IN THE SUPREME COURT OF FLORIDA

CASE NO: SC09- 1675
CASE NO: SC09-1676
CASE NO.: 4D08-3612
Trial Court Case No: 502007CAO 14860XXXMB

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

REPLY BRIEF OF PETITIONERS,

JONATHAN GREENFIELD, M.D.,
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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.

Essentially, the crux of Plaintiff s answer brief is that the DNA results end the subject inquiry because Plaintiff interprets the word "father" as used in §768.18, Fla. Stat. to mean "biological father". However, the legislature could not have meant "biological father" because the biological father is not always the "legal father", as in the case *sub judice. DOR* v. *Cummings, 930* So.2d 604,605 (Fla. 2006). Pursuant to *Cummings,* there may be no legal relationship between the biological father and the child if the legal father's rights have not been divested. *Id* at 609.

Recognizing that the biological father is not always the legal father under *Cummings, supra,* and in an attempt to reconcile that issue, the Fourth DCA erroneously held below, and Plaintiff erroneously argues here, that the decedent is the child's legal father because he is listed on the birth certificate. That argument fails as a matter of law. This Court in *Cummings*

has already defined a legal father as *"a man married to the child's mother at the time of birth"*, [Emphasis added]. *Cummings*, 930 So.2d at 605. Moreover, §382.013(2), Fla. Stat. mandates listing the Husband's name as the father on the birth certificate of any child born in Florida during a lawful marriage. The clear meaning of that legislation is inescapable. It is the public policy of this state that the Husband be deemed the legal father of a child born during a marriage. Thus, the term "father" as used in §768.18, Fla. Stat can only refer to the child's legal father because there is no legal relationship between a putative father and the child until such time as the legal father's rights have been divested. *Cummings*, 930 So.2d at 609. Therefore, in this case, the child's legal father pursuant to 768.18, Fla. Stat. must be Mr. Washington, the man married to the child's mother at the time of conception and birth, not the decedent, because Mr. Washington's rights have never been divested.

Plaintiff then argues that Mr. Washington has not objected to a paternity determination but that argument lacks merit. He was never made a party to the paternity action or this action, hence he has not been afforded the opportunity to object. He is an indispensable party to any paternity determination. *Cummings*, 930 So.2d at 609.

In response, Plaintiff and the Court below argue that paternity can be

decided in the wrongful death action under §768.18, Fla. Stat. even if Mr. Washington is not a party. In support of that position, they point to the case of *In Re Estate of Robertson,* 520 So.2d 99 (Fla 4th DCA 1988). However, any reliance on that case is misplaced. *Robertson* involved a paternity action that took place during probate proceedings pursuant to §732.l08(2)(b), Fla. Stat. In *Robertson,* the child was conceived prior to her mother's marriage, but born during the marriage. Id at 100. Her putative father died and she made a claim to inherit his estate. The decedent's mother had alleged that she was the decedent's sole heir and committed fraud on the court by failing to disclose the existence of the child. *Id.* As a result of the evidence, the Court determined paternity of the child which in result disinherited the decedent's mother. *Id.* The 4th DCA affirmed that decision.

The problem with Plaintiff s reliance on *Robertson* is that the statute in that case is very different than the statute in the present case. The *Robertson* decision relies on §732.1 08(2)(b), Fla. Stat, the inheritance statute, which authorizes an adjudication of paternity in probate proceedings. *In Re Estate of Wilson,* 685 So.2d 1206 (Fla. 1997). In fact, the legislature has also expressly authorized paternity determinations in probate proceedings pursuant to § 742.10, Fla. Stat. That statute states:

> *This chapter provides the primary jurisdiction and procedures for determination of paternity for children born out of wedlock.*

> When the establishment of paternity has been raised and determined within an *adjudicatory hearing brought under statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics,* it shall constitute the establishment of paternity for purposes under this chapter. [Emphasis added].

Thus, § 742.10, Fla. Stat. provides primary jurisdiction for paternity determination and that statute authorizes paternity determinations only in certain other specifically enumerated types of proceedings. Wrongful death is not among them. That is why any reliance on *Coral Gables Hospital* v. *Veliz*, 847 So.2d 1027 (Fla. 3rd DCA 2003) is also misplaced. The Third District Court in *Veliz* held that paternity can be determined in a wrongful death action. However, as referenced above, nothing in the wrongful death act or §742.1 0, Fla. Stat. indicates that the legislature authorizes determination of paternity in wrongful death cases. That is not to say that the legislature has left the child without remedy even though paternity cannot be determined and he cannot be a survivor under the wrongful death act. The child can still make a claim for inheritance of the decedent's estate under the inheritance statutes pursuant to §742.l0, Fla. Stat and §732.108(2)(b), Fla. Stat. This belies Plaintiff s emotional appeal to this Court that the law somehow "strip[s] young Javon of his claim altogether". (Appellant's answer brief at pg. 19).

Plaintiff spends alot of time in her answer brief defending her actions

in obtaining the DNA test without obtaining Court authority to do so in violation of *DOR* v. *Privette,* 617 So.2d 305 (Fla. 1993). Plaintiff ultimately claims the defendants made her do it because GREENFIELD on February 8, 2008 initially filed a Motion for Summary Judgment with alternative request to compel DNA testing if the motion for summary judgment was not granted. However, the alternative request for the DNA test was abandoned without a hearing as §742.l0, Fla. Stat. simply did not authorize the presiding Circuit Court to order DNA testing. [1] Plaintiff's motion to continue (OR. V.l Rl16-ll7) the hearing on summary judgment did not ask Judge Garrison to authorize the DNA testing, presumably because Plaintiff recognized that §742.l 0, Fla. Stat. did not authorize him to hold a best interest hearing and determine paternity. Plaintiff s motion simply asked Judge Garrison to postpone the hearing on summary judgment/alternative request to compel DNA testing stating "Plaintiff needs approximately 30 days in order to accomplish this testing." (OR. V.l Rl17). Thus Plaintiff did not even wait for the hearing on the alternative motion for DNA testing to take place before initiating the logistics to coordinate the tissue samples

'The defense's initial reasoning for DNA testing was to rule the case out, not rule it in. In other words, if the DNA test showed that the decedent was not the biological father then obviously this case would have been over and the issues raised here would be moot. However, the mere fact that the DNA test was positive does not establish the decedent as the child's legal father such that he can be a survivor under the wrongful death act.

from the medical examiner's office to the testing lab and initiating the testing. In short, there is nothing that Petitioners did or did not do that compelled Plaintiff to perform DNA testing without first attempting to obtain Court authority, assuming the estate could obtain such authority under Chapter 742. Plaintiff simply did the test on her own and admitted to that at the subject summary judgment hearing that took place on July 28, 2008. Plaintiff did this because she recognized that a DNA test would be the only possible way to attempt to avoid summary judgment on the survivor claim and there was no way to obtain Court authority for the testing, hence she did not even try to obtain it. (HRT, pp.17, lines 13-23). It was not until Judge Garrison granted summary judgment that Plaintiff for the first time requested the opportunity to go to family court in a last ditch effort to further stave off summary judgment. However, Judge Garrison impliedly agreed that the cause of action had already accrued and paternity could not be back dated, hence, he denied Plaintiff s Motion for Rehearing and to stay the summary judgment.

Based on the foregoing, 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). Plaintiff argues that these cases are distinguishable because they involve marriage after the cause of action whereas this case involves establishing paternity after the caused of action accrued. However, that is a distinction without a difference. The point is that where the legal relationship did not exist until after the cause of action accrued, there can be

no loss of consortium claim. That is exactly the what we have here and Plaintiff gives no reason why the application of that legal point should be different here. The Fourth District Court's opinion does not address this issue at all. 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 reverse 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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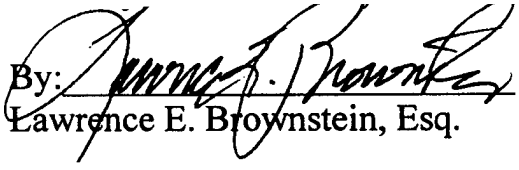

By: Lawrence E. Brownstein, Esq.

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, 10 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 9th day of March, 2010.

CERTIFICATE OF COMPLIANCE

Petitioners', GREENFIELD, Reply 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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