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Fla. Widow Tells Justices She Is Surviving Spouse Under Law

By **Carolina Bolado**

Law360 (September 6, 2023, 7:24 PM EDT) -- The widow of a mesothelioma victim told the Florida Supreme Court on Wednesday that an appellate court erred when it shoehorned a requirement into the state's Wrongful Death Act mandating that a surviving spouse be married to a victim before the victim's injury.

In oral arguments in Tallahassee, Mathew Gutierrez, representing the plaintiff, said nothing in the statutory language of Florida's Wrongful Death Act bars his client Jennifer Ripple from recovering damages for pain and suffering as a surviving spouse just because she married Richard Counter after his mesothelioma diagnosis.

Counter had sued CBS Corp., General Electric Co., the Goodyear Tire & Rubber Co. and several other manufacturers of products that contained asbestos, claiming that his exposure to asbestos during his time serving in the military and working in industrial plants and at home caused his illness.

Florida's Fourth District Court of Appeal is the "only appellate court in the history of American jurisprudence to insert a judge-made marriage-before-injury requirement onto the unambiguous text of a wrongful-death statute that does not condition recovery on marriage before injury," Gutierrez said.

In its **March 2022 decision**, the Fourth District determined that the Florida Legislature did not intend to change the common law requirement that a spouse must be married to the deceased person before the date of the decedent's injury to recover for loss of consortium. The court found no explicit change to the common law and said the law's restrictions and the common law requirements could coexist.

But Gutierrez told the high court that the wrongful-death statute was intended to "create an entire new body of law that was not recognized at common law."

Justice John Couriel expressed concern that under Ripple's interpretation of the law, a spouse could claim damages for loss of consortium "for a time period dating back ad infinitum in the case of a very remote or untraceable, unfixable-in-time injury and a marriage that happened on the day of the decedent's passing."

Gutierrez responded that the remedy to that scenario was the jury.

"The jury can hear evidence that it was a sham marriage, or that there were no damages, or that the damages were minimal, or that there was an assumption of the risk," Gutierrez said. "Any number of evidence could go to the jury to mitigate that concern."

Matthew Conigliaro, who represents the defendants, told the court that under common law, "you take your spouse as you find him or her

and are not permitted to marry into a claim for loss of consortium."

That principle is what should control here, he said. He cited the Florida Supreme Court's 1977 decision in *Carlile v. Game & Fresh Water Fish Commission*, in which the court said that "statutes will not be interpreted to displace the common law further than is clearly necessary" and that any alterations to common law must be "plainly pronounced."

"Do we do that in every case?" Justice Meredith Sasso asked. "Every time we're looking at a statute, do we need to go to the common law to make sure we're not butting up against something inadvertently? What is it about this statute that would direct you to look toward the common law?"

Conigliaro said this was a "significant principle" of the common law, so courts need to consider that principle along with interpreting the act when common law defenses are raised.

Counter was diagnosed on May 22, 2015, with mesothelioma, which can be caused by inhaling toxic asbestos, according to court documents. Counter married Ripple on July 4, 2015, and three weeks later, he filed a personal injury suit alleging that the defendants' products were the source of his asbestos exposure from the 1950s through the 1990s.

Counter died on Nov. 1, 2015, and Ripple moved as the personal representative of Counter's estate to amend the suit as a wrongful-death case. She sought to recover damages for loss of companionship and protection and for mental pain and suffering, or alternatively for Counter's two daughters to recover for lost parental companionship, instruction and guidance and for mental pain and suffering.

The trial court granted judgment on the pleadings as to Ripple and the daughters. The Fourth District affirmed with regard to Ripple but agreed with the estate that the defendants could not rely on their argument that Ripple was not Counter's "surviving spouse" under one section of the Wrongful Death Act and then argue that she was under another section to block the daughters' ability to recover damages.

Ripple is represented by Mathew D. Gutierrez of the Ferraro Law Firm PA.

CBS is represented by Matthew J. Conigliaro of Carlton Fields PA.

The case is *Ripple v. CBS Corp. et al.*, case number SC22-0597, in the Florida Supreme Court.

--Additional reporting by Nathan Hale. Editing by Karin Roberts.