IN THE SUPREME COURT OF FLORIDA

Case Number: SC09-1675 and SC 09-1676

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 Review from the Fourth District Court of Appeal

Case Number: 4D08-3612

INITIAL BRIEF OF PETITIONER

TENET ST. MARY'S INC. d/b/a
ST. MARY'S MEDICAL CENTER

Norman M. Waas, Esquire
Robert S. Covitz, Esquire
FALK, WAAS, HERNANDEZ, CORTINA, SOLOMON & BONNER, P. A.
Attorneys for Petitioner, Tenet St. Mary's
Two Alhambra Plaza, Suite 750
Coral Gables, Florida 33134

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PRELIMINARY STATEMENT

The Petitioners, JONATHAN GREENFIELD, M.D. and JONATHAN GREENFIELD, M.D., P.A., will be referred to as "GREENFIELD, M.D." and "GREENFIELD, M.D., P.A." respectively. Collectively, they will be referred to as "GREENFIELD". The Petitioner, TENET ST. MARY'S, INC. will be referred to as "ST. MARY'S".

The Personal Representative of the Estate of SHEA DANIELS will be referred to as either "DANIELS" or "Respondent".

SHEA DANIELS will be referred to as the "Decedent". The minor child, who is the subject matter of this litigation, will be referred to as "JAVON." The mother of the minor child, Rozine Cerine, shall be referred to as "MS. CERINE". Rozine Cerine's legal husband at the time of JAVON'S conception and birth will be referred to as "MR. WASHINGTON".

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. [OR. V.3, 532-553]. The symbol "A." will refer to the Appendix.

All emphasis is supplied by counsel, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

These consolidated cases are before this Court following the Fourth District Court of Appeal's reversal of a Final Summary Judgment entered in favor of the Petitioners. This Court accepted jurisdiction on January 14, 2010.

The Decedent committed suicide on September 18, 2005. [OR. V.1, 2]. As a result, DANIELS filed a wrongful death/medical malpractice action against the Petitioners, GREENFIELD and ST. MARY'S. [OR. V.1, 1-5]. The Respondent alleged that the Decedent had been improperly discharged from the hospital on September 18, 2005, at a time when he was suffering from suicidal ideations, as well as mental instability. [OR. V.1, 1-5].

DANIELS asserted four causes of action against the Defendants: (1) Active Negligence of GREENFIELD, M.D. (Count I); (2) Vicarious Liability of GREENFIELD, M.D., P.A. (Count II); (3) Active Negligence of ST. MARY'S (Count III); and (4) Vicarious Liability of ST. MARY'S for the conduct of GREENFIELD, M.D. (Count IV).[1] [OR. V.1, 1-5].

The Respondent brought this claim on behalf of the Estate, as well as on behalf of JAVON, who was alleged to be the surviving minor son of the Decedent. [OR. V.1, 1-5]. JAVON was born on September 19, 2001. At the time of his

[1] The Trial Court entered its Order Granting Partial Summary Judgment in favor of ST. MARY'S with respect to Count III of the Complaint on April 29, 2008. [OR. V.1, 153-54]. That Order was not challenged by the Respondent.

birth, JAVON's mother, MS. CERINE, was legally married to another man; MR WASHINGTON. [OR. V.1, 208-209]. MS. CERINE married MR. WASHINGTON in 1999 and was not divorced from him until November 8, 2004. [R. V.1, 208-209]. MS. CERINE was never married to the Decedent. [OR. V.1, 200; 202]. At the time of Decedent's death, JAVON was four (4) years old.

The parental rights of MR. WASHINGTON, the legal father of JAVON, were never and have never been impugned, divested or terminated pursuant to Florida law, nor was the issue of JAVON'S paternity ever properly and validly determined prior to the Decedent's death. MS. CERINE, through the Department of Revenue, filed a Petition for Support for JAVON against the Decedent on or about October 15, 2004 [Palm Beach County Case No.: 50 2004 DR 1367 FD]. [OR. V.1, 211]. This Petition was filed prior to the finalization of MS. CERINE's divorce from MR. WASHINGTON; JAVON'S "legal father". [OR. V.1, 208].

The Petition failed to disclose that, at the time of the minor's birth, MS. CERINE was married to MR. WASHINGTON. [OR. V.1, 211-213]. The Petition also did not name MR. WASHINGTON as an interested party. [OR. V.1, 211-213]. In the support action, Decedent challenged the issue of paternity, and in his response expressly stated that he was not sure who the father was and requested a DNA test. [OR. V.1, 215].

Pursuant to the law, if the court been advised that JAVON was conceived and born during the mother's marriage to MR. WASHINGTON, it would have required him to be made a party to the paternity action; a guardian ad litem would have been appointed prior to the ordering of any DNA test; and the court would have been required to make a determination as to whether the legal father's parental rights should be divested or impugned, prior to rendering any final decision in the case.

Without knowledge of MR. WASHINGTON's status as the "legal father", a DNA test was ordered by the court. The Decedent failed to appear for the test and, as a result, no DNA test was actually performed in the support action. [OR. V.1, 217]. Ultimately, the Decedent was defaulted as a result of his failure to attend the DNA test and he was ordered to pay child support. [OR. V.1, 217-219].

Under these circumstances, GREENFIELD served their "Motion for Partial Summary Judgment or Alternative Motion to Compel Paternity Testing" on February 6, 2008. [OR. V.1, 36-66]. ST. MARY'S joined in this Motion. [OR. V.1, 81-114]. Although this Motion was initially set for hearing, DANIELS filed her "Motion to Continue" same on March 7, 2008. [OR. V.1, 116-17]. In doing so, the Respondent asserted that she could conduct DNA testing with a blood specimen from the Decedent's autopsy, but would need thirty days in order to complete the testing. [OR. V.1, 116-17].

DANIELS never sought or obtained authorization from the trial court to conduct the DNA testing, which would necessarily require testing of the minor, JAVON, nor was a guardian ad litem appointed for him. [OR. V.1, 116-17]. Instead, the trial court merely granted DANIEL's "Motion to Continue" the hearing. [OR. V.I, 125]. The "Alternative Motion to Compel DNA Testing" was abandoned by Petitioners and was never heard or resolved by the trial court.

GREENFIELD then filed their "Amended Motion for Partial Summary Judgment" on May 1, 2008 [OR. V.1, 155-187] and "Second Amended Motion for Partial Summary Judgment" on May 12, 2008. [OR. V.1, 188-219].[2] The Second Amended Motion argued that because MR. WASHINGTON had not been joined in the paternity action, his status as JAVON'S legal father was never terminated, revoked or impugned. As a result, he was the "legal father" of JAVON. [OR. V.1, 190].

As a result, Petitioners argued that JAVON could not assert a claim under the Wrongful Death Act as a survivor of the Decedent and, therefore, were entitled to a Partial Summary Judgment with respect to JAVON'S "survivor claim". [OR. V.1, 191]. ST. MARY'S filed its "Notice of Joinder" in the Motions filed by GREENFIELD. [OR. V.2, 224-226].

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[2] The Second Amended Motion corrected a scrivener's error in the Amended Motion.

DANIELS filed a "Notice of Filing DNA Test Results in Opposition to Defendants' Motion for Partial Summary Judgment" on July 14, 2008. [OR. V.2, 237-38]. Notably, the DNA results were obtained as a result of unilateral actions undertaken by the Respondent and without any order or authorization from any court. [OR. V.3, 548; HRT., P. 17, L. 12-23]. DANIELS simultaneously filed her "Notice of Filing Depositions in Opposition to Defendants' Motion for Partial Summary Judgment" on July 14, 2008. [OR. V.2, 239-400].

DANIELS then filed her "Response Opposing the Greenfield Defendants' Motion for Partial Summary Judgment" on July 18, 2008 [OR. V.3, 467-472] and her "Amended Response Opposing the Greenfield Defendants' Motion for Partial Summary Judgment" on July 22, 2008. [OR. V.3, 474-484].

In doing so, DANIELS acknowledged the existence of the strong legal presumption that the "husband" is considered the legal father of a child born during the course of a marriage, but argued that the presumption is rebuttable. She also argued that the presumption was rebutted in this case or at the very least that an issue of fact existed as to the issue [OR. V.3, 471-72; 479] based upon the unilaterally obtained DNA test results, as well as JAVON'S "birth certificate", which listed the Decedent as the father.[3] [OR. V.3, 478]. GREENFIELD filed

[3] It is submitted that reliance upon the "birth certificate" was improper because the legal husband of the mother was required to be listed as the father pursuant to §382.013(2)(a), Florida Statutes. As a result, the "birth certificate" was in

their Reply to Plaintiff's Response on July 22, 2008. [OR. V.3, 474-484].

The Petitioners' Motions were heard by the trial court on July 28, 2008. [OR. V.2, 235; V.3, 532-553; HRT., P. 17, L. 12-23]. At the time of the hearing, the trial court, who had experience as a judge in the Family Division, questioned DANIEL's counsel regarding the DNA test and the identity of the court that authorized the performance of the DNA test. [OR. V.3, 548; HRT., P. 17, L. 12-23]. DANIEL's counsel conceded that the mother authorized the DNA testing for the child and that no court made a finding that it was in the best interests of the child to undertake the testing. [OR. V.3, 548; HRT., P. 17, L. 12-23]. Specifically, the hearing transcript reflects as follows:

> **THE COURT**: Who authorized the DNA testing of the child?
>
> **MS. LITTKY-RUBIN**: That I believe the mother did.
>
> **THE COURT:** And who made the finding – what court made the finding it was in the child's best interest to know the answer to that question?
>
> **MS. LITTKY-RUBIN:** I don't believe it was any court finding on that. It was for purposes of this case.
>
> [OR. V.3, 548; HRT., P. 17, L. 12-23].

The trial court then granted the Petitioners' Motions for Partial Summary Judgment. [OR. V.3, 499]. Subsequently, DANIELS served her "Motion Asking

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contravention of Florida law.

the Court to Rehear and/or Reconsider and Vacate Entry of Summary Judgment Entered Against the Surviving Child and for Entry of a Stay to Allow Plaintiff a Chance to Adjudicate Paternity in Proper Forum" on July 29, 2008. [OR. V.3, 495-97]. In accordance with her Motion, she did not "take issue . . .with the ruling . . . , but requested that the Trial Court vacate its ruling and stay the matter to allow her an opportunity to adjudicate paternity in family court." [OR. V.3, 495-97].

GREENFIELD filed their Opposition to this Motion on August 4, 2008. [OR. V.3, 500-505]. GREENFIELD argued that based on the relief requested, DANIELS had not filed a proper Motion for Rehearing and, as a result, her Motion should be denied. [OR. V.3, 500-505]. GREENFIELD likewise argued that the Motion was subject to being denied because, at the time of his death, the Decedent was not the legal father of the minor child, and no legal relationship existed between the child and the Decedent.

GREENFIELD also argued that DANIELS could not "cure' the lack of a legal relationship by attempting to "backdate paternity." [OR. V.3, 500-505]. Finally, GREENFIELD argued that the Respondent could not comply with the statutory scheme to establish paternity in Family Court. [OR. V.3, 500-505]. ST. MARY'S filed its "Notice of Joinder in GREENFIELD'S Opposition" on August 4, 2008. [OR. V.3, 506-511].

DANIELS then served her "Reply to GREENFIELD'S Opposition to the Plaintiff's Motion to Rehear" on August 4, 2008. [OR. V.3, 512-515]. The trial court entered its Order Denying Plaintiff's Motion to Rehear on August 5, 2008. [OR. V.3, 520-21]. The Trial Court entered a Final Judgment in favor of GREENFIELD and ST. MARY'S as to all of JAVON's claims on August 13, 2008. [OR. V.3, 525]. DANIELS then filed her Notice of Appeal. [OR. V.III, 526-528].

On August 5, 2009, the Fourth District Court of Appeal reversed the trial court with instructions to resolve the issue of survivorship before trial or before the jury pursuant to the Third District decision in *Coral Gables Hospital, Inc. v. Veliz*, 847 So. 2d 1027 (Fla. 3d DCA 2003). [A. 1-8]. Its Mandate then issued on August 21, 2009. [A. 9].

Thereafter, a Notice of Invoking Discretionary Jurisdiction was filed by GREENFIELD and by ST. MARY'S. A Jurisdictional Brief was filed by GREENFIELD (Case Number SC09-1675) and ST. MARY'S filed a "Notice of Joinder in Jurisdictional Brief" (Case Number SC09-1676). Respondent then filed identical Briefs in Opposition in both cases. On January 14, 2010, this Court accepted jurisdiction and consolidated both cases.

SUMMARY OF ARGUMENT

In order to recover damages against the Petitioners, DANIELS must prove that JAVON was a survivor as that term is defined by §768.18(1), Fla. Stat. (2009). A "survivor" is defined as:

> the decedent's…children…and…[i]t 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.

Because MR. WASHINGTON was married to MS. CERINE at the time of JAVON's birth, the law is clear that JAVON was not the Decedent's son. Rather, JAVON's father was MR. WASHINGTON. §382.013(2)(a), Fla. Stat. (2009) provides that:

> if the mother is married at the time of the birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.

In relying upon the birth certificate as evidence that JAVON was the Decedent's son, the District Court not only ignored §382.013(2)(a), Fla. Stat. (2009) it also ignored this Court's decision in *Florida Department of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006) and its own decision in *Johnson v. Ruby*, 771 So.2d 1275 (Fla. 4th DCA 2000).

Further, JAVON was not born out of wedlock; he was born during the marriage of MS. CERINE and MR. WASHINGTON. As such, he is not the

Decedent's statutory survivor. *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA 2001). *See also, Glover v. Miller*, 947 So. 2d 1254 (Fla. 4th DCA 2007); and *Tijerino v. Estrella*, 843 So.2d 984 (Fla. 3d DCA 2003).

Additionally, because MR. WASHINGTON was never joined in the paternity action brought by MS. CERINE and was never given the opportunity to be heard by the Family Court, MR. WASHINGTON's status as the legal father remains intact.

As such, the District Court's decision ignores the long-established rule that where a child is born during an existing marriage, the husband is considered the legal father of the child, until such time as his parental rights have been terminated, revoked or otherwise impugned, after notice and an opportunity to be heard. *Florida Department of Revenue v. Cummings*, 930 2o.2d 604 (Fla. 2006).

While the District Court is correct that the status of legitimacy is a rebuttable presumption, the presumption cannot be rebutted until the mother's husband is made a party to the paternity action and given a chance to be heard. The legitimacy certainly cannot be overcome by a District Court merely stating, without citation to evidence, that "the husband does not object" to the termination of his parental rights. *Daniels v. Greenfield*, 15 So. 3d 908, 913 (Fla. 4th DCA 2009).

Further, if this Court finds that the issue of paternity is still to be determined,

then such a determination must be made pursuant to §742.01-742.18, Fla. Stat. and not by a jury hearing evidence of liability and damages in a wrongful death trial. *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA 2001). *But see, Coral Gables Hospital v. Veliz*, 847 So. 2d 1027 (Fla. 3d DCA 2003); and *Daniels v. Greenfield*, 15 So. 3d 908, 914 (Fla. 4th DCA 2009).

Lastly, even assuming that MR. WASHINGTON's status as JAVON's legal father can now be impugned, such a change comes too late for JAVON to maintain his claim. At the time of the Decedent's suicide, there was no valid determination of paternity nor was there any legal relationship between the Decedent and JAVON which would sustain a claim brought under §768.21, Fla. Stat. The law is clear that a claim for damages cannot be brought where the legal relationship which forms the basis for the claim did not exist until after the cause of action accrued. *Fullerton v. Hospital Corp. of* America, 660 So. 2d 389 (Fla. 5th DCA 1995); and *Tremblay v.* Carter, 390 So. 2d 816 (Fla. 2d DCA 1980).

Accordingly, the decision of the District Court should be reversed with instructions to reinstate the lower court's rulings.

STANDARD OF REVIEW

The standard of review with respect to a trial court's ruling on a motion for summary judgment is *de novo*. *Clay Elec. Co-Op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). The standard of review for pure questions of law is also *de novo. Southern Baptist Hospital of Florida, Inc. v. Welker,* 908 So.2d 317, 319 (Fla. 2005).

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPERLY ENTERED ON THE MINOR'S "SURVIVOR" CLAIM BECAUSE THE MINOR WAS BORN DURING HIS MOTHER'S MARRIAGE TO ANOTHER MAN WHOSE PARENTAL RIGHTS HAD NOT BEEN LEGALLY DIVESTED.

The Trial Court properly granted Petitioners' Motions for Summary Judgment because, at the time of his death, the Decedent was not JAVON's legal father. Accordingly, the decision of the District Court should be reversed with instructions to reinstate the lower court's rulings.

In order to recover damages against the Petitioners, DANIELS must prove that JAVON was a survivor as that term is defined by §768.18(1), Fla. Stat. (2009) A "survivor" is defined as:

> the decedent's…children…and…[i]t 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.

The law is clear that JAVON was not the Decedent's son. Rather, Javon's father was MR. WASHINGTON. §382.013(2)(a), Fla. Stat. (2009) provides that:

> if the mother is married at the time of the birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.

The language of this statute is clear and unambiguous. As such, it should be afforded its plain meaning. See Saleeby v. Rocky Elson Const. Inc., 3 So. 3d 1078, 1082 (Fla. 2009)("When the statute is clear and unambiguous, 'there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'") (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)); *see also* State v. Lacayo, 8 So. 3d 385, 387 (Fla. 3d DCA 2009)("If a statute is clear and unambiguous, we will not expand our analysis and look beyond the statute's plain language or resort to rules of statutory construction.").

Based upon the clear language of the statute, there can be but one conclusion: MR. WASHINGTON is the "legal father" and his name should have been listed as the father on JAVON's birth certificate. Despite this unambiguous language, the District Court repeatedly referred to the Decedent as "the legal father". *Daniels v. Greenfield*, 15 So. 3d 908, 912 (Fla. 4th DCA 2009).

In doing so, it not only ignored §382.013(2)(a), Fla. Stat., but it also ignored this Court's decision in *Florida Department of Revenue v. Cummings*, 930 So. 2d

604, 605 (Fla. 2006)(“The issue before us is whether a legal father (i.e., a man married to the child's mother at the time of birth) is an indispensable party in a paternity action”); and its own decision in *Johnson v. Ruby*, 771 So. 2d 1275, 1276 (Fla. 4th DCA 2000)(“ the husband of the mother is presumed to be the child's biological father; at a minimum, he is the child's legal father.”)

Further, JAVON was not born out of wedlock as suggested by the District Court. *Daniels v. Greenfield*, 15 So. 3d 908, 912 (Fla. 4th DCA 2009) (“’Out of wedlock’” means that the father and mother of the child were not married.”) Rather, JAVON was born during the marriage of MS. CERINE and MR. WASHINGTON. *Tijerino v. Estrella,* 843 So. 2d 984 (Fla. 3d DCA 2003) (a child born into an intact marriage is not born out of wedlock).

As such, because MR. WASHINGTON’s status as JAVON’s legal father had not been properly divested or terminated, JAVON was not the Decedent’s statutory survivor. *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA 2001).

In *Achumba*, the Fifth District held that a child born to a mother legally married to another man could not be considered a “survivor” of a subsequently deceased third party who was alleged to be the biological father and who had recognized responsibility for the child’s support. The court acknowledged that Florida does not recognize the existence of “dual fathership” and until the husband’s status as the child’s legal father was changed, recognition of the third

party as the child's father would be precluded, regardless of what his biological relationship to the child might be. *Id.* at 1014-15.

The Fourth District cited to the *Achumba* decision in *Glover v. Miller*, 947 So. 2d 1254 (Fla. 4th DCA 2007). In *Glover*, the court addressed the issue of paternity in conjunction with the administration of a decedent's estate. Two separate individuals sought appointment as the administrator of the minor decedent's estate. The decedent was one of two twins who had been born out of wedlock. One of the individuals had signed the birth certificate as the father, and was involved in the raising of the children. Pursuant to an action brought by the Department of Revenue, this individual was adjudicated to be the twins' father approximately eleven years prior to the decedent's death.

The other individual filed his own petition for administration, asserting that he was the biological father. He also filed a petition for release of a specimen for purposes of DNA testing, which was granted because of the other twin's desire to know his true biological father. This test confirmed that this other individual was the biological father of the twins. Notwithstanding these circumstances, the Fourth District stated at page 1257:

> Miller [the adjudicated father] is Jerrod's father in the eyes of the law, regardless of the results of the DNA testing. (footnote omitted). The legal father has substantial rights . . . which cannot be lightly dismissed, even by the discovery that the legal father is not the biological father. In fact, our supreme court has held that the mere fact that biological testing shows that a man other than the legal father

> is the biological father of the child without more does not require the granting of a paternity petition. *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993).

In doing so, the court recognized that "[a] child cannot have two legally recognized fathers". *Glover v. Miller,* 947 So. 2d, 1254, 1258 (Fla. 4th DCA 2007) citing *Achumba v. Neustein*, 793 So. 2d 1013, 1015 (Fla. 5th DCA 2001).

By operation of Florida Statute §382.013(2)(a), Fla. Stat. MR. WASHINGTON was JAVON's only legally recognized father. As such, he was an indispensable party to any paternity action brought to impugn, divest or terminate his legal status.[4] *Florida Department of Revenue v. Cummings,* 930 So. 2d 604 (Fla. 2006); *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993). In *Florida Department of Revenue v. Cummings*, this Court specifically held that a legal father (a man married to the child's mother at the time of birth) is an indispensable party in an action to determine paternity and to impose support obligations on another, unless it is conclusively established that the legal father's rights with respect to the child have been divested by some earlier judgment.

In reaching this conclusion, this Court recognized that the presumption of legitimacy of a child born during marriage and the husband's status as the legal

[4] As noted in the Statement of the Case at pp. 3-4, MR. WASHINGTON's identity as the "legal father" was never disclosed in the support proceeding, nor was he provided notice of the matter.

father is "one of the strongest rebuttable presumptions known to law," so as to endow the "legal father" with such a material interest in a paternity action that a final decree could not be rendered without his joinder. This Court then cited its earlier decision in *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993), which recognized that the presumption grants legal fathers an "unmistakable interest" in paternity actions brought by the Department.

While the District Court is correct that the status of legitimacy is a rebuttable presumption, the presumption cannot be rebutted until the mother's husband is made a party to the paternity action and is given a chance to be heard. The legitimacy can certainly not be overcome by a District Court merely stating, without citation to evidence, that "the husband does not object" to the termination of his parental rights. *Daniels v. Greenfield*, 15 So. 3d 908, 913 (Fla. 4th DCA 2009).

The District Court mistakenly relied upon the results of the DNA test in support of its conclusion that the Motions for Summary Judgment should not have been granted. As noted previously, these test results were unilaterally obtained by DANIELS without court approval and were, therefore, obtained in contravention of the statutory scheme established under §742.12, Fla. Stat. and this Court's decision in *Privette*.

In *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305, 308 (Fla. 1993), this Court stated that:

> Thus, before a blood test can be ordered in cases of this type, the trial court is required to hear argument from the parties, including the legal father if he wishes to appear, and a guardian ad litem appointed to represent the child.

In light of the foregoing, the DNA results should not be considered by this Court. Further, because MR. WASHINGTON's rights as JAVON'S legal father have never been divested, impugned or terminated; and because at the time of his death, the Decedent was not JAVON's legal father, the trial court properly granted Petitioners' Motions for Summary Judgment. Accordingly, the decision of the District Court should be reversed with instructions to reinstate the lower court's rulings.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE ISSUE OF SURVIVORSHIP SHOULD BE DETERMINED IN THE WRONGFUL DEATH PROCEEDING.

The District Court erroneously relied upon *Coral Gables Hospital, Inc. v. Veliz*, 847 So. 2d 1027 (Fla. 3d DCA 2003) in determining that the issue of survivorship should be determined in the wrongful death proceeding. *Daniels v. Greenfield*, 15 So. 3d 908, 910 (Fla. 4th DCA 2009) ("We hold that the presumption [of paternity] is not a conclusive presumption and the issue of survivorship is to be determined in the wrongful death proceeding.") In fact, the

District Court pointed out that this determination "could be made by the jury". *Id.* at 912. For the reasons set out below, it is respectfully submitted that the District Court erred.

In *Achumba v. Neustein*, 793 So.2d 1013 (Fla. 5th DCA 2001) the Fifth District properly recognized that the issue of paternity and, therefore, survivorship could not be resolved within the context of a wrongful death action. The court stated:

> This is true for several reasons, not the least of which is that chapter 742, Florida Statutes, not the Wrongful Death Act, is the exclusive remedy for establishing paternity in Florida. (citations omitted). Of equal importance is that Beckford's due process rights, as Smoot's "legal father," were not considered in the pending wrongful death action. The relationship between a parent and child is constitutionally protected. (citations omitted). As such, that relationship cannot be altered or impugned without considering the "legal father's" due process rights to maintain his relationship with the child, which was not done in this case. *Id.* at 1016.

While the Third District ruled contrary to the *Achumba* decision, it is of note that *Veliz* was decided prior to this Court's decision in *Florida Department of Revenue v. Cummings*, 930 So. 2d 1257 (Fla. 2006). As a result, the Third District did not consider that the "legal father" is an indispensible party to any determination regarding paternity.

If the District Court's decision is upheld, it is difficult to imagine the procedure by which a "legal father" would be able to intervene in a wrongful death action in which he has no other interest. Does the "legal father" participate in jury

selection; is he granted peremptory challenges; does he get to make an opening statement and a closing argument; and does he cross-examine witnesses? It is respectfully submitted that forcing any defendant to litigate liability, damages and paternity before the same jury places the defendant in an unwinnable situation from the moment the jury is sworn.

Further, the time to properly resolve this issue was when the Decedent and Mr. Washington were both available to be heard. At this late juncture, it is impossible to put the "interested parties" back in the position that they would have been in prior to the Decedent's death, and it would be mere speculation and conjecture to determine what the "legal father's" position would have been had he received proper notice.

The action to establish paternity should have (and could have) been initiated prior to the decedent's death and thus the legal father/husband and the Decedent/alleged biological father could have litigated and resolved their respective rights and interests in the same proceeding. The failure of this to occur ***was not*** the result of any conduct on the part of the Petitioners, but rather was as a result of MS. CERINE's conduct in not advising the trial court of MR. WASHINGTON's status as the "legal father".

III. EVEN IF THE LEGAL FATHER'S STATUS CAN NOW BE IMPUGNED, SUCH A DETERMINATION CANNOT SUSTAIN SURVIVOR'S CLAIM HEREIN BECAUSE THE

LEGAL RELATIONSHIP WHICH GIVES RISE TO THE CLAIM DID NOT EXIST UNTIL AFTER THE CAUSE OF ACTION ACCRUED.

Assuming that MR. WASHINGTON's status as JAVON's legal father can now be impugned, such a change comes too late for JAVON to maintain his claim. At the time of the Decedent's suicide, there was no valid determination of paternity nor was there any legal relationship between the Decedent and JAVON which would sustain a claim brought under §768.21, Fla. Stat. (2009)

A claim for damages cannot be brought where the legal relationship which forms the basis for the claim did not exist until after the cause of action accrued. *Fullerton v. Hospital Corp. of* America, 660 So. 2d 389 (Fla. 5th DCA 1995); and *Tremblay v.* Carter, 390 So. 2d 816 (Fla. 2d DCA 1980).

In *Fullerton*, the Plaintiff's cause of action arose as a result of his wife's exposure to radiation while a student trainee studying radiation technology at the hospital. Fullerton married his wife several years after she was exposed to radiation. Three years after they married, she developed cancer of the thyroid and had to have her thyroid removed. Relying upon *Tremblay*, the Fifth District held that a claim for damages cannot be brought where the legal relationship which forms the basis for the claim did not exist until after the cause of action accrued.

Similarly, a legally recognized father/son relationship between JAVON and the Decedent did not exist at the time the Decedent died. As such, this Court

should reinstate the trial court's ruling. In doing so, the Petitioner acknowledges that drawing a line which results in JAVON not being able to bring a claim might strike some as being unduly harsh, however, "there has to be a line drawn somewhere, and absent legislation it would be improvident for this court to extend it." *Tremblay* at 818.

CONCLUSION

For the foregoing reasons, and based upon the foregoing authorities, the Petitioner requests that this Court reverse the decision of the Fourth District Court of Appeal with directions to reinstate the Partial Summary Judgment entered by the trial court.

Respectfully submitted,

FALK, WAAS, HERNANDEZ, CORTINA, SOLOMON & BONNER, P.A.
Attorneys for ST. MARY'S
Two Alhambra Plaza, Suite 750
Coral Gables, FL 33134
Telephone: (305) 447-6500
Facsimile: (305) 447-1777

By: _____
Norman M. Waas
Florida Bar No.: 614432

By: _____
Robert S. Covitz
Florida Bar No.: 898198

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Julie H. Littky-Rubin, Esquire, Lytal, Reiter, et al LLP, Post Office Box 4056, West Palm Beach, Florida, 33402-4056, Attorneys for Respondent, DANIELS; and Lawrence E. Brownstein, Esquire, 1655 Palm Beach Lakes Blvd., Ste. 402, West Palm Beach, Florida 33401, Attorneys for Petitioner, GREENFIELD on this 5th day of February, 2010.

FALK, WAAS, HERNANDEZ, CORTINA, SOLOMON & BONNER, P.A.
Attorneys for ST. MARY'S
Two Alhambra Plaza, Suite 750
Coral Gables, FL 33134
Telephone: (305) 447-6500
Facsimile: (305) 447-1777

By:_____
Norman M. Waas
Florida Bar Number 614432

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

FALK, WAAS, HERNANDEZ, CORTINA, SOLOMON & BONNER, P.A.
Attorneys for ST. MARY'S
Two Alhambra Plaza, Suite 750
Coral Gables, FL 33134
Telephone: (305) 447-6500
Facsimile: (305) 447-1777

By:_____
Norman M. Waas
Florida Bar Number 614432