Filing # 168148958 E-Filed 03/06/2023 06:09:16 PM

SUPREME COURT OF FLORIDA
CASE NO.: SC22-597

JENNIFER RIPPLE, as Personal Representative
of RICHARD D. COUNTER, deceased,

Petitioner,

vs.

CBS CORPORATION, et al.,

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF
THE FOURTH DISTRICT COURT OF APPEAL
DCA CASE NO.: 4D20-1939

BRIEF OF *AMICUS CURIAE* THE COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic-tort claims.[1] The Coalition has filed nearly 200 *amicus curiae* briefs in cases that may significantly impact toxic-tort litigation, including in cases before this Court and Florida's District Courts of Appeal.

The Coalition has a significant interest in ensuring that courts do not allow toxic-tort or other cases to be asserted by individuals who lack the legal right to do so. To ensure Florida courts can fairly and timely dispense justice,[2] it is critically important that resources

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[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc.; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company. Counsel for the parties consented to the filing of this brief.

[2] Underscoring the need to effectively utilize resources, this Court recently directed Florida Rules Committees to propose amendments "aimed at promoting the fair and timely resolution of civil cases" and directed the Trial Court Budget Commission to develop a "budget request for the resources necessary to successfully" do so. *In re Report & Recommendation of Workgroup on Improved Resolution of Civil Cases*, No. SC22-122, 2023 WL 166455, at *3–4, 6 (Fla. Jan. 12, 2023) (providing direction after receipt of the Workgroup's Final Report).

not be spent entertaining claims that should never have been brought because the law has determined that the individuals filing the claims do not—and should not—have the legal authority to file them.

SUMMARY OF ARGUMENT

This case presents a prime example of how the law can and should preclude untenable claims. When the Legislature decided to permit certain people to recover damages for wrongful death, it did so because of the perceived unfairness and "anomaly" that occurs when injured plaintiffs die, extinguishing all claims at common law against the alleged wrongdoer, including claims by a spouse for loss of consortium.[3] It makes no sense to interpret that "remedial" statutory enactment in a way that allows someone unable to recover loss of consortium damages before their spouse's death to somehow recover loss of consortium damages after their spouse's death.

[3] *See Kelly v. Georgia-Pacific, LLC*, 211 So. 3d 340, 342–43 (Fla. 4th DCA 2017) (explaining that "the Florida Legislature created a cause of action, wrongful death, to allow for a claim that survived the death of the injured party" and, in that statute, specifically provided that a "surviving spouse" may recover damages that "'are inclusive of a spouse's loss of consortium damages' and [thereby] allows for a spouse to recover damages for loss of consortium even after the decedent's death") (quoting *ACandS, Inc. v. Redd*, 703 So. 2d 492, 494 (Fla. 3d DCA 1997)).

To avoid that "absurd result,"[4] the Court should approve the Fourth District's decision to apply the common-law marriage-before-injury rule to claims brought under the Florida Wrongful Death Act. A contrary holding would result in an unintended departure from the common-law rule and allow wrongful-death claims for consortium-type damages by individuals who had no viable loss of consortium claim.

To assist the Court in its analysis, the Coalition provides background on the common-law marriage-before-injury rule, the multiple policy-based reasons justifying the rule, and an explanation as to why that rule and its underpinnings continue to apply to claims under the Wrongful Death Act. The Coalition also provides this Court with background on the different analytical frameworks used by the Fourth and Fifth Districts in their conflicting decisions and an explanation regarding why the framework used by the Fourth District in *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990), is proper here.[5]

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[4] *Ripple v. CBS Corp.*, 337 So. 3d 45, 57 (Fla. 4th DCA 2022); *Kelly*, 211 So. 3d at 346.

[5] The Coalition agrees with Respondents' other argument that the decedent's adult children should not be permitted to recover

ARGUMENT

I. FLORIDA'S COMMON-LAW MARRIAGE-BEFORE-INJURY RULE IS UNIVERSALLY APPLIED ACROSS THE COUNTRY AND SOLIDLY GROUNDED IN KEY POLICY PRINCIPLES.

"[M]arriage has been the foundation of our nation's family life." *Tremblay v. Carter*, 390 So. 2d 816, 818 (Fla. 2d DCA 1980). Marriage is not a means to an end, and is certainly not something that should be used as a tool to create claims for damages when such claims do not otherwise exist. Instead, Florida law recognizes that "the legal effect [of marriage] is significant. Each party takes on new responsibilities and acquires new rights." *Id.*

One of those newly-acquired rights is marital consortium. "Marital consortium is defined under Florida law as a right arising from the marital union to have performance by a spouse of all the duties and obligations assumed by the marriage relationship, including the right to society, companionship, and services." *Philip Morris USA, Inc. v. Rintoul*, 342 So. 3d 656, 665 (Fla. 4th DCA 2022) (citing *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971)).

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damages given the existence of a surviving spouse. The Coalition focuses this brief on assisting the Court in understanding and correctly deciding the conflict issue of whether the marriage-before-injury rule applies to claims under the Wrongful Death Act.

It is thus "axiomatic that marriage is an essential element of a loss of marital consortium claim.... Absent such a relationship, the right does not exist, and thus no recovery may be had for loss thereof." *Id.* at 667; *see also id.* at 668 (explaining that the loss of consortium "cause of action is incident to the marital relationship"); *Bashaway v. Cheney Bros., Inc.*, 987 So. 2d 93, 94 (Fla. 1st DCA 2008) ("the right of action for loss of consortium 'is a derivative right'") (quoting *Gates*, 247 So. 2d at 45).

Accordingly, Florida law has long required "that a party must have been legally married to the injured person at the time of the injury in order to assert a claim for loss of consortium." *Tremblay*, 390 So. 2d at 817 (citing W. Prosser, Law of Torts § 124 (4th ed. 1971)); *see also Rintoul*, 342 So. 3d at 668 ("[O]ur jurisprudence provides that if one spouse was injured before marriage, the other spouse has no right to recover damages for loss of consortium pertaining to that injury.").

This marriage-before-injury rule is not just the law in Florida. According to the American Law Reports' collection of cases around the country, "[i]n general, courts have denied recovery for loss of consortium where the injury occurs before the marriage." *Recovery*

for loss of consortium for injury occurring prior to marriage, 5 A.L.R. 4th § 300; *see also Bransteter v. Moore*, 579 F. Supp. 2d 982, 984 (N.D. Ohio 2008) (noting most states "follow the dominant common law rule"); *Stager v. Schneider*, 494 A.2d 1307, 1315 (D.C. Ct. App. 1985) (observing that, with limited exceptions, "courts of this country have unanimously held that the existence of a lawful marital relationship at the time of the tortious conduct toward and resultant injury to one spouse is required before the other spouse can bring an action for loss of consortium"); 4 Modern Tort Law: Liab. & Litig. § 28:17 (2d ed.) ("The general rule is that the parties must be married *at the time of the injury*."); Restatement (Second) of Torts § 693 cmt. h (explaining that a valid marriage is required for a spouse to maintain an action against one who inflicts injury on the other spouse).

As some courts have cogently explained, a manufacturer does not owe any duties to a person's ***future*** spouse at the time the manufacturer engages in alleged tortious conduct that exposes the then-unmarried person to harm and causes the injury. *See, e.g.*, *Quirin v. Lorillard Tobacco Co.*, No. 13 CV 2633, 2015 WL 128052, at *2 (N.D. Ill. Jan. 8, 2015).

Based on these established principles, a majority of courts nationwide hold that "[a] deprived spouse has no right to recover for an injury to the injured spouse which occurred before the marriage, ***even if he or she was unaware at the time of the marriage***." *Marriage requirement—Post-injury marriage*, 1 Stein on Personal Injury Damages § 2:11 (3d ed.) (emphasis added). Florida law is again consistent with the majority rule. *See, e.g.*, *Kelly*, 211 So. 3d at 347 (holding wife had no consortium claim, where she married husband after he was exposed to and injured by asbestos, but before his mesothelioma diagnosis); *Fullerton v. Hosp. Corp. of Am.*, 660 So. 2d 389, 390–91 (Fla. 5th DCA 1995) (holding husband had no consortium claim, where wife had been exposed to and injured by radiation before marriage, but that was not known until three years after marriage).

Florida courts explain that this area of the law "deserves the legal stability which flows from a fixed rule" and thus "reject the temptation" to create exceptions to the marriage-before-injury rule depending on different facts, such as differences in timing of knowledge of injury. *Tremblay*, 390 So. 2d at 817.

Three important policy reasons justify this well-established marriage-before-injury rule. First and foremost, the rule ensures that "a person may not marry into a cause of action." *Fullerton*, 660 So. 2d at 390; *accord Stager*, 494 A.2d at 1315.

> Since a cause of action for personal injury and the derivative rights flowing therefrom ordinarily accrue when the tort is committed, the courts concluded that to permit an unmarried person to claim loss of consortium upon his marriage to an injured spouse would have the effect of allowing him to marry into the cause of action.
>
> … Implicit in the concept of consortium is the notion that a party is entitled to expect these benefits upon entry into the marriage relationship. Therefore, an injury to a person's spouse interferes with his enjoyment of these benefits and redress may be obtained from the offending tortfeasor. However, until the marriage, neither party has a legal right to anything from the other, and so when the injury occurs before marriage there are no rights with which the injury can interfere.

Tremblay, 390 So. 2d at 817 (citations omitted).

Second, the marriage-before-injury rule follows from the "well-established principle under Florida law [] that a spouse assumes the risk of premarital injuries upon marriage." *Rintoul*, 342 So. 3d at 667. As another state supreme court put it, "he took her for better or for worse in her then existing state of health, voluntarily taking unto himself any marital deprivation that might result from

his wife's premarital injury." *Sawyer v. Bailey*, 413 A. 2d 165, 167 (Me. 1980); *see also Stager*, 494 A.2d at 1315 ("[O]ne takes a spouse in the then-existing state of health and assumes the risk of any deprivation resulting from prior disability.").

Third, courts universally recognize that the marriage-before-injury is needed because "a line must be drawn somewhere as to liability." *Fullerton*, 660 So. 2d at 390; *accord Bashaway*, 987 So. 2d at 96; *Tremblay*, 390 So. 2d at 818; *see also Stager*, 494 A.2d at 1315–16 ("on social policy grounds, liability at some point must be delimited"). "[A]llowing loss of consortium claims arising from premarital injuries would provide for near-unlimited liability for tortfeasors." *Rintoul*, 342 So. 3d at 667. Indeed, many people may suffer when someone is injured, but the law recognizes that there must be limits on the avenues for legal redress. *E.g.*, *Tremblay*, 390 So. 2d at 818 ("Brothers and sisters and even close friends are likely to be emotionally affected, but no one suggests that these persons have a cause of action."). "The emotional injury, no matter how deeply felt, however, does not give rise to the claim; instead, the existence of the ***legal*** relationship fosters the claim." *Bashaway*, 987 So. 2d at 96 (emphasis added). To avoid

unbounded liability, it is thus necessary to ensure that the legal relationship fostering the consortium claim—*e.g.*, marriage—exists at the time of the injury.

All of these good reasons for the marriage-before-injury rule apply with equal force to statutory wrongful-death claims, like those at issue here. *See, e.g.*, *Quirin*, 2015 WL 128052, at *2 (granting defendant summary judgment on wrongful-death claim, where the plaintiff was not married to the decedent at time of his exposure to asbestos). First, applying the rule to wrongful-death claims ensures that people who have intentionally chosen to be in committed ***non-marital*** relationships cannot, upon learning of their significant other's terminal prognosis, get married solely for the purpose of filing a prospective wrongful-death claim. This case is a prime example. A couple that had lived together "for decades" got married (on July 4, 2015) ***after*** the decedent was exposed to asbestos (1950s through 1990s) and ***after*** he had been diagnosed with mesothelioma (on May 22, 2015). *See Ripple*, 337 So. 3d at 48.[6]

[6] As such, this case does not present the fact pattern of marrying before the fact of injury is known, which a few courts outside Florida have said may not implicate the policy against marrying into a cause of action. *See, e.g., Stager*, 494 A.2d at 136.

Second, applying the marriage-before-injury rule to wrongful-death claims is consistent with and furthers the recognized policy that people take a spouse in their then-existing state of health and assume the risk of potential loss of marital consortium from their spouse's health conditions and prior exposures. This policy applies equally to personal-injury and wrongful-death claims. Again, this case is a good example. Mrs. Ripple married the decedent, with whom she had lived together for decades, with knowledge (not merely assuming the risk) that he had been diagnosed with a terminal disease.

Finally, applying the marriage-before-injury rule to wrongful-death claims establishes a bright-line rule that is not only easy, predictable, and certain to apply, but also ensures that tortfeasors are not subjected to potentially limitless liability to individuals that had no legal relationship to the injured party at the time of the tortfeasors' conduct causing the injury. Again, this policy applies to personal-injury and wrongful-death claims alike. Applying the marriage-before-injury rule provides legal certainty regarding who can recover as a "surviving spouse" under the Wrongful Death Act and precludes situations where defendants could be liable for

damages to unknown individuals who had no relationship whatsoever with the decedent at the time of exposure and injury.

For each of these reasons, the Coalition urges the Court to affirm the Fourth District's proper holding that the marriage-before-injury rule applies to wrongful-death claims.

II. THE FOURTH DISTRICT PROPERLY ENGAGED IN A *THORNBER* ANALYSIS.

A key difference between the Fourth and Fifth District's conflicting decisions is the legal paradigm with which the courts construed the Wrongful Death Act. In *Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212, 218–19 (Fla. 5th DCA 2018), the Fifth District engaged in a *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984), type of analysis that "focus[es] on a disputed word or phrase in isolation" and that this Court has said is "misleading and outdated." *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022). Instead, this Court has stated that "the plainness or ambiguity of the statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)), as the Fourth District has done in

considering the broader context of the existing common law on the statutory subject matter and whether the Legislature actually intended for the statute to supersede that existing common law, *see Kelly*, 211 So. 3d at 344.

In particular, the Fourth District correctly followed this Court's decision in *Thornber*, 568 So. 2d at 918, that there is a "presumption [] that no change in the common law is intended unless the statute is explicit and clear in that regard." As this Court has repeatedly held:

> Statutes...will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms....

Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1207–08 (Fla. 1997) (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977)). Hence, "[u]nless a statute unequivocally states that is changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *Thornber*, 568 So. 2d at 918.

Applying those principles, the Fourth District concluded that, in the Wrongful Death Act, the Legislature expressed its intent to allow a surviving spouse to recover the consortium-like damages that the spouse could have recovered in a common-law loss of consortium claim while the injured spouse was alive. *See Kelly*, 211 So. 3d at 345. "However, despite th[at] clear intention…, nothing in the statute abrogates the common law marriage before injury rule." *Id.* The Fourth District further concluded that the statute and the common-law rule were not repugnant, but could coexist, as the "common law rule merely limits the circumstances for when the surviving spouse may recover 'consortium-type' damages." *Id.*

The Fourth District applied the more appropriate analytical framework for the issue at hand, ensuring that due respect is given to both the common law and legislation when they address the same subject matter. As this Court explained in *Conage*, 346 So. 3d at 598, courts construing statutes should not limit their analysis strictly to the text in isolation, as the Fifth District did, but should also consider "the broader context of the statute as a whole," as the Fourth District did. For example, when a statute does not define one of its terms, courts should look to whether that term has been

defined "by our cases" and also "the context in which the word appears." *Id.* at 599. In *Conage*, this Court looked to how it had defined a term in prior cases when construing what the Legislature intended in using that term in a new statute. *Id.* at 600.

Such an analytical framework is consistent with this Court's century-old refrain that "the Legislature in enacting this statute must be credited with familiarity with this [common-law] principle and the statute must be construed with reference to it." *Nolan v. Moore*, 88 So. 601, 605 (Fla. 1920). In *Nolan*, this Court held the common-law principle that a principal is liable for an agent's actions applied to claims under a prior wrongful-death statute. *Id.* The Court explained "it was wholly unnecessary to add" to that respondeat superior principle to the statute. *Id.* "Declaring it to be so by statute would not have added potency to the law or extended its scope." *Id.*

That is the proper analysis here, too. It was "wholly unnecessary" under established Florida law to add to the Wrongful Death Act that the surviving spouse must have been married to the decedent at the time of injury. That is because Florida courts should be "construing the statute in the light of the common law."

Nolan, 88 So. at 606; s*ee also Gonzalez v. City of Belle Glade*, 287 So. 2d 669, 670 (Fla. 1973) ("This Court has consistently held that statutes should be read in the light of the common law."); *Dep't of Rev. v. Soto*, 28 So. 3d 171, 172 (Fla. 1st DCA 2010) (interpreting undefined statutory term "in the light of the common law" and "settled precedent").

The Fifth District's decision runs afoul of these well-established principles and fails to respect the context of the statute, including the existing common law and whether the Legislature clearly and unequivocally stated its intention that the statute change and supersede that common law. Perhaps that was because the defendant in *Wiederhold* did not cite *Thornber*. But regardless of the reason, the better analytical framework for the analysis at hand was the one used by the Fourth District. This Court should likewise use that framework in deciding this case.

It would be inappropriate to completely disregard the common law here, unlike in *R.R. v. New Life Community Church of CMA, Inc.*, 303 So. 3d 916, 923 (Fla. 2020), where the statute at issue was so comprehensive that it left no room for supplemental common-law rules. The Wrongful Death Act is not so comprehensive. After all,

the statute does not define a "surviving spouse," which could be interpreted in many ways, as evidenced by the conflict cases. As in *Thornber*, "there is nothing in the legislative history or language of the statute" indicating—let alone, establishing—that the Legislature intended the Wrongful Death Act to "replace the common law completely" in this area. *Thornber*, 568 So. 2d at 918. In the absence of a clear and unequivocal statement of such an intention, the Fourth District properly construed the statute in light of the longstanding common-law marriage-before-injury rule.

CONCLUSION

For these reasons, this Court should approve the Fourth District's correct decision to apply the marriage-before-injury rule to claims under the Wrongful Death Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2023, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal, which will send an electronic notice to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the applicable font and word-count requirements in Florida Rules of Appellate Procedure 9.045 and 9.210.

By: /s/ *Daniel B. Rogers*
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