**IN THE SUPREME COURT OF FLORIDA**

CASE NO: SC09- _____
CASE NO.: 4D08-3612

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

# JURISDICTION BRIEF OF PETITIONERS,

JONATHAN GREENFIELD, M.D.,
JONATHAN GREENFIELD, M.D., P.A.

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## INTRODUCTION

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 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". 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". 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 opinion of the Fourth District Court of Appeal is attached hereto as an appendix. All references to it shall be referred to as "A" followed by the applicable page number of the opinion.

## STATEMENT OF THE CASE AND FACTS

In 2005, the decedent committed suicide and his mother/Plaintiff brought a wrongful death/medical malpractice action against a psychiatrist, GREENFIELD, and the hospital, ST. MARY'S. [A. 2]. The operative complaint alleged that the minor child was the son of the decedent and therefore a survivor under §768.21, Fla. Stat. [A. 1, 2]. It is undisputed that the mother of the child was married to Washington, not the decedent, at the time of the child's conception and later birth in September, 2001, and that his parental rights had never been divested. [A. 1, 2]. The mother of the child did not divorce Mr. Washington until November, 2004. [A. 1, 2]. Although the mother did file a paternity action in October, 2004 against the decedent, it is undisputed that Mr. Washington was not made a party to that action. The decedent in the paternity action also requested a DNA test which was never conducted because he failed to appear for it. [A. 1]. The child's birth certificate listed the decedent, not the Husband, as the father of the child. [A. 2, 6].

The Petitioners 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 summary judgment at the trial level. [A. 1, 2]. It is undisputed that shortly before the hearing on that motion, the Plaintiff unilaterally obtained a DNA test which purportedly showed that the decedent is the biological father of the child. [A. 2]. The Trial Court granted the summary judgment, 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 is the child legal father by operation of law. [A. 1]. 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. [A. 1].

The Fourth District Court of Appeal reversed, holding that even though 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, paternity in this case should be determined in this wrongful death action.

## SUMMARY OF ARGUMENT

The Fourth District Court of Appeals decision in this matter directly and expressly conflicts with *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) on identical facts. In *Achumba,* a medical malpractice/wrongful death action, the Court held that a 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. As a result, the *Achumba* Court held that that the issue of paternity could not be litigated in the wrongful death action.

The subject decision of the Fourth District also conflicts with and

misapplies this Court's decision in *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006). In that case, this Court 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. Given that the mother of the minor child was married to a man other than the decedent at the time of conception and birth of the child, 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 runs inapposite and completely misapplies the teachings of *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006). It is important to note that the Fourth District expressly stated there was some confusion in the Supreme Court analysis. [A. 5].

Although the Fourth District does not directly address it, the Court's opinion impliedly holds that recovery can be had even though there was no legal relationship established between the decedent and the child at the time of death which is when the cause of action accrued. That conflicts with *Fullerton v. Hospital Corporation of America,* 660 So.2d 389 (Fla. 5th DCA 1995) and *Tremblay v. Carter*, 390 So.2d 816 (Fla. 2nd DCA 1980). In both *Fullerton* and *Tremblay* , spouses sought to maintain loss of consortium claims but could not because their marriages occurred after the date of injury, hence, after the cause of action accrued. It is not necessary that the district court opinion explicitly identify

conflicting district court opinions in order to create an express conflict pursuant to Art. V, §3(b)(3), Fla. Const. and Fla. R. App. Pro. 9.030(2)(A)(iv). *Ford Motor Company v. Kikis,* 401 So.2d 1341 (Fla. 1981).

This Court should exercise its discretionary jurisdiction and resolve these conflicts and the purported confusion the Fourth District Court stated exists with application of *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006).

## ARGUMENT

There are two principle circumstances that support this Court's jurisdiction to review district court decisions based on direct, express conflict pursuant to Art. V, §3(b)(3), Fla. Const. and Fla. R. App. Pro. 9.030(2)(A)(iv). The first is where the appellate court decision conflicts with a decision of another appellate court or prior decisions of this Court. *Wallace v. Dean,* 3 So.3d 1035 (Fla. 2009). The second is where there is a misapplication of this Court's decisions. Id.

### I. The Fourth District Court's opinion conflicts with *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 2001) and *DOR v. Cummings*, 930 So. 2d 604 (Fla. 2006) where it held that a minor child may maintain a survivor claim for the death of the biological father, and paternity could be litigated in the wrongful death action, when his 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.

In the case *sub judice*, the opinion of the Fourth District directly and expressly conflicts with the decision in *Achumba v. Neustein, M.D.*, 793 So. 2d 1013 (Fla. 5th DCA 2001) 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 since Florida does not recognize "dual fathership", 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 held that that the issue of paternity could not be litigated in the wrongful death action.

The subject decision of the Fourth District also conflicts with and misapplies this Court's decision in *DOR v. Cummings,* 930 So.2d 604 (Fla. 2006). The Fourth District's opinion considers and attempts to apply the *Cummings* analysis, [A. 6], but interprets *Cummings* as holding that the person listed on the child's birth certificate is the legal father. [A. 6]. It is respectfully submitted that such analysis is a complete misapplication and misinterpretation of *Cummings.* The Fourth District, referencing *Cummings*, did state that "some ***confusion*** has occurred in supreme court analysis...." [A. 5].

This Court in *Cummings* did not hold that the person listed on the birth

certificate is the legal father. Rather, this Court 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 was married to a man other than the decedent at the time of conception and birth of the child, 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).

## II. The Fourth District opinion conflicts with decisions of other appellate courts where it held that the child can be a survivor of the decedent pursuant to §768.21, Fla. Stat., where there was no established legal relationship between the child and decedent when the cause of action accrued.

It is not necessary that a district court opinion explicitly identify conflicting district court opinions in order to create an express conflict pursuant to Art. V, §3(b)(3), Fla. Const. and Fla. R. App. Pro. 9.030(2)(A)(iv). *Ford Motor Company*

*v. Kikis*, 401 So.2d 1341 (Fla. 1981).

In the case at bar, 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). Permitting a paternity action within this wrongful death action therefore conflicts directly with *Fullerton* and *Tremblay.*

This Court should exercise its discretionary jurisdiction and resolve these conflicts and the purported confusion the Fourth District Court stated exists with application of *DOR v. Cummings*, 930 So.2d 604 (Fla. 2006).

## CONCLUSION

Based on the foregoing argument and authorities, it is respectfully submitted that this Honorable Court should exercise its discretionary jurisdiction.

Respectfully submitted

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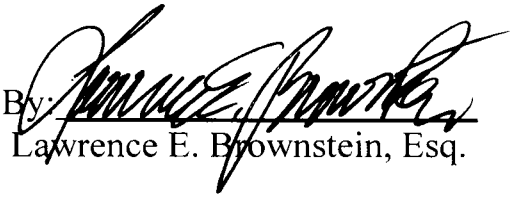

By: _____
Lawrence E. Brownstein, Esq.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served via US mail to: Julie Littky-Rubin, Esq. Lytal & Reiter, et al, 515 N. Flagler Drive, 10th Floor, West Palm Beach, Fla. 33401; Robert Covitz, Esq., 515 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301-4221 this 9th day of September, 2009; Norman Waas, Esq., Two Alhambra Plaza, Ste. 750, Coral gables, Fla. 33134.

## CERTIFICATE OF COMPLIANCE

Petitioner's jurisdictional 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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