IN THE SUPREME COURT OF FLORIDA

JONATHAN GREENFIELD, M.D.; JONATHAN GREENFIELD, M.D., P.A.; and TENET ST. MARY'S, INC.

Petitioners/Defendants,

v.

DOROTHEA DANIELS, as Personal Representative of the Estate of SHEA DANIELS, deceased,

Respondent/Plaintiff.
_____/

CASE NOS. SC09-1675 & SC09-1676

L.T. CASE NO. 4D08-3612

RESPONDENT'S ANSWER BRIEF
(AS TO ALL PETITIONERS)

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PRELIMINARY STATEMENT

The plaintiff presented DNA evidence in the trial court to **a 99.998% certainty** demonstrating that her son, Shea Daniels--the decedent in this wrongful death case--was the father of her surviving then four year-old grandson, Javon. **Javon's birth certificate listed the decedent as his father.** Plaintiff also presented unrebutted evidence that while the child's mother was married--on paper alone--she had not even seen "her husband" for over a year before the child was born.

The trial judge, however, refused to allow the personal representative to adjudicate the child's paternity in the context of the wrongful death case, and further refused alternatively to grant a stay, to enable the parties to adjudicate paternity in Family Court. This draconian, two-fold ruling, forever deprived this young boy from pursuing a claim for his father's wrongful death.

The Fourth District reversed. Not only did it rule that young Javon was indeed a "survivor" under the plain language of §768.18(1), and that Shea Daniels was the boy's "legal" father, the Fourth further observed that it was against the child's best interest to blindly apply the presumption of legitimacy against him, as a means of preventing him from pursuing a claim for the wrongful death of the only father he ever knew. The Fourth acknowledged the conflict between the Fifth

District's opinion in *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA 2001), and the Third District's decision in *Coral Gables Hospital, Inc. v. Veliz*, 847 So. 2d 1027 (Fla. 3rd DCA 2003), but found the facts of our case distinguishable. Still, the Fourth ruled that the issue of paternity could indeed be resolved in the context of a wrongful death case.

The plaintiff, Mrs. Daniels, is filing this single brief in response to both briefs filed by the defendants. We will refer to the plaintiff/respondent, Dorothea Daniels, as Personal Representative of the Estate of Shea Daniels, deceased, as the plaintiff, or by her proper name. We will refer to Javon Daniels, the now seven-year old survivor of his decedent father, and grandson of the personal representative, as Javon. The defendants/petitioners, Jonathan Greenfield, M.D.; Jonathan Greenfield, M.D., P.A.; and Tenet St. Mary's, Inc., will be referred to collectively as defendants, or by their proper names.

We will use the following abbreviations:

4D V__ R__ - Original Volume and Page Number from the Record on Appeal from the Fourth District

4D HT, pp.__ - Citations to the Actual Page Numbers of the Hearing Transcript from the Hearing Conducted on July 28, 2008 and Found in the Original Record on Appeal in the Fourth District

STATEMENT OF THE CASE AND FACTS

This case arises out of a medical malpractice complaint brought against the defendants, Jonathan Greenfield, M.D., Jonathan Greenfield, M.D., P.A., and Tenet St. Mary's, Inc. (4D V1 R1-5). Dorothea Daniels, the mother of the decedent, Shea Daniels, and the personal representative of his estate, brought an action against the defendants for negligently discharging her son from the hospital, when he was clearly suffering from suicidal ideations and significant mental instability (V1 R1-5). On September 18, 2005, the date the doctors discharged Shea and the day before his young son's fourth birthday, Shea promptly committed suicide (4D V1 R2).

Mrs. Daniels brought this case on behalf of her surviving grandson, little Javon (4D V1 R2; 4D V1 R155). However, the defendants challenged Javon's right as a survivor to Shea Daniels' estate, filing an "Amended Motion for Partial Summary Judgment or Alternative Motion to Compel Paternity Testing" (4D V1 R155-187).

Javon's mother, Rosine Cerine, was never married to Shea Daniels (4D V1 R155). At the time Javon was conceived, she was married (at least in name) to Willie Washington (4D V1 R156).

While the defendants insist on portraying the DNA testing as having been done "unilaterally" by the plaintiff, on January 16, 2008, it was the **defendants** who **moved to compel paternity testing** (4D V1 R26-27). In their motion, defendants referenced Ms. Cerine's previous uncompleted petition to establish the paternity of Javon, which had been filed against the decedent, Mr. Daniels, as Palm Beach County Case No: 50 2004 DR 13767 FD (4D V1 R26). Before he died, the Family Court had compelled Mr. Daniels to submit to a DNA test (4D V1 R26). Unfortunately, he failed to appear for the test (4D V1 R26).

Early on in the context of this wrongful death case, the defendants wanted to determine Javon's paternity, and sought "a DNA test to determine whether the child is, in fact, the biological descendant and proper beneficiary of the decedent" (4D V1 R26-27). The defendants' motion advised the court that the medical examiner's office still had blood samples available from which to compare the decedent's DNA to that of the minor child (4D V1 R27).

On February 6, 2008, defendants, Jonathan Greenfield, M.D., and Jonathan Greenfield, M.D., P.A., served a motion for partial summary judgment/alternative motion to compel paternity testing (4D V1 R36-66). Tenet St. Mary's, Inc., joined in the Greenfield defendants' motion (4D V1 R81-114).

The **trial court initially continued the hearing** on the defendants' motion for partial summary judgment **to await the production of the DNA results *defendants* sought** (4D V1 R116-117; 125). Subsequent to the many machinations over the DNA, however, the defendants then changed their respective positions, and asserted that whether the decedent was Javon's father or not was legally irrelevant, because Javon's mother was still nominally married to someone else at the time Javon was conceived (4D V1 R158). Both the physician and the hospital argue to this Honorable Court, that because they abandoned their original motion to compel the DNA testing, that plaintiff's decision to complete the testing procedure was somehow "unilateral" and unauthorized (Tenet's Initial Brief to the Supreme Court, p. 9; Greenfields' Initial Brief to the Supreme Court, pp. 3-4).

The DNA test results, conducted by the DDCDNA Diagnostic Center at the defendants' initial behest, were released on April 30, 2008 (4D V2 R238). **They squarely confirmed--to a 99.998% certainty--that the decedent, Shea Daniels, was indeed Javon's father** (4D V2 R238).

The **unrebutted** evidence presented also demonstrated that while Javon's mother did marry Willie Washington in 1999, the couple separated in early 2000 when Mr. Washington entered the military and moved away (4D V3 R468). The

couple finally formalized their divorce, but not until November 8, 2004 (4D V3 R468).

Javon's mother and Shea Daniels began dating in May of 2000 (4D V3 R468). Javon's mother testified that she had not had any intimate relations with Mr. Washington in either 2000 or in 2001 (4D V3 R468). Javon was born on September 19, 2001 (4D V3 R468).

Javon's birth certificate listed the decedent, Shea Daniels, as his father (4D V3 R468). Shea also provided Javon's mother between $50 and $70 per week in child support, and would sometimes buy clothes for Javon on his own (4D V3 R468).

Despite the overwhelming evidence to support Javon's paternity, after a hearing on July 28, 2008, the trial judge entered an order granting the defendants' motion for partial summary judgment, declaring Javon could not be a survivor of his deceased biological father (4D V3 R499). The sole reason for granting the defendants' motion for partial summary judgment was as follows:

> THE COURT: It may seem like we are defining [sic] logic here, as you suggest, but this is the civil court not the family court.
>
> **The presumption is rebuttable in family court not in civil court.** As a matter of law, Mr. Washington is the father of the child

> until the family court says otherwise. The motion is granted. (4D HT, pp. 17-18).

Noting that Javon's mother had previously instituted a family court action which did not reach fruition, and in light of the DNA testing which the defendants in this case had originally sought to compel (and which revealed with virtually 100% certainty that Javon was indeed Shea Daniels' son), Mrs. Daniels filed a motion for rehearing (4D V3 R495-97). She asked the trial judge to rehear and/or reconsider and vacate the entry of summary judgment entered against the surviving child, and further asked, in the alternative, for a stay to allow her the chance to adjudicate the paternity issue in the forum the trial judge believed was appropriate (4D V3 R495-497).

Inexplicably, the trial judge also denied that motion (4D V3 R520-21). He then entered final judgment for the defendants (4D V3 525).

The Fourth District reversed, explaining its ruling in an extensive opinion in *Daniels v. Greenfield*, 15 So. 3d 908 (Fla. 4th DCA 2009), released on August 5, 2009. After the defendants filed a notice to invoke discretionary jurisdiction based on alleged conflict, this Honorable Court accepted jurisdiction on January 16, 2010.

SUMMARY OF ARGUMENT

The Fourth District properly ruled that Javon Daniels, who is now seven, could indeed pursue a wrongful death case on behalf of his deceased father, Shea Daniels. Not only did the court find Javon was a survivor of Shea Daniels under the plain language of §768.18(1), it further found that Mr. Daniels was also Javon's "legal father" pursuant to §382.013(2)(a), because it was Shea who was listed as the "father" on Javon's birth certificate.

The Fourth District refused to allow the rebuttable presumption of paternity to slam the courthouse doors in the face of young Javon, simply because his mother was still married to a man she had not formally divorced, or even seen for over a year at the time of his birth. In light of the birth certificate, the conclusive DNA test results, the unrebutted evidence that Mr. Daniels provided support to young Javon, and the evidence that Javon's mother had not been intimate with anyone else but Shea at the time of the child's conception, the Fourth District correctly ruled that Javon could pursue a claim for his father's wrongful death. This Honorable Court should not strip this child of his rightful and legitimate claim, and should respectfully affirm the Fourth District's ruling in its entirety.

STANDARD OF REVIEW

Mrs. Daniels agrees with petitioners that these are issues of law reviewed by this Court, *de novo*.

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY REVERSED THE TRIAL COURT'S DECISION TO PERMANENTLY DEPRIVE THE CHILD SURVIVOR UNDER §768.18(1), FROM BRINGING A CLAIM FOR THE WRONGFUL DEATH OF THE MAN SHOWN TO BE BOTH HIS "BIOLOGICAL" AS WELL AS HIS "LEGAL" FATHER.

A. *Relying on the plain language of the wrongful death statute, the Fourth District properly found that young Javon was a survivor of Shea Daniels.*

According to the defendants, Javon was not born out of "wedlock," because his mother was "married" at the time of his birth, to a man she had not seen for at least a year before he was born. As such, they assert, Javon had no claim under §768.18(1), Fla. Stat.

The Fourth District staunchly disagreed with this pronouncement. Dismantling defendants' argument with a careful analysis of the statutory text of §768.18(1), Judge Warner explained for the majority:

> A survivor '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. The 'child born' can refer only to a **biological** child. 'Out of wedlock' means that the **father** and mother of the child were not married. **Thus, the clear meaning of the phrase is that a biological child born to a father not married to the child's mother may be a**

> **'survivor' under the wrongful death act if the biological father recognized a responsibility of the child's support.** The statute does not require a legal determination of paternity. It merely requires recognition by the biological father of a responsibility of support. There is no presumption of legitimacy within the statute which would preclude Javon from his ability to claim loss based upon his survivorship status. Thus, **the statute appears to benefit the child by permitting recovery from the biological father without undermining the relationship that the child might have with a 'legal father.'** Under the clear language of the statute, the motion for **summary judgment should not have been granted, because Javon is a 'survivor' of Shea based upon the evidence of Shea's support of Javon and the DNA tests, as well as the birth certificate listing Shea as the father**. *Daniels v. Greenfield*, 15 So. 3d 908, 912 (Fla. 4th DCA 2009)(Emphasis added).

The defendants insist that Javon was **not** born out of wedlock, because his mother was "married" at the time of his birth. The Fourth District's detailed analysis shows the fallacy of that assertion. Because Javon was born "out of wedlock" of his biological father--the person for whose death he made his claim--the personal representative only had to show that the father recognized a responsibility for the child's support for the boy to be a "statutory survivor." The evidence of Shea's $50 - $75 per week child support contribution, and occasional clothing purchases demonstrate that Javon is indeed a "survivor" of his father under §768.18(1) as the Fourth District found.

Had Javon's claim been for the death of his **mother**, there would be no "wedlock" issue, because his mother was indeed "married" when she conceived Javon. However, little Javon was clearly born out of the "wedlock" of his father, who was not married to his mother at the time of his conception.

The defendants rely on *Tijerino v. Estrella*, 843 So. 2d 984 (Fla. 3rd DCA 2003), to support their argument that Javon was **not** born out of wedlock. However, *Tijerino* is completely distinguishable.

In *Tijerino*, the alleged biological father sued to establish the paternity of a child he alleged was his biologically. The Third District found that he had no standing to establish the paternity, because the child was born into an intact marriage, and both the married woman and her husband **objected** to his action. *Id.* at 985.

Here, Javon's mother testified that Shea Daniels was his father, and there is no evidence at all to suggest that Willie Washington had any objection to that. The Fourth District also specifically used the plain language of the wrongful death statute, to rule that a biological child born to a father not married to the child's mother at the time of birth, may still be a "survivor" under the wrongful death act, if the biological father recognized a responsibility for the child's support. *Daniels, supra.*, at 912. The Fourth District observed that the wrongful death statute

benefits a child by permitting him to recover as a survivor of the biological father, without undermining the relationship that the child might have with a "legal father." *Id*. Nothing in *Tijerino* had anything to do with wrongful death. The defendants have not only shown no legal error in the Fourth District's interpretation of the statute, but they have further failed to show that our facts do not comport with the Fourth's interpretation.

B. The Fourth District correctly ruled that Shea Daniels was Javon's "legal father" under precedent established by this Court.

The Fourth District went on to reconcile this Court's decision in *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006), with the mandates of §382.013(2)(a), Florida Statutes (2000), which require the name of the husband to be on the birth certificate as father, unless paternity is determined otherwise. Abiding by this Court's *Cummings* analysis, the Fourth ruled Shea was actually also Javon's "**legal father**," because under *Cummings*, the legal father--the one who becomes indispensable to the paternity proceedings--is the **man listed as "father" on the birth certificate**.

Defendants vociferously reject that Shea Daniels was Javon's "legal father," because they argue he was erroneously listed as Javon's father on the birth certificate in contravention of §382.013(2)(a). They argue that this alleged "error,"

where the **actual** father was listed on the child's birth certificate (instead of the man who had been married to the mother in name alone, but had been away in the military at the time of his conception, and had not had intimate relations with the mother for over a year before the child was born), prevents Javon from claiming that Shea Daniels is his legal father. Based on this argument, the defendants urge this Court to reverse the Fourth District's ruling, and to hold that Javon has **no claim** for the death of the man who was both his "biological" **and** "legal" father.

In dismissing defendants' argument, the Fourth District drew a very important distinction between our case, and the Second District's decision in *S.B. v. D.H.*, 736 So. 2d 766 (Fla. 2nd DCA 1999). There, as the court explained, the biological father was listed on the birth certificate, instead of the document listing the husband of the mother. However, in *S.B.*, the Second District found that the listing was done in error, **because the husband objected to it**. *Daniels, supra.*, at 913. The court advised that under those circumstances, a putative biological father could not maintain a paternity action concerning a child conceived by a married woman, because **both** the **married woman and her husband** objected to the challenge. *Id.*

Here, though, as the Fourth District observed, there is no record evidence that the "husband," Mr. Washington, objected. Further, he and the mother have been divorced since 2004, making our circumstances far different. *Id.*

The hospital takes great issue with what it characterizes as some type of quantum "leap" made by the Fourth District with respect to the husband's objection (Hospital's Initial Brief to the Supreme Court, p. 22). However, there is not a shred of evidence in the record that Mr. Washington had any objection to his former wife listing the baby's actual father (Shea Daniels) on his birth certificate, especially since Mr. Washington and Javon's mother had been physically and geographically separated for at least a year before Javon's birth. Nor is there any remote suggestion that Willie Washington would want to assume responsibility for eighteen years worth of support of young Javon, a child who was not his as attested to by his ex-wife Rosine, and fully buttressed by conclusive DNA test results.

The Fourth District was unpersuaded by defendants' assertion that the alleged "unilateral" DNA testing done on Javon was in any way faulty, compromised or invalid. Whether or not the defendants ultimately abandoned their request for DNA testing, they certainly cannot hide from the fact that **it was they who initially initiated such testing**. Based on this record and the language of §768.18(1), the Fourth District simply refused to allow a **rebuttable presumption**

to defeat a clearly legitimate claim of a young boy for the wrongful death of his biological and legal father.

II. THE FOURTH DISTRICT PROPERLY FOLLOWED THE THIRD DISTRICT'S ANALOGOUS *VELIZ* CASE, IN HOLDING THAT JAVON'S PATERNITY COULD BE DETERMINED IN THE CONTEXT OF THIS WRONGFUL DEATH CASE.

Notwithstanding that *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA), *cause dismissed*, 805 So. 2d 804 (Fla. 2001), is factually distinguishable from our case, the defendants still argue that the Fourth District erred in following Judge Griffin's well reasoned dissent in *Achumba*, as well as the Third District's decision in *Coral Gables Hosp., Inc. v. Veliz*, 847 So. 2d 1027 (Fla. 3rd DCA), *rev. dismissed*, 857 So. 2d 195 (Fla. 2003), which relied on that dissent. The Fourth District was certainly well aware of the potential conflict between *Achumba* and *Veliz*. However, it explicitly noted that the major difference between *Achumba* and our case was the birth certificate. *Id* at 912.

In *Achumba*, unlike here where the biological father was listed on the birth certificate, the "birth certificate listed the **husband of the mother** as the child's father." *Id*. The court went on to explain that it is the listing of the father on the

birth certificate which provides the presumption of legitimacy. *Daniels*, *supra.*, at 912.

In *Achumba*, the personal representative brought a wrongful death claim for the death of the decedent whom she alleged was the child's biological father. *Daniels*, 15 So. 3d at 911. The defendant in *Achumba* moved for summary judgment, because at the time of the child's birth, the mother was married to another man **and** that man's name was on the child's birth certificate. *Id.*

Because the mother's husband was listed on the birth certificate, the *Achumba* court explained that the child was not "born out of wedlock of the father." *Id.* To recognize the decedent as the child's father in that case would have necessarily impugned the husband's parental rights, the court admonished. *Id.* *Achumba* went on to conclude that Florida does not recognize "dual fathership," and that the child's paternity could not be resolved in the context of a wrongful death case, because the husband's due process rights as the child's "legal father" (because the husband was on the birth certificate) could not be considered in the pending wrongful death action. *Id.*

Judge Warner cited to Judge Griffin's "cogent dissent" in *Achumba*, which doubted both "the accuracy and the wisdom of the premise on which the majority opinion [was] based." *Daniels*, at 911. Judge Griffin had sought guidance from

the Fourth District's decision in *In Re Estate of Robertson*, 520 So. 2d 99 (Fla. 4th DCA 1988), where the Fourth had held that the **illegitimate daughter** of the decedent **could inherit** from his estate, **even though her mother was married to another man at the time of her birth**. *Id.* at 911-12. Quoting to Judge Griffin's dissent in *Achumba*, the Fourth District below stated:

> If *Robertson* is correct that the existence of a legal father does not prevent a natural child from inheriting by intestate succession, the wrongful death act should likewise be interpreted to allow the natural child to be a wrongful death claimant. **Contrary to the view of the majority, allowing a child to share in the estate of the natural father through intestate succession or through a wrongful death proceeding in no way impugns or alters the legal father's relationship with the child.** (*Daniels*, 15 So. 3d at 912)(*citing, Achumba*, 793 So. 2d at 1017)(Griffin, J., dissenting).

Finding *Achumba* to be distinguishable from these facts, where the decedent himself **was in fact listed as the father on the birth certificate**, the Fourth District ultimately held that the ample evidence in this case, which included the DNA results, Shea's name listed on Javon's birth certificate, the mother's attestation of Shea's fatherhood and Shea's support of the child, made it clear not only that Javon was a statutory "survivor" of Shea Daniels, but also that it was far from the child's best interests to blindly apply a presumption. *Id.* at 914.

Focusing on the best interests of the child, the Fourth found **no legal or equitable merit** in preventing the personal representative from asserting Javon's claim for "the loss of his father, the only father he has ever known." *Daniels*, at 914. The Fourth District then remanded for further proceedings to resolve the issue either pretrial, or before the jury, as the court had done in *Veliz*.

The sharp tone of the Fourth District's opinion exposes its disdain for the incongruity of defendants' position. The Fourth refused to see how the "birth certificate statute" could somehow steal this child's claim from him, when Shea Daniels was actually also the "**legal father**." The court also found Javon to fall squarely within the definition of a "survivor" as set forth in §768.18(1).

There was no doubt in the Fourth District's mind that Shea Daniels was indeed Javon's father; the only father he ever knew. There was not a scintilla of evidence that the mother's former husband could have cared less about that fact, or that he laid any claim as father of the child. As a result, the Fourth District could not legally, or in good conscience, allow the application of a rebuttable presumption to slam the doors of the courthouse in the face of this little boy. This Court should affirm that ruling.

III. THE DEFENDANTS' ATTEMPTS TO ANALOGIZE A CHILD'S PARENTAGE TO SPOUSES WHO CANNOT MARRY INTO

CONSORTIUM CLAIMS IS UNTENABLE AT BEST, AND DISINGENUOUS AT WORST.

Both defendants argue that this Court should reverse the Fourth District, because Mrs. Daniels is bringing a claim for her grandson's damages under facts where the legal relationship forming the basis for the claim, did not exist until after the cause of action accrued. The defendants rely on *Fullerton v. Hospital Corp. of America*, 660 So. 2d 389 (Fla. 5th DCA 1995), and *Tremblay v. Carter*, 390 So. 2d 816 (Fla. 2nd DCA 1980). Both of those cases essentially hold that persons who marry injured victims after they have been injured, may not bring consortium claims, because those claims are reserved for those who were married **before** the cause of action accrued.

Defendants again argue that because Shea Daniels' paternity had not been "formally" determined prior to his death, that the law should strip young Javon of his claim altogether. Defendants' argument erroneously presumes that Shea Daniels was **not** Javon's legal father. They also overlook that Javon satisfied the terms of §382.013(2)(a) by showing that Shea appeared on the birth certificate as his "father," and was ascertained to be both his "legal" and his "biological" father through testimony and DNA testing, as the Fourth District found.

This case is completely distinguishable from *Glover v. Miller*, 947 So. 2d 1254 (Fla. 4th DCA), *rev. dismissed*, 953 So. 2d 519 (Fla. 2007), where two men claimed to be the father of a deceased **child**, and then argued over who had the right **to collect from the estate of the dead son**. In that instance, there had been no adjudication of paternity on behalf of the biological father before the boy's death, and the court found that the legal father--the man both married to the boy's mother, the one listed on the birth certificate, and the one adjudicated to be the father for child support purposes--could not have his paternity challenged after the fact.

Here, the plain reading of §768.18(1) renders Javon a "survivor." The plain language of §382.013(2)(a) renders Shea the "legal" father. The overwhelming evidence, including conclusive DNA evidence, also shows that he was also the "biological" father. Shea Daniels became Javon's "legal father" on the day the birth certificate was issued, and it is untenable for defendants to argue that these facts present anything close to spouses who try to "marry into consortium claims."

CONCLUSION

The Fourth District Court of Appeal was eminently correct in reversing the trial judge in this case. This Court should, respectfully, affirm that decision.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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