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

REPLY BRIEF OF PETITIONER

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

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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.

In her Answer Brief, DANIELS argues that, despite the clear language of §382.013(2)(a), Fla. Stat. (2009), JAVON is the Decedent's statutory survivor because he was listed on JAVON's birth certificate and, thus, was JAVON's "legal father." In further support of her argument, DANIELS argues that this fact was established to a 99.998% certainty based upon unilaterally obtained DNA results.

These DNA results, however, were obtained: without notice to JAVON's legal father, MR. WASHINGTON; without benefit of any court order; without a guardian ad litem being appointed on behalf of JAVON; and without a court finding, by clear and convincing evidence, that the DNA test was in JAVON's best interests.

The law is clear that JAVON was not the Decedent's son. JAVON's legal father was MR. WASHINGTON because he was married to MS. CERINE at the time of JAVON's birth. §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. 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. See, *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 *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.")

Here, there is no evidence that the issue of paternity was resolved prior to the child's birth. As such, MR. WASHINGTON is the "legal father." As the Second District noted in *S.B. v. D.H*, 736 So. 2d 766, 767 (Fla. 2d DCA 1999): "the initial 'legal father' of any child of a married woman must be the husband unless a paternity action is resolved prior to the child's birth." The District Court explained that its decision was based upon the presumption of legitimacy.

The strength of this presumption is set out in a decision from this Court; a decision which DANIELS conspicuously fails to discuss in her Answer Brief. In *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305, 308 (Fla. 1993), this Court stated:

> Court after court in the United States has held that the presumption and its related policies are so weighty that they can defeat the claim of

a man proven beyond all doubt to be the biological father.

Thus, even if the Court were to accept the results of the unilaterally obtained DNA test, the results cannot defeat the presumption of legitimacy in favor of MR. WASHINGTON. This is particularly true where, as here, the legal father was never given notice of the paternity action. See, *Florida Department of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006) (a man married to the child's mother at the time of birth is an indispensable party in an action to determine paternity).

Furthermore, the DNA test should not have been considered by the Fourth District nor should it be considered by this Court. As this Court ruled in *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305, 308 (Fla. 1993):

> 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[1] and a guardian ad litem appointed to represent the child.

Before such a blood test can be ordered "the trial court ordering the blood test must decide…whether the child's best interests will be served by being declared illegitimate and having parental rights transferred to the biological father." *Id.* at 309. Further, "[t]he one seeking the test bears the burden of proving

[1] Subsequently, this court held that the legal father is an indispensable party in a paternity action brought pursuant to Chapter 409, Florida Statutes. *Florida Department of Revenue v. Cummings*, 930 So.2d 604, 605 (Fla. 2006).

these elements by clear and convincing evidence." *Id.* at 308.

Notably, DANIELS never proved to any court, by clear and convincing evidence or any other evidentiary standard that JAVON's best interests would be served by being declared illegitimate. Further, no guardian ad litem was appointed to represent JAVON's interests. Rather, it was MS. CERINE who unilaterally authorized the DNA testing. [OR. V.3, 548; HRT P. 17, L. 12-23].

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

DANIELS argues that the issue of paternity should be determined in the Wrongful Death proceeding below based upon the Third District's decision in *Coral Gables Hospital, Inc. v. Veliz,* 847 So. 2d 1027 (Fla. 3d DCA 2003). Notably, *Veliz* was decided prior to this Court's decision in *Florida Department of Revenue v. Cummings*, 930 So. 2d 604, 605 (Fla. 2006)(the "legal father" is an indispensible party to any determination regarding paternity).

Even though decided before *Cummings,* the Fifth District properly

recognized the legal father's right to be heard on the issue of paternity. In *Achumba v. Neustein*, 793 So.2d 1013 (Fla. 5th DCA 2001)[2], the Fifth District ruled 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.

DANIELS cites the Fourth District's decision of *In Re Estate of Robertson*, 520 So. 2d 99 (Fla. 4th DCA 1988) to support her contention that JAVON's status as the Decedent's survivor can now be adjudicated in the context of a Wrongful Death proceeding. Her reliance upon the *Robertson* decision is misplaced.

The *Robertson* decision involved the application of §732.108(2)(b), Fla. Stat. (1985). Unlike the Wrongful Death statute, this subsection of the statute

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[2] DANIELS is correct that the Fourth District found *Achumba* distinguishable because the Decedent was listed on the birth certificate herein, whereas the *Achumba* decision involved a birth certificate which properly listed the husband of the mother as the child's father. What DANIELS apparently fails to recognize is that, by operation of law, MR. WASHINGTON should have been listed on the birth certificate. See §382.013(2)(a), Fla. Stat. (2009). See also, *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**.")

governing intestate succession and wills specifically allows for the adjudication of paternity after the death of the putative father. Specifically, §732.108(2)(b), Fla. Stat. (1985) provides:

> (2) For the purpose of intestate succession…a person born out of wedlock is a lineal descendant of his or her mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendant of his or her father and is one of the natural kindred of all members of the father's family, if:
>
> (b) **The paternity of the father is established** by an adjudication before or **after the death of the father**.

It is of note that, while DANIELS urges this Court to adopt the *Veliz* decision and allow this issue to be decided by a jury in a Wrongful Death action, she fails to address any of the issues raised by this Petitioner at pages 24-25 of the Initial Brief. Specifically, what is 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?

The failure to address any of these questions or to explain MS. CERINE's actions is most telling in light of DANIELS' emotional comments made on behalf of JAVON.[3] These comments only serve to highlight why this issue should not be

[3] DANIELS referred to JAVON as a "four year-old" and "this young boy" and then noted that the doctors discharged the Decedent a "day before his young son's fourth birthday". See Answer Brief at pages 1 and 4. DANIELS also argued

decided by a jury in a Wrongful Death action.

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.

DANIELS erroneously argues that *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) are inapplicable because a legally recognized father/son relationship existed between the Decedent and JAVON at the time of Decedent's death. Specifically, she argues that the Decedent was JAVON's legal father at the time of his death because he was listed as such on the birth certificate.

The Decedent was not JAVON's legal father even though he was erroneously listed as such on the birth certificate. As previously noted, by operation of law, MR. WASHINGTON should have been listed on the birth certificate. See §382.013(2)(a), Fla. Stat. (2009). See also, *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**.")

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that "the Fourth District could not legally, or in good conscience, allow the application of a rebuttable presumption to the slam the doors of the courthouse in the face of this little boy." *Id.* at 18. As GREENFIELD properly pointed out, the Legislature has not left JAVON without a remedy. See GREENFIELD Answer Brief at page 4.

Because the Decedent was not JAVON's legal father at the time of his death, this Court should adopt the reasoning of the *Fullerton* and *Tremblay* courts and rule that the survivor has no claim because the legal relationship, if any, which gives rise to the claim did not exist until after the cause of action accrued.

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,

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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 22nd day of March, 2010.

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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.

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