DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANIS KELLY, as Personal Representative of the Estate of John K. Kelly,
Appellant,

v.

GEORGIA-PACIFIC, LLC, UNION CARBIDE CORP., PREMIX-MARBLETITE MANUFACTURING CO.,
and **IMPERIAL INDUSTRIES, INC.,**
Appellees.

No. 4D15-4666

[February 22, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol Lisa Phillips, Judge; L.T. Case No. 14-018038 (27).

Paulo R. Lima, Juan P. Bauta II, and Amanda A. Kessler of The Ferraro Law Firm, P.A., Miami, for appellant.

Marie A. Borland of Hill, Ward & Henderson, P.A., Tampa, and Stuart A. Weinstein and Laura E. Eggnatz of Shapiro, Blasi, Wasserman & Hermann, P.A., Boca Raton, for appellee Georgia-Pacific, LLC.

Matthew J. Conigliaro of Carlton Fields Jorden Burt, P.A., Tampa, and Ryan S. Cobbs of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellee Union Carbide Corporation.

LEVINE, J.

The question presented for our review is whether the Florida Wrongful Death Act supersedes the common law requirement that a spouse must be married to the decedent before the date of the decedent's injury to recover damages for loss of consortium. Stated another way, did the legislative enactment, giving the estate's representatives and survivors a remedy not found in the common law, "explicitly," "clearly," and "unequivocally" abrogate the common law requirements to recover consortium damages when those damages are awarded under the Wrongful Death Act. Because there can be no change in the common law unless the statute is "explicit and clear in that regard" and the Wrongful

Death Act does not "explicitly," "clearly," and "unequivocally" abrogate the common law rule, we hold that a spouse who was not married to a decedent at the time of the decedent's injury may not recover consortium damages as part of a wrongful death suit. Thus, we find that the trial court did not err in entering an order of dismissal, and subsequently entering a final judgment. We therefore affirm.

John Kelly and his wife, Janis Kelly, filed an action against appellees for negligence, strict liability, and for Janis Kelly's loss of consortium. During the course of the litigation, the husband died, and the wife amended the complaint, dropping her loss of consortium claim and adding a wrongful death claim, which included a demand for loss of consortium damages.

The decedent worked in construction and was exposed to asbestos during the years of 1973 to 1974. The decedent and appellant did not marry until 1976. In 2014, the decedent was diagnosed with mesothelioma and alleged that his exposure to asbestos caused the disease. The decedent died from mesothelioma in 2015.

Appellees moved to dismiss the wife's wrongful death claim, arguing that a spouse must be married to the injured party at the time of the injury for the spouse to bring a claim for loss of consortium and that the wrongful death claim sought damages for loss of consortium. Appellees argued it was undisputed that appellant was not married to the decedent when the decedent was injured. The trial court granted the motion to dismiss and dismissed that portion of appellant's complaint seeking consortium damages under the Wrongful Death Act. Appellant then voluntarily dismissed the remaining claims for negligence and strict liability. The trial court entered a final judgment, and this appeal ensued.

The standard of review that we use is de novo. *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005).

The tort of wrongful death did not exist at common law, and a personal injury claim did not survive the death of the injured party. *Nissan Motor Co. v. Phlieger*, 508 So. 2d 713, 714 (Fla. 1987). As a result, the Florida Legislature created a cause of action, wrongful death, to allow for a claim that survived the death of the injured party. *See* § 768.16, Fla. Stat. (2015).

The purpose of the Florida Wrongful Death Act is to provide a "separate and independent" cause of action since the original cause of action for personal injury did "not survive" the death of the injured party. *City of*

Pompano Beach v. T.H.E. Ins. Co., 709 So. 2d 603, 605 (Fla. 4th DCA 1998). The passage of the Wrongful Death Act remedied this "anomaly." *Variety Children's Hosp. v. Perkins*, 445 So. 2d 1010, 1012 (Fla. 1983). It is "thus clear that the paramount purpose of the Florida Wrongful Death Act is to prevent a tortfeasor from evading liability for his misconduct when such misconduct results in death." *Id.* Thus, the statute explicitly, clearly, and unequivocally supersedes the common law by allowing the wrongful death cause of action to proceed even after the death of the injured party. *See id.*

Under the Wrongful Death Act, the decedent's personal representative "shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." § 768.20, Fla. Stat. (2015). Survivors are defined as

> the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.

§ 768.18(1), Fla. Stat. (2015).

As to damages, the Wrongful Death Act provides:

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.
>
> (2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

§ 768.21, Fla. Stat. (2015). These damages "are inclusive of a spouse's

loss of consortium damages" and allows for a spouse to recover damages for loss of consortium even after the decedent's death. *See ACandS, Inc. v. Redd*, 703 So. 2d 492, 494 (Fla. 3d DCA 1997) (stating that "the legislature did not intend for a spouse's consortium claim to survive an injured spouse's death from his or her injuries by the fact that the legislature has provided for wrongful death damages that are inclusive of a spouse's loss of consortium damages"). Indeed, in this case, after the decedent died, appellant amended her complaint to replace her loss of consortium claim with a wrongful death claim that included a demand for the same exact damages as her prior loss of consortium claim.

Finally, the legislature announced that the public policy for the creation of the statute was to "shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat. (2015). The statute is "remedial" and "shall be liberally construed." *Id.* Nevertheless, although the statute is "remedial," "we cannot construe the statutory provisions so 'liberally' as to reach a result contrary to the clear intent of the legislature." *Stern v. Miller*, 348 So. 2d 303, 308 (Fla. 1977).

Appellant argues that the passage of the Wrongful Death Act, explicitly, clearly, and unequivocally superseded the common law relating to the damages resulting from "loss of consortium." Under the loss of consortium tort, the plaintiff may recover damages for the loss of

> the companionship and fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation. Consortium means much more than mere sexual relation and consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage.

Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971).

Significantly, under the common law of loss of consortium, the parties must have been married to one another at the time of the injury to recover damages for loss of consortium. *Tremblay v. Carter*, 390 So. 2d 816, 817 (Fla. 2d DCA 1980). As the court in *Tremblay* explained, the rationale for the common law rule is that

> [s]ince 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.

Id.

In the present case, the decedent's injury occurred when he was exposed to asbestos. *See Am. Optical Corp. v. Spiewak*, 73 So. 3d 120, 129 (Fla. 2011) ("Here, a foreign substance—asbestos fibers—were inhaled and became embedded in the lungs of the plaintiffs without their knowledge or consent. This, like the electric shock suffered by the plaintiff in *Clark [v. Choctawhatchee*, 73 So. 3d 120 (Fla. 2011)], constitutes an actual injury that has been inflicted upon the bodies of the plaintiffs."). Thus, because the decedent was injured before appellant married him, for appellant to prevail in her claim, we must find that the Wrongful Death Act specifically supersedes the common law of loss of consortium.

We look to the language of the Wrongful Death Act. In interpreting a statute, "the plain meaning of the statutory language is the first consideration." *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). There is, of course, the rule of statutory interpretation stating that statutes in derogation of the common law are to be strictly construed. *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 364 (Fla. 1977). But since the Wrongful Death Act is a remedial statute, "the general rule of strict construction does not, in Florida, apply to a remedial statute in derogation of the common law." *Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 290 (Fla. 2003). *See also Perkins*, 445 So. 2d at 1012 (basing its decision "upon the language contained in section 768.19, Florida Statutes (1981)"); *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So. 2d 109, 118 (Fla. 2002) (holding that "the language of the Act" precluded the plaintiff from recovering).

Whether the legislature intended for the Wrongful Death Act to supersede the common law of loss of consortium "depends upon the legislative intent as manifested in the language of the statute." *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). "The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *Id.* Thus, "[u]nless a statute unequivocally states that it 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." *Id.*

In *Thornber*, the "express language" of the statute in question made "no mention of whether it superseded the common law with regard to the circumstances" at issue. *Id.* Thus, the statute did not "replace the

common law completely." *Id.* *See also Honeywell Int'l, Inc. v. Guilder*, 23 So. 3d 867, 870 (Fla. 3d DCA 2009) (finding that the legislature clearly intended to create a child's right to parental consortium). Indeed, changes to the common law must come through the legislature in the form of statutes. *See Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1207 (Fla. 1987) ("[A] statute will not displace the common law unless the legislature expressly indicates an intention to do so.").

Applying the principles of *Thornber* to the present case leads us to the conclusion that the statutory language of the Wrongful Death Act does not, directly or indirectly, abrogate or supersede the common law requirement that the spouse must be married to the injured party at the time of the injury to recover for loss of consortium. Here, the plain language of the statute shows that the legislature clearly intended that the Wrongful Death Act allow for a surviving spouse to recover "consortium-type" damages. *See ACandS*, 703 So. 2d at 494. The legislature is presumed to know of the common law limitation for recovering loss of consortium damages. *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975) ("[T]he Legislature is presumed to know the existing law when it enacts a statute . . . ."). However, despite the clear intention that the Wrongful Death Act allow for the recovery of consortium damages after the decedent's death, nothing in the statute abrogates the common law marriage before injury rule. Therefore, because the legislature did not explicitly and clearly overrule the common law limitation on loss of consortium when enacting the Wrongful Death Act, the common law marriage before injury rule was incorporated into the Act. *See Dep't of Rev. ex rel. Soto v. Soto*, 28 So. 3d 171, 172 (Fla. 1st DCA 2010) (holding that Florida's child support statute should be read in light of settled common law precedents limiting the type of gifts that can be credited against retroactive child support obligations).

Further, there appears to be no reason why the common law requirement—that the injured spouse and the surviving spouse be married prior to the date of injury—cannot coexist with the Wrongful Death Act. Nothing in the Wrongful Death Act is "so repugnant to the common law that the two cannot coexist." *Thornber*, 568 So. 2d at 918. The common law rule merely limits the circumstances for when the surviving spouse may recover "consortium-type" damages under the wrongful death statute for the "decedent's companionship and protection and for mental pain and suffering from the date of injury." § 768.21(2), Fla. Stat. (2015).

Additionally, we note that the plain language of the Wrongful Death Act indicates that the legislature did not intend for a surviving spouse to recover consortium damages if the surviving spouse was not married to the decedent prior to the date of the decedent's injury. The definition of

"survivor" in the statute is limited to familial relationships only, and both subsections (1) and (2) of section 768.21 clearly provide that damages are recoverable from the date of "injury." §§ 768.18(1), 768.21(1)-(2), Fla. Stat. (2015). Thus, the plain language of the statute indicates that the legislature anticipated that the surviving spouse would have been married to the decedent prior to the date of injury.

To read the statute to permit recovery of consortium damages where the injury occurs prior to marriage, as the dissent does, would allow for results not supported by the plain language of the statute. For example, two unmarried individuals could be living together and in a relationship where one individual is financially dependent upon the other. If one of them is injured and the two continued living under the same arrangement for several years, then, under the dissent's view, so long as the couple is married a day before the injured party dies, the newly wedded surviving spouse could recover damages from all of the way back to when the decedent was first injured. However, given that the legislative definition of "survivor" is limited to familial relationships only, the legislature plainly did not intend for the surviving spouse to be able to collect consortium damages that proceeded the marriage.

Finally, it would make no sense to allow a spouse to recover consortium damages under the Wrongful Death Act simply because his or her spouse has died when that same spouse would be prohibited from recovering the same damage under a loss of consortium claim had his or her spouse survived. We are required to interpret the Wrongful Death Act to avoid absurd results such as this. *Allstate Ins. Co. v. Rush*, 777 So. 2d 1027, 1032 (Fla. 4th DCA 2000) ("In all, statutes must be construed as to avoid an unreasonable or absurd result.").[1]

Since the common law applies to our inquiry, we are next asked to not apply the marriage before injury rule in cases where the injury is a "latent injury" that does not reveal itself until after the parties marry. Appellant argues there would be no risk, or at least a diminished risk, of a spouse "marrying into a cause of action." Thus, appellant contends we should not

[1] Although the dissent claims that the opinion of this court is the only one of its kind in the United States, we must emphasize that exceedingly few courts have ever even considered this issue and none have interpreted Florida's Wrongful Death Act or Florida's common law specifically. *See* Wade R. Habeeb, *Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death occurred before marriage*, 69 A.L.R.3d 1046 (2011 update) (noting that there is "little authority" for the proposition that a wrongful death statute abrogates the marriage before injury rule).

apply the marriage before injury rule because one of the reasons for the rule is not present.

In *Fullerton v. Hospital Corporation of America*, 660 So. 2d 389, 390 (Fla. 5th DCA 1995),

> Fullerton's cause of action arose as the result of his wife's exposure to radiation when she was a student trainee studying radiation technology at the hospital. Fullerton married his wife several years after she was exposed to radiation. They did not realize that she was injured until three years after they had married when she developed cancer of the thyroid and had to have her thyroid removed.

The wife argued that the court should set aside the marriage before injury rule. However, the court concluded that "[i]n the absence of any statutory law on this point, Florida courts are required to follow the common-law rule." *Id.* at 391. The court therefore held the wife could not recover. *See also* § 2.01, Fla. Stat. (2015) ("The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.").

Like in *Fullerton*, appellant asks us to set aside the common law marriage before injury rule. However, we, like the court in *Fullerton*, "are required to follow the common-law rule" until the legislature passes a statute superseding this common law requirement. 660 So. 2d at 391. Thus, we also affirm the trial court on this issue.[2]

In conclusion, we affirm the trial court and hold that the Florida Wrongful Death Act does not clearly or explicitly abrogate or overturn the common law requirement that the decedent and surviving spouse be

---

[2] Additionally, we note that other jurisdictions have prohibited a loss of consortium claim from proceeding in so-called "latent injury" cases. *See, e.g.*, *Anderson v. Eli Lilly & Co.*, 588 N.E.2d 66, 67-68 (N.Y. 1991); *Doe v. Cherwitz*, 518 N.W.2d 362, 362 (Iowa 1994); *Gross v. Sauer*, No. 37 83 58, 1992 WL 205277, *2 (Conn. Super. Ct. Aug. 14, 1992).

married prior to the date of injury to recover consortium damages.[3] Although there may be persuasive policy reasons for superseding this common law rule, especially in the present case where the injury is latent, such a change may come only from the legislature by statutory enactment.

Affirmed.

CONNER, J., concurs.
TAYLOR, J., dissents with opinion.

TAYLOR, J., dissenting.

I respectfully dissent. I would reverse the trial court's order barring the plaintiff from recovering wrongful death damages after almost 40 years of marriage to the decedent. The trial court dismissed the plaintiff's wrongful death claim because she was not married to the decedent when he was exposed to asbestos-containing products in the early 1970's. It bears emphasizing, however, that the decedent was not diagnosed with any asbestos-related illness until 2014. In dismissing the plaintiff's claim, the trial court incorrectly applied a common law rule governing loss of consortium claims to a cause of action that arose under the Wrongful Death Act. This common law rule, which limits loss of consortium recovery to spouses who are married at the time of the injury, cannot coexist with the Wrongful Death Act as written.

Under the Wrongful Death Act, marriage at the time of injury is not a necessary element of the cause of action. A wrongful death cause of action did not exist at common law. *Nissan Motor Co. v. Phlieger*, 508 So. 2d 713, 714 (Fla. 1987). It is purely statutory and supersedes the common law. As the Florida Supreme Court has noted on numerous occasions, the Legislature intended to create an entirely new and independent cause of action for survivors of injured persons who subsequently died from their injuries. *Id.* Both the text of the Wrongful Death Act and Florida Supreme Court precedent demonstrate the Legislature's clear intent to grant a decedent's survivors a brand new cause of action not previously recognized at common law.

As the majority correctly points out, "[u]nless a statute unequivocally states that it 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

---

[3] We do not express any comment regarding other damages recoverable under the Wrongful Death Act such as recovery for medical and funeral expenses and other damages recoverable by an estate's personal representative. *See* § 768.21(3)-(6), Fla. Stat.

changed the common law." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). Here, however, the Wrongful Death Act meets both tests of *Thornber*.

First, the Legislature unequivocally stated that the Wrongful Death Act is a "remedial" statute, and is designed "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." § 768.17, Fla. Stat. (2015). This constitutes an unequivocal statement that the Wrongful Death Act is in derogation of the common law. By definition, a remedial statute is "designed to correct an existing law" or to give a party a "remedy for a wrong, where he had none, or a different one, before." *Adams v. Wright*, 403 So. 2d 391, 394 (Fla. 1981) (citation omitted).

Second, the Wrongful Death Act is so repugnant to the common law rule regarding consortium claims that the two cannot coexist where the plaintiff is asserting a claim for wrongful death. We have explained that the cause of action for wrongful death is "created and limited" by the Wrongful Death Act. *Hess v. Hess*, 758 So. 2d 1203, 1204 (Fla. 4th DCA 2000). Applying the common law "marriage at the time of injury" rule to the facts of this case would require us to rewrite the Wrongful Death Act. The Wrongful Death Act sets forth the exclusive list of individuals who are entitled to recover damages as statutorily-designated "survivors." It follows that the Wrongful Death Act is repugnant to any common law rule that would effectively modify the definition of the term "survivors" under the Act. Stated another way, applying the common law requirements of a consortium claim to a wrongful death claim would alter the category of "survivors" that may recover damages under the Wrongful Death Act, thereby limiting the class of "survivors" in a way that was not authorized by the Legislature. This result is wholly repugnant to the plain language of the statute.

As noted above, the "marriage at the time of injury" element of a common law loss of consortium claim simply does not apply to a wrongful death action. Under the Wrongful Death Act, the decedent's personal representatives "shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." § 768.20, Fla. Stat. (2015). "Survivors" are defined as:

> the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child

> born out of wedlock of the father unless the father has recognized a responsibility for the child's support.

§ 768.18(1), Fla. Stat. (2015).

As for damages, a wrongful death claim is "brought on behalf of the survivors, not to recover for injuries to the deceased, but to recover for statutorily identified losses the survivors have suffered directly as a result of the death." *City of Pompano Beach v. T.H.E. Ins. Co.*, 709 So. 2d 603, 605 (Fla. 4th DCA 1998). The statute provides that the surviving spouse may recover "for loss of the decedent's companionship and protection and for mental pain and suffering" and "the value of lost support and services" from the date of the decedent's injury to her or his death. § 768.21(1)–(2), Fla. Stat. (2015).

In interpreting a statute, we must first consider "[t]he plain meaning of the statutory language." *St Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). No language in the Wrongful Death Act states or even suggests that a surviving spouse must be married to the decedent at the time of injury to recover the delineated damages. The statute gives a right of action not had under common law and it must be limited strictly to the meaning of the language employed and not extended beyond its plain and explicit terms.

The statute defines "survivors" as including "the decedent's spouse" without any other limitation. *See* § 768.18, Fla. Stat. (2015). Further, section 768.21, which governs recoverable damages, does not state that a spouse must be married to the decedent at the time of the decedent's injury. Under the clear terms of the Wrongful Death Act, a cause of action for the recovery of wrongful death damages vests in favor of the surviving spouse on the date of death of the decedent. Thus, the only relevant time for the determination of an individual's status as a survivor is the time of the decedent's death. *See*, *e.g.*, *Powell v. Gessner*, 231 So. 2d 50, 51 (Fla. 4th DCA 1970) ("[T]he status of a child in respect to its right to sue for the wrongful death of a parent is determined at the time of the death of the parent.").

The majority contends that the language of section 768.21(2) implies that the Legislature assumed the surviving spouse would be married to the decedent on the date of injury. Section 768.21(2) states that "[t]he surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury." However, the clause "from the date of injury" does not provide a limitation as to *who* may recover, but rather indicates *what* a surviving spouse may recover. Accordingly, the statute does not limit

recovery to those surviving spouses who are married to the decedent at the time of injury.

While the Legislature may not have contemplated the unique facts of this particular case, the term "survivors" is unambiguous. As our supreme court has explained, "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 78 So. 693, 694 (Fla. 1918)).

Although the common rule governing consortium claims and the Wrongful Death Act providing "consortium-like" damages have been around for decades, the issue of whether the common law "marriage at the time of injury" rule should be incorporated into the Wrongful Death Act appears to be a matter of first impression in Florida. This is not, however, an issue of first impression in the United States. Courts addressing this issue in other states have rejected outright the argument that the common law "marriage before injury" rule deprives surviving spouses of their right to maintain statutory actions for wrongful death. These jurisdictions support the spouse's right to recover for consortium-like damages where such damages are provided by statute, regardless of whether the spouse and decedent were married at the time of the initial injury that resulted in death. Moreover, to my knowledge, no other appellate court in the history of American jurisprudence has come to the conclusion reached by the majority.

In *Lovett v. Garvin*, 208 S.E.2d 838 (Ga. 1974), for example, the Georgia Supreme Court held that the husband's right of action for tortious homicide of his wife under the wrongful death statute accrued at the time of the wife's death from the injuries inflicted by the defendant—thus, because the husband and wife were married at the time of the wife's death, the husband was entitled to bring a wrongful death action even though the husband and wife were not married at the time the injuries were inflicted.

The *Lovett* court wrote that "[s]ince the [wrongful death statute] gives a right of action not had under common law, it must be limited strictly to the meaning of the language employed and not extended beyond its plain and explicit terms." *Id.* at 840. The court went on to explain that:

> Nothing in the language of this statute states or implies that the husband must be married to the wife at the time the injuries from which she subsequently dies are inflicted. Therefore, we agree that the right of action accrues at the time

> of the death of the wife. Since at the time of the decedent's death here she was lawfully married to the plaintiff, he was entitled to bring an action for damages against the defendant for her wrongful death under the law of this state.

Id.

Similarly, in *DeVine v. Blanchard Valley Medical Associates, Inc.*, 725 N.E.2d 366 (Ct. Comm. Pls. Ohio 1999), a case where the husband brought a wrongful death action against health care providers for their negligent failure to properly diagnose and treat his wife's cancer, the Ohio court held that the husband was not precluded from seeking damages for loss of consortium in his wrongful death action although the husband and wife were not married when the wife was diagnosed with cancer.

After acknowledging the common law rule that a spouse must be married at the time of injury to recover for loss of consortium, the *DeVine* court noted that the Ohio wrongful death statute was an independent cause of action and that nothing in the statute limited recovery. The court concluded that a claim for wrongful death differs significantly from a claim for loss of consortium, stating as follows:

> A claim for loss of consortium has been recognized at common law for many years. Conversely, an action for wrongful death is statutory in nature and operates as an exception to the common law. A cause of action brought under R.C. Chapter 2125 provides a single and distinct cause of action, involving multiple elements of damages. This right of action is independent from any right or cause that may be brought by the injured person.

Id. at 369 (internal citations omitted).

Likewise, in *Du Bois v. Community Hospital of Schoharie County, Inc.*, 540 N.Y.S.2d 917 (N.Y. App. Div. 1989), a New York appellate court affirmed the trial court's denial of the hospital's motion to dismiss a widow's wrongful death action. There, the appellate court drew a distinction between a common law loss of consortium claim and wrongful death damages sought by a spouse. The court stated that although a claim for loss of consortium is not permitted unless the surviving spouse was married to the injured person at the time of the actionable conduct, "that is not the case with a wrongful death cause of action." *Id.* at 918. The court held that the widow's rights as a beneficiary of the decedent are not affected by when the marriage occurred as long as the parties were married at the time of the decedent's death. *Id.*

Finally, in *Corley v. State, Department of Health & Hospitals*, 749 So. 2d 926, 942 (La. App. 2d Cir. 1999), the court explained that for purposes of a wrongful death action, "it is irrelevant what the relationship between the claimants and the decedent was at an earlier time, such as at the time of the act or omission which caused or set in motion the death[.]"

These decisions illustrate that courts across the country have routinely rejected the appellees' argument. In fact, as far as I am aware, the majority's decision is the first time any court has held in a reported opinion that the common law requirements of a consortium claim barred a spouse from asserting a statutory claim for wrongful death where the injury occurred before the marriage. *See* Wade R. Habeeb, *Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death occurred before marriage*, 69 A.L.R.3d 1046 (2011 update) (collecting cases that uniformly reject the appellees' argument).

Under Florida's Wrongful Death Act, the surviving spouse is entitled to maintain a claim for all those statutorily identified losses that he or she has suffered directly as a result of the death of the decedent. This includes the bundle of services and benefits specified in the act which we commonly call "consortium." The Legislature, by including these damages without basing their recoverability on the surviving spouse's relationship to the decedent at the time of injury, clearly intended that such damages be recoverable in a wrongful death action. Here, the plaintiff's wrongful death claim is not a common law claim for loss of consortium deriving from her late husband's claim for personal injury, but is a claim based on a wholly independent and distinct cause of action authorized by the Legislature. According to the statute, her rights vested upon the death of her husband. The date of their marriage is immaterial.

In sum, I would reverse the trial court's dismissal of the plaintiff's wrongful death consortium claim. The trial court incorrectly applied the common law rule concerning consortium claims in personal injury cases to the plaintiff's statutory claim for wrongful death. In doing so, the court barred the plaintiff from recovering a significant portion of the damages provided by the Legislature for surviving spouses of those who died from injuries caused by the negligence of others.

* * *

Not final until disposition of timely filed motion for rehearing.