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WHEN DOES A WRONGFUL DEATH ACTION SURVIVE?

by Ted Babbitt

Wrongful death is a creature of statute. An action for wrongful death did not exist at common law. The Supreme Court of Florida has consistently held that the statutes giving rise to a wrongful death action provide a totally new right of action for the decedent's heirs distinct from any right of action which the decedent may have had prior to the death. See eg. Florida East Coast Ry v McRoberts, 149 So. 631 (Fla. 1933).

Fla. Stat. 768.19 (1995) which defines a wrongful death action provides that such an action exists only when "the event would have entitled the person injured to maintain an action and recover damages if death had not ensued."

In Toombs v Alamo Rent-A-Car, Inc., 27 F.L.W. S915 (Fla. October 31, 2002), the Supreme Court was faced with the question of exactly when a cause of action for wrongful death survives? That case was a wrongful death action brought against Alamo by the surviving family of a decedent whose husband negligently drove his car into a siderail while the decedent was a passenger. The car has been rented by both the husband and wife. The suit was brought against Alamo under the dangerous instrumentality doctrine. That doctrine has been held not to apply in a co-bailee situation in Raydel, Ltd. v Medcalfe, 178 So.2d 569 (Fla. 1965). Thus, had plaintiff's decedent survived, she would not have been able to sue Alamo because of the negligence of her husband. The

wrongful death action contended that since the wrongful death claim was an independent cause of action, the heirs should not be bound by the decedent's co-bailee status.

A number of cases have previously considered similar questions. In Hudson v Keene Corp., 445 So.2d 1151 (Fla. 1st DCA 1984) approved 472 So.2d 1142 (Fla. 1985), the Court found that there was no wrongful death action which could be brought when the statute of limitations expired prior to the death of the decedent even though the statute of limitations for wrongful death had not yet expired.

To the contrary, in Nissan Motor Co. v Phlieger, 508 So.2d 713 (Fla. 1987), the fact that the 12 year statute of repose expired subsequent to the death of the decedent and prior to the time the action was brought was found not to bar the action because at the time of decedent's death, the cause of action was still viable. Also in Safecare Health Corp. v Rimer, 620 So.2d 161 (Fla. 1993), the Court held that a settlement entered into prior to the decedent's death with one tortfeasor did not bar a wrongful death action against the other tortfeasor since the second claim was still viable at the time of decedent's death.

Thus, the Court in Toombs, supra, concluded that the key question as to whether or not a wrongful death claim survives the death of the decedent is whether the claim upon which it is based is still a viable claim at the time the decedent dies. Since, in the Toombs case the decedent was foreclosed from bringing an action against Alamo because of her status as a co-bailee of the

vehicle, no cause of action survived her death. At page 917 the Court concluded the following:

Although we have long emphasized that an action for wrongful death is distinct from the decedent's action for personal injuries had he or she survived because it involves different rights of recovery and damages, the language of the Act makes clear a cause of action for wrongful death is predicated on the decedent's entitlement to "maintain an action and recover damages if death had not ensued." See *Valiant Ins. Co. v Webster*, 567 So.2d 408, 411 (Fla. 1990) ("While the Wrongful Death Act creates independent claims for the survivors, these claims are also derivative in the sense that they are dependent upon a wrong committed upon another person.") *Celotex Corp. v Meehan*, 523 So.2d 141, 147 (Fla. 1988) ("[A] wrongful death action is derivative of the injured person's right, while living, to recover for personal injury." Accordingly, consistent with our decisions in *Perkins*, *Hudson*, *Pflieger*, and *Safecare*, we hold that no cause of action for wrongful death survived the decedent in the instant case because she had no right of action at her death. We approve *Toombs* and disapprove *Alley*.

This decision clarifies the circumstances under which a wrongful death claim survives.

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