civ. P. 1.080(b), (f). As attorneys who appeared on behalf of Philip Morris by filing its first paper, Shook Hardy's attorneys became agents of Philip Morris and "any notice … to the attorney … in the proceeding shall be accepted as … notice to the client." Fla. R. Judicial Admin. 2.505(h); *see also* Fla. R. Civ. P. 1.080(b) ("When service is required … to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court.").

Philip Morris based its argument in the trial court on the fiction that the motion for rehearing was unsigned and undated.[14] But the record certified by the clerk of the trial court demonstrates otherwise. (R1:106.) While the trial court and the parties mistakenly believed that Mrs. Capone's lawyer had failed to sign and date the motion, that is no reason for this Court to disregard the truth.

As for the fact that the parties found an unsigned copy of the motion for rehearing along with the cover letter to chambers, the most likely explanations are that (1) they simply overlooked the original motion sent directly to the clerk or (2) the original motion had not yet made it from the clerk's office to the court file in chambers. The record makes clear that Mrs. Capone's trial attorneys practice was to file signed originals with the clerk and unsigned copies on counsel and the trial judge. Philip Morris's counsel indicated that none of Mrs. Capone's pleadings were signed and that her lawyer "files everything unsigned." (R2:264.) But a review of the record on appeal demonstrates that the originals of all of Mrs. Capone's pleadings were in fact signed.

[14] Even if the original motion were unsigned, the law is clear that it was not a "nullity" and the defect could have been cured by allowing an amended motion signed by counsel. *See Torry v. Leesburg Reg'l Med. Ctr.*, 769 So. 2d 1040, 1045-46 & n.8 (Fla. 2000) (holding that a pleading signed by someone not authorized to practice law is not a nullity and the defect may be cured by giving the party a reasonable time to file an amended pleading with a proper signature).

To the extent Philip Morris may dispute these explanations and suggest that the signed original made it into the record on appeal through some nefarious means, the proper remedy would be to remand the case to the trial court to conduct an evidentiary hearing on the matter. Regardless, the Third District's decision cannot be sustained.

CONCLUSION

For the foregoing reasons, this Court should quash the district court's opinion and remand so that the district court can reverse the dismissal of this action and remand the case to the trial court to proceed on the amended complaint.

Respectfully submitted,

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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 January, 2012:

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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.

_____
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