IN THE SUPREME COURT OF FLORIDA

TENET ST. MARY'S INC., ETC.

Petitioner,

vs.

DOROTHEA DANIELS, ETC.,

Respondent.
_____/

CASE NO.: SC09-1676

4th DCA CASE NO.: 4D08-3612

RESPONDENT'S BRIEF OPPOSING JURISDICTION

JULIE H. LITTKY-RUBIN, ESQ.
Lytal, Reiter, Clark, Fountain & Williams, LLP

515 N. Flagler Dr., Suite 1000
Post Office Box 4056
West Palm Beach, FL 33402-4056
Telephone: (561) 655-1990
Facsimile: (561) 832-2932
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

PREFACE

The Fourth District reversed a summary judgment entered against a then-seven year-old boy, in the action he brought for the wrongful death of his father. Based on its interpretation of §768.18(1), the Fourth District ruled that because Shea Daniels had provided support for Javon, the child could maintain a wrongful

death claim, notwithstanding that his mother was actually married to--but estranged from--another man when Javon was conceived. The Fourth District **explicitly distinguished** the Fifth District's opinion in *Achumba v. Neustein, infra.*, and simply used this Court's opinion in *Florida Department of Revenue v. Cummings, infra.*, to tangentially buttress its ultimate holding.

Still, the defendants assert that the Fourth District's opinion somehow "**expressly and directly**" conflicts with those very opinions, and further claims **additional** conflict with two other appellate decisions. Despite their attempts to string a thread of decisions together to show conflict, in the face of the District Court's explicit distinguishing, and its actual holding, defendants fall far short of triggering discretionary review in this Honorable Court.

The plaintiff/respondent, Dorothea Daniels, as Personal Representative of the Estate of Shea Daniels, deceased, will be referred to as plaintiff, respondent or by her proper name. Her grandson, the young minor survivor, Javon Daniels, will be referred to as Javon. The defendants/petitioners, Jonathan Greenfield, M.D., Jonathan Greenfield, M.D., P.A., and Tenet St. Mary's, Inc. d/b/a St. Mary's Medical Center, will be referred to collectively as defendants or petitioners. The undersigned has used bold face type for emphasis.

STATEMENT OF THE CASE AND FACTS

The Fourth District recited the key facts of this case as follows:

Javon Daniels was born to Rozine Cerine and the decedent, Shea Daniels. Rozine had been married to Willie Washington in 1999, but they separated in 2000 when Washington moved away and joined the military. She met Shea in May 2000, and Javon was born in September 2001. **Shea's name was listed on the birth certificate as the father.**

Shea and Rozine had a difficult relationship **but he supported Rozine and Javon by paying support of $50 - $70 per week**. He also bought clothes for Javon. His mother, Dorothy, visited with Javon on occasion. Rozine filed a petition to determine paternity and for child support against Shea in October 2004. Shea answered, demanding a DNA test, which was ordered but never conducted because Shea failed to appear. He was defaulted in the paternity proceeding, but a judgment establishing paternity was never entered. In November 2004, Rozine obtained a divorce from Willie Washington. The record does not contain a copy of the divorce decree.

Shea committed suicide in 2005, and his mother brought a wrongful death action on behalf of Javon against a psychiatrist and hospital. Both answered and claimed that Javon was not a survivor, because the **presumption of legitimacy** required that Willie Washington be deemed Shea's legal father. Thus, Javon could not be a survivor of Shea.

During the proceedings, the plaintiff conducted a paternity test **which showed that Shea was the biological father of Javon**. Although the court questioned whether such a test should have been authorized, it had granted a continuance for the plaintiff to obtain the test. **The test merely confirmed what the birth certificate already recorded. Shea was Javon's father.** (Slip Op, pp. 1-2).

SUMMARY OF ARGUMENT

The defendants do not come close to demonstrating that the Fourth District's

decision in any way creates the necessary "express and direct" conflict needed for this Court to accept jurisdiction. Not only did the Fourth District base its ruling on an issue of statutory interpretation, having nothing to do with the cases defendants cite for conflict, but it also explicitly **distinguished** *Achumba*, one of the cases defendants cite for the alleged conflict.

Contrary to defendants' argument, the Fourth District also did not "misapply" the holding from another factually distinguishable case, *Cummings*. The court simply used part of the *Cummings* conclusion to buttress its underlying statutory interpretation.

Finally, there is no viable analogy between the rights of a child born out of wedlock, who survives his support-paying father to bring a wrongful death claim, and the rights of a spouse who marries her injured partner after the injury occurred, to bring a consortium claim. The law clearly allows the wrongful death claim, and, equally as clearly, prohibits the consortium claim, thereby obviating any conflict. This Court should refuse to accept jurisdiction because defendants/petitioners have failed to come close to showing the "express and direct conflict" needed for discretionary review.

ARGUMENT

NOTHING ABOUT THE FOURTH DISTRICT'S

OPINION BELOW COMES CLOSE TO "EXPRESSLY AND DIRECTLY" CONFLICTING WITH *ACHUMBA, CUMMINGS, FULLERTON* OR *TREMBLAY* AS DEFENDANTS ASSERT.

A. *Article V, §3(b)(3), of the Florida Constitution puts tight parameters on the limited class of cases this Court may accept for discretionary review.*

Article V, §3(b)(3) of the Florida Constitution does not permit this Court's discretionary review, unless the lower court's opinion establishes a point of law **contrary** to a decision of the Supreme Court of Florida or another District Court. *See, First Union National Bank v. Turney*, 832 So. 2d 768, 769-70 (Fla. 1st DCA 2002). In other words, a party may only establish "express and direct" conflict when the holdings in two different cases are **irreconcilable**, or the District Court has misapplied a decision of this Court. *Id. See, Aravena v. Miami Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006).

B. *In the face of the Fourth District's explicit distinguishing of* Achumba v. Neustein, *793 So. 2d 1013 (Fla. 2001), it seems a bit disingenuous for the defendants to assert there could be "express and direct conflict" between it, and the case below.*

In the opinion below, Judge Warner went to great pains to explicitly limit the Fourth District's ruling to its discrete facts, writing:

> We hold that **under the unique circumstances of this case**, the court erred in determining as a matter of law that the child is not a survivor in accordance with the

> wrongful death statute. We reverse. (Slip Op, p. 1).

Later, likely anticipating defendants' current argument about an "express and direct conflict," Judge Warner bluntly explained:

> ***Achumba* is distinguishable from the present case**, because the birth certificate in *Achumba* listed the husband of the mother as the child's father. It is the listing of the father on the birth certificate which provides the presumption of legitimacy. (Slip Op, p. 5).

The Fourth District even acknowledged that there **had been** a conflict between *Achumba*, and the Third District's decision in *Coral Gables Hospital, Inc. v. Veliz*, 847 So. 2d 1027 (Fla. 3rd DCA 2003). It then noted that while the Third District actually **certified** the conflict on that issue,[1] this Court ultimately dismissed the case (Slip Op, p. 5).

Importantly, while the Fourth District fastidiously distinguished *Achumba* from the case below, it reached its ultimate holding not from the issues found in *Achumba*, but rather from its analysis of the statutory text of §768.18(1) (Slip Op, p. 5). As Judge Warner opined:

> A survivor 'includes the child born out of wedlock of a mother, but not the child born out of wedlock of the

---

[1]The Third District rejected the Fifth District's conclusion that paternity is an issue that cannot be resolved in the context of a wrongful death action, and explicitly certified that issue to this Court.

> 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 on 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 test, as well as the birth certificate listing Shea as the father*** (Slip Op, p. 5).

After making this ruling, the Fourth District then went on to **distinguish** *Achumba*, implicitly admonishing why it could not possibly conflict with these facts.

This posture may cause this Court to harken back to the decision in *First Union National Bank v. Turney*, 832 So. 2d 768 (Fla. 1st DCA 2002), another case where petitioners urged only an "uncertified," "direct and express" conflict as a basis for review. *Id.* at 769. Calling out the petitioners in that case for making

essentially a baseless argument, the First District noted with disdain:

> **This asserted direct and express conflict is spurious** for reasons the *Turney* decision itself develops in some detail. *Id.*

"Spuriousness" seems to exist here too, when the decision below actually **details** why there is no conflict with *Achumba*. Certainly, this Court cannot accept jurisdiction based on an "express and direct" conflict with a case the Fourth District explicitly distinguished.

C. *For similar reasons, petitioners have also failed to show conflict through a "misapplication" of the law of* Florida Department of Revenue v. Cummings.

This Court should not lose sight of how tangentially the Fourth District used *Cummings* in its opinion. It never even mentioned *Cummings* until after explaining that it was reversing the summary judgment **based on its "analysis of the statutory text of §768.18(1)."**

After distinguishing *Achumba*, the Fourth District demonstrated why *Cummings* was not at all dispositive of its holding. The court cited *Cummings* for the general proposition that "legal" fathers are the ones listed on birth certificates. The Fourth District wanted the opinions to show that not only was Mr. Daniels Javon's biological father according to the DNA testing, he was also the "legal" father, because his name was listed on the child's birth certificate.

The defendant petitioners boldly assert that the lower court somehow "misapplied" *Cummings*. However, the Fourth District simply used *Cummings* to buttress its own analysis that Shea Daniels was Javon's "legal father," and that Mr. Washington (Javon's mother's, now ex-husband) was not an indispensable party because he was not listed as Javon's father on his birth certificate (thereby undermining defendants' claim that he was the "legal father").

This dicta, while supportive, in no way affected the Fourth District's ultimate holding: *i.e.*, the trial court erred in granting summary judgment against Javon, when the wrongful death statute recognizes him as Shea Daniels' survivor, based on evidence of support. As *Cummings* is a paternity case with little actual bearing on the Fourth District's holding, the court's analysis falls far short of "misapplying" the case, or showing the requisite "express and direct" conflict needed for this Court to accept jurisdiction over this appeal.

D. *Simply because the defendants/petitioners reject the Fourth District's analysis, does not mean that there is somehow "a complete lack of a legal relationship" between Javon and his father at the time the cause of action accrued, or any type of "express and direct" conflict with consortium decisions.*

The defendants/petitioners somehow try to equate the Fourth District's decision reversing summary judgment entered against the young boy in this case, to cases which refuse to allow litigants to maintain consortium claims for injured

partners who later become "spouses." They assert that Javon never established a "legal" relationship to his decedent father before the death, and therefore, he is in the same position as a "claim-less" person, who chooses to marry a partner **after** he/she suffers an injury.

Again, this Court cannot overlook the statutory basis for the Fourth District's ruling. The Fourth District explicitly reminded us that under §768.18, a child born out of wedlock of the father is a **legal** "survivor" **when the father has recognized a responsibility for the child's support** (Slip Op, p. 5). It explicitly noted that the statute **does not require a legal determination of paternity**, and merely requires the recognition by the biological father of the responsibility of support.

How then, can the defendants/petitioners, possibly assert that there was "no legal relationship" between the decedent and the child, and somehow try to analogize our situation to the consortium cases of *Fullerton* and *Tremblay*? Mischaracterizing the District Court's reasoning certainly does not arm defendants with the type of legal conflict needed to trigger this Court's review.

CONCLUSION

The petitioners have fallen woefully short of demonstrating any "express

and direct" conflict possibly emanating from the Fourth District's decision below. This Court should refuse to accept jurisdiction and allow the Fourth District's opinion to stand.

JULIE H. LITTKY-RUBIN, ESQ.
Lytal, Reiter, Clark, Fountain & Williams, LLP

515 N. Flagler Dr., Suite 1000
P.O. Box 4056
West Palm Beach, FL 33402-4056
Telephone: (561) 655-1990
Facsimile: (561) 832-2932
Attorneys for Respondent

By: JULIE H. LITTKY-RUBIN
Florida Bar No. 983306

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

furnished by U.S. mail this 29th day of September, 2009 to:

Robert S. Covitz, Esq.
Falk, Waas, Hernandez, Cortina, Solomon & Bonner, P.A.
515 E. Las Olas Blvd., Ste. 1000
Ft. Lauderdale, FL 33301

Lawrence E. Brownstein, Esq.
Law Offices of Lawrence E. Brownstein
Forum Building
1655 Palm Beach Lakes Blvd., Ste. 402
West Palm Beach, FL 33401

JULIE H. LITTKY-RUBIN, ESQ.
Lytal, Reiter, Clark, Fountain & Williams, LLP
515 N. Flagler Dr., Suite 1000
Post Office Box 4056
West Palm Beach, FL 33402-4056
Telephone: (561) 655-1990
Facsimile: (561) 832-2932
Attorneys for Respondent

_____

By: JULIE H. LITTKY-RUBIN
Florida Bar No. 983306

CERTIFICATE OF COMPLIANCE

Respondent's Brief Opposing Jurisdiction has been typed using the 14 point Times New Roman font.

_____

By: JULIE H. LITTKY-RUBIN
Florida Bar No. 983306