IN THE SUPREME COURT OF FLORIDA

CASE NO: SC09-1675
CASE NO: SC09-1676
CASE NO.: 4D08-3612
Trial Court Case No: 502007CA014860XXXMB

JONATHAN GREENFIELD, M.D.,
JONATHAN GREENFIELD, M.D., P.A.
and TENET ST. MARY'S INC. d/b/a
ST. MARY'S MEDICAL CENTER
Petitioners,
v.
DOROTHEA DANIELS, as Personal
Representative of the Estate of
SHEA DANIELS, deceased,
Respondent.

On Discretionary Review from the Fourth District court of appeal

INITIAL BRIEF OF PETITIONERS,

JONATHAN GREENFIELD, M.D.,
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PRELIMINARY STATEMENT

This appeal invokes the discretionary jurisdiction of this Honorable Court, pursuant to Art. V, §3(b)(3), Fla. Const. and Fla. R. App. Pro. 9.030(2)(A)(iv), from a decision of the Fourth District Court of Appeal. That Court reversed a Partial Summary Judgment entered in favor of the Petitioners, JONATHAN GREENFIELD, M.D. and JONATHAN GREENFIELD, M.D., P.A., TENET ST. MARY'S, INC., relative to a minor child's purported "survivor" claim.

In this brief, the Personal Representative of the Estate of SHEA DANIELS will be referred to as "Plaintiff" or "Estate". SHEA DANIELS will be referred to as "Decedent". The minor child, who is the subject matter of this litigation, will be referred to as "the child" or the "minor child". The mother of the minor child shall be referred to as the "mother" or "Rozine Cerrine". The mother's legal husband at the time of the minor child's conception and birth will be referred to as "Washington" or "Husband". The Petitioners, JONATHAN GREENFIELD, M.D. and JONATHAN GREENFIELD, M.D., P.A., will be referred to collectively as "GREENFIELD". Petitioner, TENET ST. MARY'S, INC. will be referred to as "ST. MARY'S".

The symbol "OR." will designate the original record on appeal, followed by the volume and page number from the Record on Appeal. The symbol "HRT." will refer to the Hearing Transcript dated July 28, 2008, followed by the transcript page number, contained as part of the Record on Appeal at volume 3 pages 532 through 553.

STATEMENT OF THE CASE AND FACTS

In 2005, the decedent, Shea Daniels, committed suicide and his mother/Plaintiff brought a wrongful death/medical malpractice action against a psychiatrist, GREENFIELD, who had treated him, and the hospital, ST. MARY'S, from where he had been discharged shortly before the suicide. (OR.V1 R1-5). The operative complaint alleged that at the time of the death, the decedent had a minor child who was a survivor under §768.18, Fla. Stat. (OR.V1 R2). The complaint initially sought economic damages as well for the child but the claim for economic damages was later withdrawn. (OR.V1 R200, R202).

It is undisputed that the decedent and the mother of the child were never married to each other at any time. (OR.V1 R205, 208). However, the mother was married to another man at the time of the child's conception and birth. (OR.V1 R208). The child was born on September, 2001 (OR.V1 R209) and the mother of the child, Rozine Cerrine, and her Husband, Willie Washington, had been married since 1999. (OR.V1 R208). It is also undisputed that Mr. Washington's parental

rights with respect to the minor child have through this day never been divested.

Mr. and Mrs. Washington did not divorce until November, 2004, over three years after the child was born. (OR.V1 R208, R209). Although the mother did file a paternity action in October, 2004 against the decedent (OR.V1 R211), it is undisputed that Mr. Washington was not made a party to that action. (OR.V1 R211, 213). There is no evidence that the mother ever advised the court in that paternity action that she was married to Washington at the time the child was conceived and born. (OR.V1 R211-213).

The decedent denied the allegation of paternity in the paternity action and also requested a DNA test which was never conducted because he failed to appear for it. (Or.V1 R215). The child's birth certificate listed the decedent, not the Husband, as the father of the child, despite Florida statute which mandates that the Husband's name be listed. Due to the decedent's failure to appear for the DNA test, he was defaulted in the paternity action. (OR.V1 R217-R219).

The Petitioners/Greenfield defended the survivor claim on the basis that the Husband, not the decedent, was and still is the child's legal father by operation of law and moved for partial summary judgment at the trial level on the survivor claim. (OR.V1 R188-219). The Plaintiff had previously moved for a continuance of the hearing on motion for summary judgment to obtain a DNA test. (OR.V1 R116-R117). However, the Plaintiff did not bring the matter to the family law

court or obtain authorization from any court to perform that test. Rather, it is undisputed that Plaintiff unilaterally obtained a DNA test without a best interest of the child determination. (OR. HRT. P.17, lines 12-23). The results of the DNA test purportedly indicate that the minor child's lineage is from the decedent and not the Husband. [A. 2].

The Trial Court granted Petitioners/Greenfield partial summary judgment on the survivor claim, ruling that because the mother of the child was married at the time of the child's birth, and the Husband's parental rights had never been divested, the Husband, Willie Washington, not the decedent, was at the time of the death and still is the child's legal father by operation of law. (OR. HRT. P.18, lines 3-7). As a result, the court ruled that the child was not a survivor of the decedent such that he could maintain a claim in this action under Florida's wrongful death statute. (Id.).

The Fourth District Court of Appeal reversed, holding that even though the child was conceived and born during the marriage to the Husband, and the Husband's parental rights had never been divested, and even though he is not a party in this action and was never a party in the paternity action filed in 2004, the child could maintain an action as a survivor pursuant to §768.18, Fla. Stat. in this wrongful death action. *Daniels v. Greenfield,* 15 So.3d at 914. That Court also held that because the decedent was listed on the child's birth certificate rather than the

Husband, the decedent, not the Husband, is the child's "legal father". *Daniels v. Greenfield,* 15 So.3d at 912. Petitioners/Greenfield filed their Jurisdictional Brief (Case No: SC09-1675) seeking discretionary review of the decision based on conflict with *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) and Petitioners/St. Mary's Incorporated filed its Notice of Joinder (Case No: SC09-1676). This Court accepted jurisdiction on January 14, 2010 and consolidated the cases.

SUMMARY OF ARGUMENT

According to the language of §768.18, Fla. Stat , in order for the child to be a "survivor" of the decedent in the context of this case, the child must have been born out of wedlock and the decedent must have been his "father". The child in this case was not born out of wedlock because his mother was married at the time of conception and birth. *Tijerino v. Estrella,* 843 So.3d 984 (Fla. 3d DCA 2003). Therefore, the decedent cannot be the child's legal father as a matter of law. It is well settled that the where a child is born during a lawful marriage, the child is ***not*** born out of wedlock and the Husband is by operation of law the child's legal father. *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006); *DOR v. Privette,* 617 So.2d 305 (Fla. 1993); *Shuler v. Guardian Ad Litem Program,* 17 So.3d 333 (Fla. 5th DCA 2009); *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) ; See §382.013(2), Fla. Stat . The Husband's status as the legal father of the child

remains intact until such time as his parental rights have been divested by a court of competent jurisdiction or administrative procedure and substituted by the putative father. *Id.* The Husband's parental rights cannot be divested until such time as he is made a party to the case. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006).

The decedent's estate in this case is essentially bringing a paternity claim to attack the status of the Husband as the legal father of the child without the Husband being made a party to the case. By law, the putative father cannot maintain a claim to change the legal parental status unless both the Wife and the Husband do not object, *Tijerino v. Estrella*, 843 So.2d 984 (Fla. 3d DCA 2003), *Johnson v. Ruby*, 771 So.2d 1275 (Fla. 4th DCA 2000) and the Husband must be given an opportunity to object. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006); *DOR v. Privette*, 617 So.2d 305 (Fla. 1993). The Husband is an indispensable party in any paternity action or matter which attempts to change the legal relationship between the child and the Husband. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006). These sound principles are consistent with §382.013(2), Fla. Stat, which mandates that the Husband's name be listed as the child's father on the birth certificate of every child born during a lawful marriage.

In the case at bar, the 4th District Court of Appeals decision disregards the above-referenced legal principles and holds contrary to them. While Petitioners

agree with the 4th DCA that the status of legal father is a "rebuttable presumption", that presumption cannot be rebutted until the Husband has been made a party to an appropriate action to divest his rights and has been given an opportunity to be heard. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006). That opportunity has never been afforded in this case or prior thereto.

Further, even if the legal status of the Husband's parental rights could now be changed, such a change is too late for the child to be able to maintain a loss of consortium claim. This is because there was no legal relationship between the child and the decedent at the time of death which is when the cause of action accrued. *Shuler v. Guardian Ad Litem Program*, 17 So.3d 333 (Fla. 5th DCA 2009). The law is well settled that there can be no loss of consortium claim where the legal relationship which forms the basis for the claim did not exist until after the cause of action accrued. *Hospital Corporation of America*, 660 So.2d 389 (Fla. 5th DCA 1995); *Tremblay v. Carter*, 390 So.2d 816 (Fla. 2nd DCA 1980).

Based on the foregoing, the decision of the 4th District Court of Appeal should be reversed.

ARGUMENT

A. Standard of Review:

This matter poses a pure question of law and is therefore subject to *de novo* review. *Clay Elec. Co-Op., Inc. v. Johnson*, 873 So.2d 1182 (Fla. 2003).

I. The 4th District Court of Appeal erred where it held that the decedent's estate may challenge paternity and assert a survivor claim for a minor child , and paternity could be litigated in the wrongful death action, where the child's mother was married to someone other than the decedent at the time of conception and birth, the Husband's parental rights had never been divested and he was not a party to the action.

According to the language of §768.18, Fla. Stat , in order for the child to be a "survivor" of the decedent in the context of this case, the child must have been born out of wedlock and the decedent must have been his "father". Case law holds that where a child is born during a lawful marriage, such as in this case, the child is ***not*** born out of wedlock because the mother is married at the time of the birth. *Tijerino v. Estrella*, 843 So.3d 984 (Fla. 3d DCA 2003) It is further well settled that the where the child is born during a lawful marriage, the Husband is by operation of law the child's legal father until such time as his parental rights have been divested and the putative father is substituted by Court decree. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006); *DOR v. Privette*, 617 So.2d 305 (Fla. 1993); *Shuler v. Guardian Ad Litem Program*, 17 So.3d 333 (Fla. 5th DCA 2009); *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) ; See §382.013(2), Fla. Stat . As a result, it is clear that Willie Washington, the mother's Husband at the time of the child's birth, the same Husband who for three years

after the birth continued to be the mother's Husband, is the minor child's legal father in this case.

In *Cummings*, 930 So.2d 604 (Fla. 2006), this Court held that a man married to the mother at the time of a child's birth is an indispensable party to any paternity action and is the child's legal father until such time as his parental rights have been divested. In *DOR v. Privette*, 617 So.2d 305 (Fla. 1993), this Court expressly recognized the legal father's unmistakable interest in any paternity action. These principles are consistent with §382.013(2), Fla. Stat which mandates that the name of the mother's Husband be listed on the birth certificate of any child born in Florida during a lawful marriage.

Applying those principles, the 5th DCA in *Shuler v. Guardian Ad Litem Program*, 17 So.3d 333 (Fla. 5th DCA 2009) held that the mother's husband is the child's legal father unless and until a Court effects a substitution of the putative father. *Id* at 335. That Court also held that the putative father of a child born during a lawful marriage had no legally protected parental relationship to the child. *Id* at 336.

Despite its opinion in the case *sub judice* to the contrary, the 4th District Court of Appeal has previously applied these well settled rules of law and not permitted a putative father to maintain a challenge to paternity where the child was born during a lawful marriage. In *Johnson v. Ruby*, 771 So.2d 1275 (Fla. 4th DCA

2000), the Court held that a putative father had no right to seek to establish paternity of a child who was born during a lawful marriage when a married woman and her husband object. *Id* at 1275. The Court further held that the Husband of the mother is the child's legal father. *Id.* The Court further cited to §382.013(2), Fla. Stat as support for that proposition. *Id.* Similarly, in *Tijerino v. Estrella,* 843 So.2d 984 (Fla. 3d DCA 2003), the 3rd District Court held that a child born during a lawful marriage is born *in wedlock* and that a putative father may not maintain a paternity action where the mother and husband object. *Id.* Of course, the Husband is an indispensable party to such an action to afford him an opportunity to object. *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006).

In the case at bar, the Plaintiff/estate seeks to do just what the Fourth District Court in *Johnson* and Third District Court in *Tijerino* previously said it cannot do, ie., allow a putative father, in this case his estate, to maintain a paternity action to be litigated, albeit in a wrongful death action, where the child was born during a lawful marriage and the mother's Husband is not a party to the litigation, has never had an opportunity to object and his parental rights have never been divested.

The 5th District in Achumba *v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) has ruled on identical facts. In *Achumba*, a wrongful death action against a doctor, the Court held that the child born during a marriage could not maintain a claim as a survivor of a third party/decedent, even though the decedent

was the biological father, where the Husband's parental rights had never been divested. Id. at 1015. The Court held that the Husband was the child's legal father, Id. at 1014, and because the child was born while the mother was married, the child was *not* born out of wedlock of the father. Id. at 1015. As a result, the *Achumba* Court rightly held that the issue of paternity could not be litigated in the wrongful death action. The 5th District Court in *Achumbia* found that there was nothing in the language of §768.18, Fla. Stat that changed the application of the legal principles referenced above. Judge Garrison's granting the summary judgment at the Trial level in this cause was simply a correct application of the law to the undisputed facts of this case.

The Fourth District Court appears to recognize that its decision in this matter does not square with this Court's legal analysis in *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006) with respect to the identity of the legal father in this case. The 4th District Court, referencing *Cummings*, states that "some ***confusion*** has occurred in supreme court analysis…." *Daniels v. Greenfield,* 15 So.3d at 913. The 4th District Court then goes on to hold that because the decedent's name is listed on the child's birth certificate, the decedent, not the mother's Husband, is the child's legal father. *Id.* Clearly that holding is a misinterpretation of this Court's decision in *Cummings* which held that a man married to the mother at the time of the child's birth is an indispensable party to any paternity action and is the child's legal father until such

time as his parental rights have been divested. This principle is further codified in §382.013(2), Fla. Stat which provides that if the mother is married at the time of the child's birth, the Husband's name shall be entered on the birth certificate. The language of the statute is mandatory.

Given that the mother of the minor child in this matter was married to a man other than the decedent at the time of conception and birth, given that the Husband's parental rights have never been divested, and given that the Husband is not a party to this action, litigating paternity in this wrongful death case to establish a loss of consortium claim for non-economic damages asserted by the child runs inapposite and completely misapplies the teachings of *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006); *DOR v. Privette*, 617 So.2d 305 (Fla. 1993), and the mandate of §382.013(2), Fla. Stat. As a result, the Fourth District Court of Appeal's decision in this matter should properly be reversed and the partial summary judgment reinstated.

II. The Fourth District erred where it held that the child can be a survivor of the decedent pursuant to §768.18, Fla. Stat., where there was no established legal relationship between the child and decedent when the cause of action accrued.

Even if the estate of the putative father can maintain a survivor action for a child born during a lawful marriage, the cause of action accrued at the time of the decedent's death. As a result, attempting to declare that the decedent is now the

legal father of the child cannot support recovery because there simply was no legal relationship between the decedent and the child at the time the cause of action accrued. *Fullerton v. Hospital Corporation of America*, 660 So.2d 389 (Fla. 5th DCA 1995)(because injury occurred prior to marriage, spouse had no valid claim for loss of consortium even where damages, and therefore cause of action, did not take place until after marriage); *Tremblay v. Carter*, 390 So.2d 816 (Fla. 2nd DCA 1980)(cause of action accrued prior to marriage and therefore spouse had no valid claim for loss of consortium). The Fourth District Court's opinion does not address this issue at all. As a result, the Fourth District Court of Appeals decision in this matter should properly be reversed.

CONCLUSION

Based on the foregoing argument and authorities, it is respectfully submitted that this Honorable Court reveres the opinion of the Fourth District Court of Appeal and reinstate the Partial Summary Judgment entered by the Trial Court in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served via US mail to: Julie Littky-Rubin, Esq. Attorney for Plaintiff, Lytal & Reiter, et al, 515 N. Flagler Drive, 10th Floor, West Palm Beach, Fla. 33401; Norman Waas, Esq., Attorney for Tenet St. Mary's, Inc, Two Alhambra Plaza, Ste. 750, Coral Gables, Fla. 33134 this 4th day of February, 2010.

CERTIFICATE OF COMPLIANCE

Petitioners', GREENFIELD, Initial Brief has been typed using the 14 point Times New Roman font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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