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L.T. CASE NO. 5D06-3639

SUPREME COURT OF FLORIDA

RANDALL B. WHITNEY, M.D., JAMES SCOTT PENDERGRAFT, IV, M.D., and ORLANDO WOMEN'S CENTER, INC., a Florida corporation,
Petitioners,

vs.

C.H., individually, and as Settlor of the J.F. Special Needs Trust, and THE CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION, INC., as Trustee of the J.F. Special Needs Trust,
Respondents.

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The above captioned appeal is an effort by the Petitioners, RANDALL B. WHITNEY, M.D.; JAMES SCOTT PENDERGRAFT, IV, M.D. and ORLANDO WOMEN'S CENTER, INC., a Florida corporation ("Dr. Whitney"), to have this Court exert its discretionary jurisdiction to review the opinion of the Fifth District Court of Appeal dated May 30, 2008. A conformed copy of the Fifth District Court of Appeal's May 30, 2008 opinion is in the attached Appendix at Tab A.

The underlying lawsuit involves a claim brought on behalf of the Respondent, C.H., individually, and as Settlor of the J.F. Special Needs Trust, and THE CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION, INC., as Trustee of the J.F. Special Needs Trust (the "Respondent"), that has taken various forms over the course of the litigation. It is the various sets of allegations that have been made on behalf of the Respondent, and indeed the identity of the Respondent over the course of this litigation, that is at the crux of the legal issues presented to this Court for its discretionary review.

The events giving rise to the underlying litigation occurred on November 16, 2001, when C.H., 22 weeks pregnant, sought to undergo a pregnancy termination procedure at Dr. Whitney's facility. The Respondent has alleged that the pregnancy termination procedure was performed negligently, and that as a result,

C.H. gave birth to a child, J.F., who suffers from significant physical, mental, and emotional deficits.

The Respondent initially filed a lawsuit in which the claimant was identified as follows: "The Plaintiff, Douglas B. Stalley, as guardian de son tort of the property of J.F., a minor." The Respondent then filed an Amended Complaint that did not change the identity of the claimant in any meaningful way. The only distinction is that Douglas B. Stalley had actually been appointed as guardian of J.F., and the Complaint was amended to reflect that fact.

Further, the cause of action alleged in both the original Complaint and the first Amended Complaint was a cause of action for wrongful life, a cause of action that is not recognized under Florida law, and which this Court has previously rejected. Dr. Whitney filed a Motion for Summary Judgment, which the Circuit Court in and for Orange County, Florida granted, on the basis that this Court had previously recognized that wrongful life is not a cause of action that is recognized under Florida law.

At the conclusion of the hearing in which the trial court granted Dr. Whitney's Motion for Summary Judgment, the Respondent move *ore tenus* for leave to amend the Complaint in an effort to allege a cognizable claim for wrongful birth. The trial court granted the Respondent leave to amend her

pleading, and the Respondent then submitted a Second Amended Complaint which successfully alleged a cause of action for wrongful birth, rather than wrongful life. In order to do so, the Respondent had to substitute in a new party, C.H., individually, and as Settlor of the J.F. Special Needs Trust, as well as The Center for Special Needs Trust Administration, Inc., as the Trustee of the J.F. Special Needs Trust. The Second Amended Complaint was the first time in which C.H. had been identified as a party to this litigation.

Dr. Whitney filed a Motion to Dismiss the Second Amended Complaint, arguing that the allegations for wrongful birth brought on behalf of C.H. did not relate back to the filing of the earlier Complaints, because the Second Amended Complaint alleged a completely different cause of action, wrongful birth, and further that the Second Amended Complaint brought in a new party, C.H., rather than J.F. The trial court agreed, and dismissed the Second Amended Complaint with prejudice, because the Second Amended Complaint was filed and served more than four years after the cause of action for wrongful birth had accrued.

The Respondent appealed the trial court's decision to the Fifth District Court of Appeal. The Fifth District reversed, finding that wrongful birth and wrongful life are not distinct causes of action under Florida law, and that there was a unity of interests among the parties named in all three versions of the underlying

Complaints, such that the trial court had erred in ruling that the Second Amended Complaint did not relate back to the dates of filing of the earlier Complaints. Dr. Whitney timely filed a Motion for Rehearing and a Motion for Rehearing *En Banc*, arguing that the Fifth District's opinion was inconsistent with its earlier decision in ***West Volusia Hospital Authority v. Jones***, 668 So.2d 635 (Fla. 5th DCA 1996), or, in the alternative, that the issues raised in this appeal constituted questions of great public importance that deserved certification to this Court. The District Court denied these motions on July 29, 2008, and Dr. Whitney timely submitted a Petition seeking to have this Court exert its discretionary jurisdiction to review the opinion of the Fifth District Court of Appeal. The Petition was filed on August 27, 2008.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal's May 30, 2008 opinion conflicts with this Court's opinion in ***Kush v. Lloyd***, 616 So.2d 415 (Fla. 1992). This Court in ***Kush*** made it very clear that a cause of action for wrongful birth is separate and distinct from a cause of action for wrongful life. The Fifth District's opinion in this case blurs that distinction, and contrary to this Court's ruling in ***Kush***, finds that these are merely distinct legal theories under the general rubric of one cause of action for medical malpractice. As a practical matter, this refusal to recognize this Court's distinction as set forth in ***Kush*** led the Fifth District to the conclusion that the allegation of a claim for wrongful birth made more than four years after the accrual of the cause of action could relate back to the filing of a the original Complaint and first Amended Complaint that stated causes of action for wrongful life, a cause of action that is not recognized under Florida law. To allow the Fifth District's decision to stand will not only eliminate the distinction between wrongful birth and wrongful life that this Court recognized in ***Kush***, but will also be used to greatly expand the relation-back doctrine, to the point where the doctrine itself will no longer be recognizable.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Article V, Section 3(b)(3) Florida Constitution (1980).

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *KUSH v. LLOYD*, 616 SO.2D 415 (FLA. 1992).

The opinion of the Fifth District Court of Appeal in the instant matter reached the conclusion that causes of action for wrongful birth and wrongful life are not distinct causes of action at all, but rather are merely different legal theories under the umbrella of medical malpractice. Therefore, alleging a claim for wrongful birth more than four years after the cause of accrued, when the only prior allegations had been for wrongful life, is perfectly acceptable, and relates back to the filing of the earlier Complaints. The Fifth District Court of Appeal refused to recognize that this Court in ***Kush*** had previously stated that in fact these are two distinct causes of action, and not merely two different legal theories under the broad umbrella of medical malpractice. Because the Fifth District Court of Appeal's opinion constitutes an express and direct conflict with this Court's statements in ***Kush***, this Court should exert its discretionary jurisdiction to review the Fifth District Court of Appeal's May 30, 2008 opinion in order to address this conflict.

This Court in ***Kush*** defined wrongful birth as follows:

> "Wrongful birth" is that species of medical malpractice in which parents give birth to an impaired or deformed child and allege that negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy.

Id. at 417. This Court went on to define wrongful life as follows:

> "Wrongful life" is that species of medical malpractice in which a cause of action is brought on behalf of a child born with birth defects, where the birth allegedly would not have occurred but for the negligent medical advice to or treatment of the parents. Black's Law Dictionary 1613 (6th Ed. 1990). For reasons expressed below, the tort does not exist in Florida.

Id.

This Court in ***Kush*** went on to identify wrongful birth and wrongful life each as separate and distinct torts under Florida law. For example, this Court stated: "However, we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth." ***Id.*** at 422. This Court went on to state:

> Petitioners contend that damages of this type essentially are a claim for "wrongful life" – a tort Florida has not recognized. While we agree that "wrongful life" is not a part of Florida tort law, we do not accept the remainder of this argument. Part of the confusion stems from the fact that some jurisdictions have at least suggested that the tort of "wrongful life" can address two separate concerns: (1) the extraordinary expenses associated with caring for the impaired child until its death; and (2) liability for "suffering" caused by the impairment.

Id. at 423. Thus, this Court in ***Kush*** unequivocally stated that wrongful birth and wrongful life are separate and distinct torts.

The Fifth District Court of Appeal used to recognize this distinction. For example, in ***DiNatale v. Lieberman***, 409 So.2d 512 (Fla. 5th DCA 1982), the Fifth District Court of Appeal stated: "Wrongful life" has been defined as the child's cause of action for having been born deformed, and "wrongful birth" as the parents' cause of action for the expenses of caring for the defective child." ***Id.*** at 513. However, with the Fifth District's May 30, 2008 opinion, it has strayed away from its former decision in ***DiNatale***, and more importantly it has strayed away from this Court's formulation in ***Kush***. Whereas this Court has unequivocally stated that wrongful birth and wrongful life are separate and distinct causes of action, now the Fifth District Court of Appeal has decided that these are merely distinct legal theories under the general rubric of medical malpractice, and therefore the assertion of a cause of action for wrongful birth will relate back to the assertion of a cause of action for wrongful life.

This Court should exert its discretionary jurisdiction to review this matter because the Fifth District's May 30, 2008 opinion, blurring the lines of what constitutes a separate and distinct cause of action, will create havoc in the field of amending complaints. This case is a perfect example of the exponential increase

that the application of the Fifth District's formulation will have if it is allowed to stand. The blurring of the lines of what constitutes a separate and distinct cause of action will allow for virtually unlimited amendments to pleadings, and the practical elimination of statutes of limitations. Plaintiffs will be able to take the position that rather than stating a completely distinct cause of action that should not relate back to the filing of the original pleading, instead the allegations of an amended pleading are merely distinct legal theories under the general rubric of negligence. The Fifth District's treatment of allegations of wrongful birth and wrongful life is contrary to this Court's opinion in ***Kush***, and creates a rule of law that will undermine, and perhaps even eliminate the significance of the relation-back doctrine.

Under the Fifth District's formulation, virtually any amendment will be deemed to relate back, regardless of whether it states a new and distinct cause of action, and regardless of whether it brings a new party into the litigation.

CONCLUSION

For the reasons stated above, Dr. Whitney respectfully requests that this Court exert its discretionary jurisdiction to review the Fifth District Court of Appeal's decision below, and thereby allow this Court to consider the merits of Dr. Whitney's arguments.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 5th day of September, 2008 to all parties on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla. R. App. P. 9.100 (l). This document is being submitted in New Times Roman 14 point font.

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