IN THE SUPREME COURT OF FLORIDA

CASE NO: 87,110

THE FULTON COUNTY ADMINISTRATOR,
as Administrator of the Estate of
LITA MCCLINTON SULLIVAN,

Petitioner/Plaintiff,

v.

JAMES VINCENT SULLIVAN,

Respondent/Defendant.
_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Lita McClinton Sullivan was killed as a result of gunshot wounds sustained on January 16, 1987. (R. 1470, 1497.) Her father, Emory C. McClinton, was appointed Temporary Administrator of her estate on January 25, 1987. (R. 187.) In that capacity, Mr. McClinton filed this lawsuit on December 23, 1991, almost five years after the homicide. (R. 1.)

Each of the criminal investigators who worked on this case immediately recognized this murder as a "contract killing," whereby someone hired the gunman to shoot and kill the victim. (R. 725, 1481, 1766.) The "almost businesslike" nature of the murder focused as "a kind of mission" upon the death of the "targeted individual," given the total absence of any "ransacking" or other apparent criminal objective such as theft or rape. See, e.g., testimony of FBI Special Agent Todd Letcher (R. 1481-83); testimony of Special Agent Robert Ingram (R. 1763-68); and testimony of Atlanta Police Dept. Sgt. Welcome Harris (R. 724-26).

Petitioner placed great emphasis upon Respondent's financial motive to make "a million dollars" by ending the "war"-like divorce proceedings, scheduled for trial on January 26, 1987, wherein a hearing to address the enforceability of the couple's postnuptial agreement was scheduled for later on January 16, 1987, the day of the murder, all of which made him "the immediate suspect." (R. 1499, 1768, 1802-03, 1849, 1853, 1865, 1878, 2095, 2099, 2127-28.)

The investigative authorities "automatically" focused upon Respondent as the "prime suspect" from the beginning and the only member of the victim's circle of contacts and acquaintances who was not ruled out. See, e.g., testimony of FBI Special Agent Todd Letcher (R. 1483-84, 1611, 1703, 1709, 1726); testimony of Special Agent Robert Ingram (R. 1765-69, 1774, 1789, 1793); and testimony of Atlanta Police Dept. Sgt. Welcome Harris (R. 698-739). No other possible suspect ever appeared to have "the means, motive, and opportunity." (R. 1611.)

Petitioner's trial witnesses testified that the evidence raising suspicions about Respondent's involvement in this homicide had been gathered within days or weeks of the murder. See, e.g., Depo. of Muriel Alls (Southern Bell representative with Respondent's telephone records)(R. 680-90); Depo. of Sgt. Welcome Harris (Atlanta Police Dept., original investigators who ruled out all suspects other than Respondent, the initial target of their investigations)(R. 698-739); testimony about interviews with flowers salesperson, Randall Benson, beginning on January 17, 1987 (R. 1591, 1908); and testimonies about Respondent's telephone calls (R. 1770-73). When Special Agent Ingram summarized the reasons authorities suspected Respondent, he referenced only clues available within days of the murder. (R. 1806.)

Respondent's telephone records upon which this prosecution rested were "automatically" investigated "as a matter of course." (R. 1484.) The answers that Respondent gave to the questions of investigators served only to heighten, rather than to diminish, the

suspicions about his liability. (R. 1705.)

Petitioner's Trial Testimony Concerning the Statute of Limitations

No one testified at trial or otherwise as a representative of Petitioner, the Fulton County Administrator. Instead, Petitioner's counsel addressed the victim's father and mother, Emory and JoAnne McClinton, as their clients throughout the trial (R. 942, 964, 1180, 1447, 2102, 2124), and Petitioner rested its case immediately following their testimonies (R. 2011).

In his trial testimony, Emory McClinton never made any reference to either (1) his due diligence in pursuing this claim, (2) his reliance upon any specific misrepresentations of the Defendant, or (3) when he first learned of the potential claim. (R. 1983-94.) Instead, he testified only of the absence of any contact he had with Defendant since the murder. (R. 1991-92.)

On cross-examination, Respondent asked about Mr. McClinton's receipt of $250,000 as the sole beneficiary of the insurance policy on his daughter's life. (R. 1993.) At closing argument, Respondent explained that this testimony demonstrated not that Mr. McClinton had anything to do with his daughter's death, but that Mr. McClinton had considerable resources with which to employ attorneys and investigators in pursuit of all potential claims based on that death. (R. 2123.)

Similarly, the decedent's mother, JoAnne McClinton, never addressed in her trial testimony any statute of limitations issues.

(R. 1995-2011.) She did note, however, that she had neither seen nor communicated with Respondent since her daughter's death. (R. 2009-10.)

Respondent's Motions for Directed Verdict and for New Trial

At the close of Respondent's case in chief presented at trial, Respondent (representing himself pro se) moved for a directed verdict on three grounds, the first of which was "that the filing of the case is barred by the statute of limitations." (R. 2012.)

The trial court denied both this motion and Defendant's renewed motion for directed verdict at the close of all evidence. (R. 2016, 2082-83.) In denying the motion for directed verdict on each of the three grounds raised by Defendant, the trial court explained: "The statute of limitations gives me the most problem . . . ." (R. 2018.) Defendant responded: "It was the main issue throughout, Your Honor." (R. 2022.) Respondent also filed his "Motion for a New Trial" within ten days of the entry of Final Judgment, based in part upon the argument that "[s]ufficient relevant facts and evidence were known, or should have been known, to all parties of interest" shortly after the contract murder on January 16, 1987. (R. 993.)

The Jury Instruction and Verdict Form

In the charging conference, Respondent clearly and timely objected to the presentation of the statute of limitations issues in Petitioner's proposed jury instruction and verdict form, both of which the trial court adopted over Respondent's objections. (R.

2075-81.)

> THE COURT: If you find by the greater weight of the evidence that James Vincent Sullivan actively participated in fraudulent concealment in arrangement of the murder of Lita McClinton Sullivan --
>
> MR. SULLIVAN: Your Honor, shouldn't that be continued to say, for the purpose of precluding knowledge of this being a suspect . . . [s]o their knowledge of his being a suspect was denied for the purposes of this lawsuit?

(R. 2079-81.)

Nonetheless, at the trial's conclusion, the court read without elaboration Petitioner's proposed jury instruction on the issue of fraudulent concealment. (R. 2132. See also the written jury instruction at R. 937.) Similarly, question 2 on the verdict form addressed only whether Defendant "actively participated in fraudulent concealment of his involvement" in the homicide. (R. 989.) Nothing in the record suggests that the jury considered Petitioner's burdens to prove (a) its own due diligence, (b) the success of Respondent's concealment efforts, or (c) Petitioner's reasonable reliance upon Respondent's affirmative misrepresentations until some date less than two years prior to the filing of the lawsuit.

The Prejudice to Respondent

In his own closing argument, Respondent summarized the prejudice that he suffered from Petitioner's delay in bringing

suit:

> In this instance, I'm forced to use simply their testimony, their own investigative reports. I have nothing else to use; it's not available. . . .
>
> No one knows who was on the phone; no one knows what was discussed. . . . Something terribly disturbing, very disturbing to me has been, and let me ask you the question, this is where fairness comes in. If these phone calls were so important, why did they wait five years to ask me about them? Who could have ever remembered a phone call five years ago? Remember, they testified they had these records; it's right away. . . . If I had been asked then, if I had been asked a month later, probably would have remembered. But five years later, impossible. . . . What we don't know [is] if I took the call--five years later when they first asked me, I don't have a prayer of remembering.

(R. 2103, 2106-07, 2113, emphasis added.)

Respondent was forced to represent himself pro se because of the last minute withdrawal of his counsel two business days before the trial began. Init. Brief at 14-17. The trial record demonstrates the prejudicial effect of the extensive hearsay testimony offered by the criminal investigators who testified at Petitioner's request. (See, e.g., R. 1470-71, 1498-50, 1545, 1548, 1724-29, 1757-61, 1767, 1770-71, 1777, and 1780). The trial court commented on this prejudice:

> Agent Letcher testified at length . . . to a lot of hearsay . . . and a lot of speculative stuff . . . . It was unobjected to . . . . There's a lot of evidence that came before this Court or this jury, I should say, that probably would not have been admissible in a criminal case. . . . [A]s I indicated earlier on in this case, there was a lot of unobjected evidence that did come before this jury.

(R. 1609, 2141.) Respondent had already been prosecuted in federal court based upon the same factual grounds, wherein the court granted Respondent's motion for judgment of acquittal at the conclusion of the Government's case in chief. (R. 1159, 1168-70, 1704-05, 1712-14.)

The Final Judgment and Reversal

The trial court entered Final Judgment against Respondent, awarding $3,500,000 in compensatory damages and $500,000 in punitive damages to Petitioner on this wrongful death claim. (R. 991-92.) The Fourth District Court of Appeal reversed based upon the violation of Florida's two-year statute of limitations for wrongful death claims. Sullivan v. Fulton County Administrator, 662 So. 2d 706 (Fla. 4th DCA 1995). In its opinion, the Fourth District certified the following question to this Court: "Are statutes of limitations for civil actions tolled by the fraudulent concealment of the identity of the defendant?" Id. at 710.

SUMMARY OF THE ARGUMENT

If this Court chooses to accept jurisdiction, then this Court should answer the Fourth District's certified question in the negative. Florida precedent that binds this case limits the scope of the fraudulent concealment doctrine, which can toll a statute of limitations period, to the defendant's concealment of a cause of action. In the decision below, the Fourth District properly

determined that the doctrine does not apply where the plaintiff knows that he has a claim based upon wrongfully-caused injuries, but simply does not know whom the proper defendants are. This limitation of the fraudulent concealment doctrine represents the majority rule in this country.

Petitioner fails to acknowledge the well-established public policies that justify a bar to untimely claims brought by plaintiffs who fail to pursue unknown defendants with due diligence, despite actual or constructive notice of their claims based upon known injuries and wrongdoing. If plaintiffs know of their injuries caused by wrongdoing, but are not required to pursue the wrongdoers with due diligence, then none of the policies supporting the enforcement of statutes of limitations are served. On the other hand, there is no justification for imposing any due diligence obligations upon plaintiffs who do not know that they have a cause of action based upon wrongfully-caused injuries.

Moreover, this Court should not even accept jurisdiction of this appeal because the decision of the Fourth District is supported by other, substantive grounds which are self-sufficient in themselves. First, no record evidence shows that the undisputed elements of fraudulent concealment were satisfied so as to toll the statute of limitations. No testimony or other evidence suggests that the McClintons acted with due diligence, that they ever relied upon any specific and affirmative misrepresentations made by Respondent, or that any such misrepresentations reasonably deterred the McClintons from suspecting Respondent until December 23, 1989,

two years before they filed this lawsuit. On these grounds alone, the Fourth District's mandate to enter judgment for Respondent must be upheld.

Second, the jury was neither instructed to address these undisputed elements nor asked whether any specific and affirmative misrepresentations made by Respondent reasonably deterred the McClintons from suspecting that they could sue Respondent until December 23, 1989. This ground also precludes the appellate relief that Petitioner seeks, since it requires remand for a new trial that asks the jury to address these undisputed and essential elements of the fraudulent concealment doctrine.

I. PETITIONER FAILS TO DISTINGUISH BINDING FLORIDA PRECEDENT LIMITING THE DOCTRINE OF FRAUDULENT CONCEALMENT TO THE CONCEALMENT OF A CAUSE OF ACTION.

Petitioner fails to distinguish binding Florida precedent that limits the application of the fraudulent concealment doctrine to the concealment of the cause of action, rather than the mere concealment of who participated in the alleged wrongdoing. International Bhd. of Carpenters, Local 1765 v. United Ass'n of Journeymen, Local 803, 341 So. 2d 1005 (Fla. 4th DCA 1976), cert. denied, 357 So. 2d 186 (Fla. 1978); Smith v. Greater New York Mutual Ins. Co., 444 So. 2d 488 (Fla. 4th DCA 1984). Although Respondent never admitted that he participated in this contract killing, Respondent also never suggested that the McClintons could not bring a wrongful death claim against the conspirators behind

this obvious contract killing.[1]

The Fourth District's International Brotherhood decision rested in part upon the absence of any Florida legislation expanding the grounds for tolling statutes of limitations to include concealment of participation, despite the inclusion of numerous other statutory tolling grounds. This limitation of the fraudulent concealment doctrine is "inherently harsh," but the "[h]arsh results represent a trade-off which the Legislature has decided it is willing to make in exchange for the burying of stale claims. . . . In the end, its determination should, and therefore does, prevail." International Brotherhood, 341 So. 2d at 1006-07 (emphasis in original). Courts of other states have also considered the limited scope of their respective tolling statutes as a reason to avoid expansion of the fraudulent concealment

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[1] In its Brief, the Amicus Curiae argues that Respondent "concealed not merely his identity as an accomplice to the murder, but he concealed the entire existence of a cause of action . . . . The Plaintiff's legal representative was aware of one cause of action for wrongful death against the man who pulled the trigger, but the existence of his co-conspirator was unknown, not merely his name and address." Amicus Brief at p. 11. This is an interesting interpretation of the factual record, which the Amicus must not have reviewed. No one ever testified that anyone ever suspected that the gunman had acted alone. Instead, all of the testimony on this point consistently described this as a "contract killing" that appeared as such from the beginning. See Statement of Facts above at p. 1.

In the absence of any attempt to point to any affirmative misrepresentations of Defendant about the cause of action, the Amicus's argument seems to suggest that no statutory limitations period will ever accrue on a conspiracy claim until a conspirator confesses. No judicial authority anywhere supports such a proposition.

doctrine's scope.[2]

Since 1828, the Florida Legislature has addressed the tolling of statutes of limitations based upon a known defendant's physical concealment of himself, but it has never extended that rule to the mere concealment of the defendant's identity as a participant in the alleged wrongdoing.

> **When limitations tolled**. --
> (1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:
> (a) Absence from the state of the

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[2] Ohio courts, which do not apply the doctrine of fraudulent concealment unless the defendant conceals not only his participation but also the cause of action, have reasoned that their similar statute supports this limited application of the doctrine.

> In other words, that statute has reference to the concealment of the defendants while the petition avers concealment of their acts or conduct. Statutes of limitation are vital to the welfare of society and are favored in the law. Exceptions in statutes of limitation in favor of persons under disability are construed strictly, and cannot be enlarged from considerations of apparent hardship or inconvenience.

Moore v. District 50 of United Mine Workers of America, 131 N.E.2d 462, 463 (Ohio Ct. Comm. P. 1954).

Similarly, the Michigan Supreme Court found "no compelling reason" to apply retroactively a new Michigan statute expanding the fraudulent concealment doctrine to the concealment of "the identity of any party," so as to overrule its previous holdings that refused to apply the doctrine without concealment of the cause of action. Vega v. Briggs Mfg. Co., 341 Mich. 218, 222-23, 78 N.W.2d 81, 84 (Mich. 1954) (affirming dismissal of conspiratorial assault claims). Indiana courts have also addressed the limited scope of their tolling legislation: "The concealment recognized by our statute relates to the cause of action and not to the identity of the party against whom the action may be brought." Landers v. Evers, 24 N.E.2d 796, 797 (Ind. App. 1940).

> person to be sued.
> (b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that process cannot be served on him.
> (c) Concealment in the state of the person to be sued so that process cannot be served on him.

§ 95.051(1)(a-c), Fla. Stat. (1995). "No disability or other reason shall toll the running of any statute of limitations except those specified . . . ." Id. at § 95.051(2). The Florida legislature has expressly chosen to toll the statutory limitations period based upon a known defendant's (a) physical flight from the jurisdiction, (b) misrepresentations that obstruct the service of process upon him, and (c) physical concealment, but not based upon an unknown defendant's failure to identify himself as part of a wrongful conspiracy.

This Court has repeatedly analyzed the issue of adding to the legislated grounds for tolling statutes of limitations.

> "We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof."

Faulk & Coleman v. Harper, 62 So. 2d 62, 65 (Fla. 1952) (applying rule of "expressio unius est exclusio alterius" to foreclose tolling of limitations period based upon incapacity of plaintiff suffered after plaintiff filed claim), quoting Dobbs v. Sea Isle

Hotel, 56 So. 2d 341, 342 (Fla. 1952).[3] "[T]he modern tendency is against grafting exceptions to [statutes of limitations] where the legislature has not seen fit expressly to so provide. Exceptions to the operation of such statutes will not be read into them merely to prevent hard cases." 35 Fla. Jur. 2d, Limitations & Laches § 57 at p. 70.[4]

The Florida State Legislature has refused to address concealment of one's participation in a conspiratorial wrong as a ground for tolling any statutory limitations period, even though the Legislature has addressed numerous, similar tolling grounds. As shown below, at least three, well-established public policies support the exclusion of this new ground proposed by Petitioner.

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[3] "When the legislature refuses to write exceptions into the act the courts have consistently refused to do so." Carey v. Beyer, 75 So. 2d 217, 217-218 (Fla. 1954) (affirming judgment for defendant based upon absence of plaintiff's insanity among list of statutory grounds for tolling limitations period). See also Brown v. MRS Mfg. Co., 617 So. 2d 758, 760 and n.6 (Fla. 4th DCA 1993) (Florida courts did not recognize tolling of limitations based upon automatic bankruptcy stay until legislature added express provision on that point to Florida Statutes section 95.031(1) in 1989).

[4] In concurring with this Court's decision to bar a murder prosecution based upon the two-year statute of limitations applicable in 1972, Justice England explained: "Statutes of limitations have always barred stale prosecution attempts, even though the product of villainy is the loss of a human life. This case reflects no more than a faithful application of the well-established legal principle that courts are bound to follow explicit legislative guidelines." Reino v. State, 352 So. 2d 853, 862 (Fla. 1977) (England, J., concurring).

A. PETITIONER FAILS TO ADDRESS THE PUBLIC POLICIES IN SUPPORT OF APPLYING THE FRAUDULENT CONCEALMENT DOCTRINE ONLY WHERE THE CAUSE OF ACTION IS CONCEALED.

Petitioner simply ignores all of the well-established public policies that support this limited application of the fraudulent concealment doctrine. At least three such policies are readily apparent.

First, Petitioner fails to acknowledge the need to protect the fairness of the adversary system to ensure that all defendants, however responsible for the plaintiff's losses, have fair access to witness memories and other evidence subject to deterioration over time.[5] Second, Petitioner fails to acknowledge the need for final repose that puts an end to potential litigation, both in order to make the court system manageable and to discourage endless provocation among potential litigants.[6] Third, Petitioner fails to

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[5] Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976) ("The purposes of the statutes of limitations are to protect defendants . . . , thrown off guard for want of reasonable prosecution, 'against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage.'").

[6] "Such statutes rest upon sound public policy and tend to the peace and welfare of society and are deemed wholesome. . . ." "[S]tatutes of limitations are favored by the courts. . . . They are statutes of repose, founded upon a rule of necessity and convenience and the well-being of society." "The purpose of a statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs.'"

Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg &

acknowledge the need to encourage plaintiffs to investigate their claims with due diligence so as to make the truth-seeking function of the adversary system more effective.[7]

These policies support a distinction between knowledge of injuries cause by wrongful conduct and knowledge of who participated in the wrongful conduct. When a potential plaintiff has a reason to know of the wrongful conduct and his resultant damages, then there is a rational basis for the imposition of a due diligence obligation upon him. His temporary ignorance about the identities of the responsible parties does not justify a total release from his due diligence obligations, imposed upon him in support of all of the public policies underlying statutes of limitations. None of those policies are served unless the limitations period accrues against known claims. The potential

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Feldman Fine Arts, 717 F. Supp. 1374, 1385-86 (S.D. Ind. 1989) (citations omitted), aff'd, 917 F.2d 278 (7th Cir. 1990).

> In addition to the general policy favoring repose and the quieting of titles, the statute seeks to relieve defendants of the cost and vexation of protracted litigation and the uncertainty of contingent liabilities. Not only defendants but also the courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars would instantly increase if actions now time-barred were revived by a new statute or tolling rule.

State v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687, 694 (10th Cir. 1981) (affirming dismissal of securities fraud claims as barred by statute of limitations).

[7] Nardone, 333 So. 2d at 36 (Fla. 1976) ("quest for truth" hampered by "tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses" caused by statute of limitations violations).

plaintiff must be encouraged to pursue his known cause of action by diligently investigating the responsible parties.

By contrast, when the potential plaintiff does not know of the cause of action, then there is no justification for penalizing him with the bar of the statute of limitations.

> In this Court's view a plaintiff need not know the identity of a potential defendant before the statute of limitations begins to run. . . . [Equitable tolling was] designed to aid people who were injured by the wrongful acts of others and yet through no fault of their own are unaware of a potential lawsuit. Two situations are typical:
>
> (a) Someone is injured by the act of another, but the injury does not manifest itself until many years later.
>
> (b) Someone suffers an injury that by itself doesn't indicate it was caused by another's wrongful acts.
>
> But when a person is injured and he knows it was wrongfully caused by the acts of some other person, he then has two years to investigate the situation and determine who is the correct defendant.

McDaniel v. Johns-Manville Sales Corp., 542 F. Supp. 716, 718-19 (N.D. Ill. 1982) (emphasis in original) (summary judgment entered against plaintiffs, who knew that they had been wrongfully injured and failed to prove that reasonable investigations would not have revealed claims against asbestos manufacturers). As the California Supreme Court recently explained, "the rationale for distinguishing between ignorance of the wrongdoer and ignorance of the injury" as "premised on the common-sense assumption that once the plaintiff is aware of the injury, the applicable limitations period . . . normally affords sufficient opportunity to discover the identity of all the wrongdoers." Bernson v. Browning-Ferris Ind. of California, 7 Cal. 4th 926, 30 Cal. Rptr. 2d 440, 873 P.2d 613, 616 (Cal.

1994).

Courts from other jurisdictions have explained that the decision to impose this burden upon plaintiffs who do not initially know whom to sue rests upon a balancing of the various hardships reflected by these policies against the hardship suffered by plaintiffs barred by the statute of limitations.

> [T]he court will balance the hardship on the plaintiff caused by the bar of his suit against the increased burden of a defendant to obtain proof of his defense after the passage of time. . . . . The hardship imposed upon a party who is unaware he has an actionable injury until after the limitations period has run is much more severe than that imposed upon a party who knows, or reasonably should know, he has suffered an actionable injury but does not learn the identity of the person who injured him until the limitations period has passed. The former is in no position to take advantage of the limitations period in which to determine the identity of the party injuring him. The latter, however, knows he has a cause of action, has the time given by the limitations period to attempt to learn the identity of the person who injured him and is not in the position of being barred before ever knowing of his right to sue.

Guebard v. Jabaay, 65 Ill. App. 3d 255, 258, 381 N.E.2d 1164, 1167 (Ill. Ct. App. 1978) (emphasis added, citations omitted) (affirming dismissal of complaint based upon statute of limitations bar to medical malpractice claims, recognizing that while rule is "sometimes harsh in application to a given case, that is the nature of any statute providing for such limitations; the legislature has sought to limit the trial of stale claims and has not provided for extension of the time within which an action may be brought on the grounds urge by plaintiff.").

In order to implement the policy of encouraging potential plaintiffs to investigate their claims with due diligence, courts

must form rules to define the kind of constructive notice that justifies imposing this burden upon potential plaintiffs, without regard to either the sympathetic posture of the plaintiffs or the apparent guilt of the defendant. The principles defining constructive notice under objective standards are well-developed.[8]

Because this burden of due diligence must consistently be imposed upon plaintiffs seeking to toll the statute of limitations, all such plaintiffs must plead and prove "that the alleged efforts of the defendants to conceal their participation in the assault were successful, [and] if successful, when plaintiff first discovered or learned of such participation." Moore v. District 50, 131 N.E.2d 462, 463 (Ohio Ct. Comm. P. 1954). "The misrepresentation or fraud must be of such character as to prevent

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[8] "[A]ppellant can hardly claim . . . that '[s]he possessed no clew [sic] with which to begin such [a] search.' Appellant was well aware, not only of the existence of wrongful death and survival claims, but also of [the defendant's] identity as owner of the vehicle that collided with decedent's car." Estate of Chappelle, 442 A.2d at 159 (D.C. Cir. 1982) (affirming summary judgment for defendants based upon "the rationale of those jurisdictions which have held generally that concealment of the identity of liable parties, unlike the concealment of the existence of a claim, is insufficient to toll the statute of limitations").

> Mr. Vest has alleged that he knew that he had been harmed when the false charges were filed against him, but he did not know the cause of his harm or whether it constituted a legal injury under federal law. However, he did know that somebody had caused Mr. Buoy to bring the false charges. . . [A] reasonable plaintiff would investigate such a case to find out who had maliciously prosecuted him.

Vest v. Bossard, 700 F.2d 600, 609 (10th Cir. 1983) (remanding for consideration of possible factual grounds to toll limitations period applicable to civil rights claim based upon false criminal charges).

inquiry or to elude investigation or to mislead and hinder the party who has the cause of action from obtaining the necessary information by the use of ordinary diligence, and the actions relied upon must be of an affirmative character and fraudulent." Landers v. Evers, 24 N.E.2d at 797 (Inc. App. 1940).

> Concealment of his identity by a defendant by silence alone is not enough to toll the running of prescription. Additionally, he must be guilty of some trick or contrivance tending to exclude suspicion and prevent the plaintiff from bringing his action. There must also be reasonable diligence on the part of the plaintiff to ascertain the identity of the party injuring him[,] and the means of knowledge are the same in effect as knowledge itself.

Arceneaux v. Motor Vehicle Casualty Co., 341 So. 2d 1287, 1291 (La. Ct. App. 1977) (emphasis added, citations omitted) (cited by Petitioner in support of minority rule at Initial Brief p. 19).

Petitioner cites no authority for the proposition that the statutes of limitation for conspiratorial wrongs are tolled until a member of the conspiracy confesses. No such authority exists, despite the obvious benefit to the conspirators revealed only after the limitations period expires.[9]

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[9] [T]here is, of course, the seeming paradox that the statute of limitations benefits the wrongdoer at the expense of the innocent and unsuspecting owner of property. Yet, the statutes of limitation are a persistent and necessary part of our judicial system. The legislature is well aware that in enacting statutes of limitation their protection can inure to the benefit of undeserving persons, as is disclosed by the limitation for filing suits for fraud, intentional torts, and, indeed, even prosecution for crimes. They act as a necessary protection against the assertion of unmeritorious claims long after they are capable of being fairly defended.

B. PETITIONER FAILS TO DEMONSTRATE THAT THE MINORITY RULE SHOULD APPLY IN FLORIDA.

The rule of International Brotherhood remains the majority rule in this country.

> [U]nder the weight of authority, the concealment of the identity of a party liable cannot be deemed the same as concealment of the cause of action itself. . . . The fraudulent concealment which will postpone the operation of the statute must be concealment of the fact that plaintiff has a cause of action or of the facts constituting it, including the fact of damage, and not of the injurious consequences flowing therefrom. Concealment of the identity of the wrongdoer rather than the cause of action generally does not constitute fraudulent concealment.

54 C.J.S. Limitations of Actions §§ 89, 90 at 129 (emphasis added, citations omitted). "Concealment of the identity of parties liable, or concealment of the parties, has been held not to constitute concealment of the cause of action, and not to be available to avoid the running of the statute of limitations." 51 Am. Jur. 2d,

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> "The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation be presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. . . . The underlying purpose of statutes of limitations is to prevent the unexpected enforcement of state claims concerning which persons interested have been thrown off their guard by want of prosecution."

Jackson v. American Credit Bureau, 23 Ariz App. at 202-03, 531 P.2d at 935 (Ariz. Ct. App. 1975) (holding that "no showing of a fraudulent concealment of the cause of action which would have tolled it," despite plaintiff's late discovery of "the identity of the taker" sued for conversion).

Limitation of Actions § 148 at 721 (citations omitted).[10]

Petitioner never addresses this majority rule, but instead cites a few cases from other jurisdictions that purport to support a contrary, minority rule. As shown below, Petitioner's cases do not provide any compelling reason for Florida to adopt the minority rule.

Petitioner cites McCampbell v. Southard, 23 N.E.2d 954 (Ohio Ct. App. 1937), a traffic accident case in which the Defendant

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[10] Cases from other jurisdictions following this majority rule include without limitation Burns v. Thomas, 790 S.W.2d 1 (Tex. Ct. App. 1988) (rule that "fraud and concealment, in order to prevent the running of the statute, must relate to concealment of the cause of action and not to the concealment of the parties, . . . has been consistently followed by the Texas courts"); McDaniel v. Johns-Manville Sales Corp., 542 F. Supp. 716, 718 (N.D. Ill. 1982) (Illinois law does not require that plaintiff "know the identity of the potential defendant before the statute of limitations begins to run"); Landers v. Evers, 24 N.E.2d 796, 797 (Ind. App. 1940) (car accident victim "had full knowledge of the cause of action within the statutory period," despite other driver's misrepresentation about his name); Clulow v. State, 700 F.2d 1291, 1301 (10th Cir. 1983) (Oklahoma follows rule that concealment of defendants' identities does not toll limitations period because such concealment does not prevent plaintiff "from knowing he had a cause of action"); Jackson v. American Credit Bureau, 23 Ariz. App. 199, 531 P.2d 932, 934, 936 (Ariz. Ct. App. 1975) ("no showing of a fraudulent concealment of the cause of action" of conversion based upon later plaintiff's later discover "of the identity of the taker"); Estate of Chappelle v. Sanders, 442 A.2d 157, 158 (D.C Cir. 1982) (one year wrongful death limitations period accrued on date of death from car accident and barred claim, despite defendant's fraudulent denial "that her car had been involved in this collision"); Vest v. Bossard, 700 F.2d 600 (10th Cir. 1983) (Utah would "adopt the rule followed in Chappelle."); Shockley v. Sander, 720 S.W.2d 418, 421 (Mo. Ct. App. 1986) ("[W]e follow the general rule in other jurisdictions that where one fraudulently conceals one's identity as the defendant, rather than concealing the existence of the cause of action itself, the statute of limitations is not tolled."); Moore v. District 50, supra at 131 N.E.2d 463 (Ohio Ct. Comm. P. 1954) (allegation that defendants "conspired to conceal from this plaintiff their participation in the assault" did not provide basis for tolling assault statute of limitations).

driver misrepresented his name in violation of Section 12606 of the Ohio General Code (requiring traffic accident participants to "stop and upon request of the person injured or any person, give such person his name and address"). The McCampbell case fits squarely within the exception recognized in footnote 1 of International Brotherhood ("The result is otherwise only when . . . there is some independent statutory duty (which does not exist in this case) imposed upon the tortfeasor to reveal his identity"). International Brotherhood at 341 So. 2d 1006 n.1.

Petitioner cites Arceneaux v. Motor Vehicle Casualty Co., 341 So. 2d 1287 (La. Ct. App. 1977), another traffic accident case inapplicable for a number of reasons. First, Louisiana operates under a civil code rather than the common law. Second, the court applied its own doctrine of contra non valentem rather than the common law doctrine of fraudulent concealment. The court described the "contra" doctrine as "an exception to the general rules of prescription [which] establishes that prescription does not run against persons unable to bring an action or against persons who for some reason are unable to act." Arceneaux at 341 So. 2d 1291. Third, that court found that its own doctrine of "contra" did not even apply. Id.[11]

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[11] Concealment of his identity by a defendant by silence alone is not enough to toll the running of prescription. Additionally, he must be guilty of some trick or contrivance tending to exclude suspicion and prevent the plaintiff from bringing his action. There must also be reasonable diligence on the part of the plaintiff to ascertain the identity of the party injuring him[,] and the means of knowledge are the same

With respect to Missouri law, Petitioner ignores the series of cases in which Missouri state courts have expressly adopted the majority rule. See, e.g., Shockley v. Sander, supra at 720 S.W.2d 421 ("[W]e follow the general rule in other jurisdictions that where one fraudulently conceals one's identity as the defendant, rather than concealing the existence of the cause of action itself, the statute of limitations is not tolled."). Instead, Petitioner cites Sonnenfeld v. Rosenthal-Sloan Millinery Co., 145 S.W. 430 (Mo. 1912). The "good reason why the statute of limitations [was] not available to the defendant" in that case was that the defendant "wrongfully got possession of the note" upon which that promissory note claim rested. Sonnenfeld at 145 S.W. 432. The plaintiff did not recall the name of the maker of the note, but she had an affirmative right to hold the note, and the defendant had an affirmative duty to deliver it to her. "It is true that the Defendant was not bound under the law to furnish the plaintiff information, but it was bound to give her up the note which belonged to her, and which had on its face all of the information she needed." Id. Although the right to hold a promissory note and the corresponding duty to deliver it are grounded in the common law rather than legislation, the defendant's breach of its affirmative duty to deliver the note (and thereby disclose its identity) also brings this case squarely within the express exception set forth in footnote 1 of International Brotherhood.

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in effect as knowledge itself.
Id. (emphasis added, citations omitted)

Next, Petitioner cites two cases that purport to represent Pennsylvania law. First, the case of DeRugeriis v. Brener, 237 Pa. Super. 177, 348 A.2d 139 (Pa. Super. Ct. 1975), merely represents another traffic accident case in which one driver breached his affirmative duty to disclose his identity truthfully and accurately. That lower appellate court made no citation to any Pennsylvania or other authority on the topic of fraudulent concealment.

Petitioner also cites Layton v. Blue Giant Eqpt. Co. of Canada, 105 F.R.D. 83 (E.D. Pa. 1985), a federal court decision that cites federal case law in support of the proposition that Pennsylvania law extends the fraudulent concealment doctrine to concealment of a defendant's identity. Layton at 105 F.R.D. 86. That federal court makes no analysis of the applicability of the fraudulent concealment doctrine to the product liability claim at issue there, except in stating that an employee of the defendant purportedly misrepresented the identity of the manufacturer.

Petitioner cites Royal Indemnity Co. v. Petrozzino, 598 F.2d 816 (3d Circuit 1979) (applying New Jersey law) and Spitler v. Dean, 148 Wis. 2d 630, 436 N.W.2d 308 (Wis. 1989), both of which merely analyze the discovery rule rather than the doctrine of fraudulent concealment. Petitioner ignores the irrelevance of the discovery rules legislated by other states to this claim for wrongful death, given that no discovery rule applies to the Florida statute of limitations for wrongful death claims. Worrell v. John F. Kennedy Memorial Hosp., 384 So. 2d 897, 900, 902 (Fla 4th DCA

1980) (wrongful death cause of action accrues at time of death, since discovery rule does not apply), rev'd on other grounds, 401 So. 2d 1322, 1323 (Fla. 1981) ("We agree with the district court in its construction and application of the applicable statute of limitations.")

Finally, Petitioner cites the California case of Bernson v. Browning-Ferris Ind. of California, 7 Cal. 4th 926, 30 Cal. Rptr. 2d 440, 873 P.2d 613 (Cal. 1994), a suit for libel by a Los Angeles City Counselman based upon a 36-page document criticizing his political activities, without reference to either publisher or author. "Our holding that a defendant's intentional concealment of his identity may justify an estoppel represents a new rule of law . . . ." Bernson at 873 P.2d 620.

The Bernson court reasoned that claimants should not be penalized by the statute of limitations when they have no means of suing. Id. at 617. First, the court asked hypothetical questions about what plaintiffs could possibly do when "a thief, for example, leaves no clues to his identity." Id. (emphasis added). The facts in this case, however, do not give rise to such questions: all relevant testimony about suspects consistently named Respondent as the prime suspect from the beginning. See Statement of Facts above at pp. 1-2. Second, the Bernson court cited two replevin cases from other jurisdictions as authority for expanding the fraudulent concealment doctrine beyond concealment of the cause of action, even though the court recognized that there can be no replevin cause of action "until the discovery of the whereabouts of the

article." Id. at 617 n.5, quoting Cal. Code Civ. Proc. § 338(c).[12]

Finally, in forging this new, minority rule, the Bernson court expressly limited the rule's application to only the rarest of cases and affirmed the bulk of the principles supporting the majority rule:

> While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute. As we have observed, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." Aggrieved parties generally need not know the exact manner in which their injuries were "effected, nor the identities of all parties who may have played or rule therein." . . .
>
> However, where the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his identity, the plaintiff should not be penalized. Recognition of a potential equitable estoppel under the foregoing circumstances will not unduly burden the trial courts.
>
> Indeed, our holding will have virtually no

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[12] The two cited replevin cases also make it clear that no replevin cause of action exists until the goods are located in the possession of someone with no right to hold them. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, 917 F.2d 278, 289 (7th Cir. 1990) ("In the context of a replevin action . . . , a plaintiff cannot be said to have 'discovered' his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that 'other' is."); O'Keefe v. Snyder, 83 N.J. 478, 416 A.2d 862, 870 (N.J. 1980) ("O'Keefe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.").

> affect [sic] on the vast majority of civil cases. It is only in those relatively few where the defendant asserts a statute of limitations defense and the plaintiff claims that he was totally ignorant of the defendant's identity as a result of defendant's fraudulent concealment, that the issue will even arise; among those few, it will be the rare and exceptional case in which the plaintiff could genuinely claim that he was aware of no defendant . . . .

Bernson at 873 P.2d 616, 619 (citations omitted). By its express terms, the Bernson holding represents a new rule of law with an extremely limited application.

The general rule in California remains unchanged. In the February, 1995 decision of Bristol-Myers Squibb Co. v. Superior Court, 32 Cal. App. 4th 959, 38 Cal. Rptr. 2d 298 (Cal. Ct. App. 1995), the court rejected the equitable tolling arguments of a silicone breast implant victim. "To start the commencement of the statutory period it is not necessary that the plaintiff be able to identify the negligent party." Squibb at 32 Cal. App. 4th 965, 38 Cal. Rptr. 2d 303.

That decision rested upon repeated citations to a 1988 decision of the California Supreme Court which rejected a DES victim's equitable tolling arguments based upon her inability to identify a particular manufacturer. Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923 (Cal. 1988).

> [T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that it a process contemplated by pretrial discovery. Once the plaintiff has a suspicion

> of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her. . . .
>
> [T]he fundamental purpose of the statute is to give defendants reasonable repose, that is, to protect the parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims. . . .
>
> Of course, nothing stated herein affects the well-established rule that the ignorance of the legal significance of known facts or the identity of the wrongdoer will not delay the running of the statute. . . . [S]ummary judgment is proper. . . . Plaintiff . . . felt that someone had done something wrong to her concerning DES, it was a defective drug and that she should be compensated. . . .
>
> In sum, the limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged. . . . By her own admission, her real reason for delaying action was that she did not know whom to sue, not that she did not know whether to sue. . . . Plaintiff does not dispute the general rule that ignorance of the identity of the defendant does not effect the statute of limitations.

Id. at 44 Cal. 3d 1110-1114, 245 Cal. Rptr. 662-664, 751 P.2d 928-930 (emphasis added, citations omitted).

Petitioner fails to acknowledge the continued vitality of the majority rule and the policies that uphold it. The Fourth District correctly determined that Respondent's alleged concealment of his participation in this conspiratorial murder, even if true, did not fall within the definition of fraudulent concealment under Florida law.

II. PETITIONER FAILS TO ADDRESS THE CENTRAL QUESTION, BASED UPON THE UNDISPUTED ELEMENTS OF FRAUDULENT CONCEALMENT, OF WHETHER ANY SPECIFIC AND AFFIRMATIVE MISREPRESENTATIONS MADE BY RESPONDENT REASONABLY DETERRED THE MCCLINTONS FROM SUSPECTING RESPONDENT UNTIL DECEMBER 23, 1989.

This Court should not accept jurisdiction because the Fourth District has not posited a question of great public importance.[13] First, the scant written argument offered on this question by the Petitioner (4 pages) and the Amicus Curiae (3 pages) fail to demonstrate any issue of significant importance. Second, the California case upon which Petitioner rests its argument for a "trend" in the law contrary to the majority rule adopted by Florida acknowledges its extremely limited application.[14]

Third and of most importance, however, the other, substantive grounds upon which this Court must affirm the Fourth District's decision, without regard to the certified question, make this

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[13] This Court has not yet decided whether to accept discretionary jurisdiction pursuant to the question certified by the Fourth District Court of Appeal. Order Postponing Decision on Jurisdiction and Briefing Schedule.

[14]

> Indeed, our holding will have virtually no affect [sic] on the vast majority of civil cases. It is only in those relatively few where the defendant asserts a statute of limitations defense and the plaintiff claims that he was totally ignorant of the defendant's identity as a result of defendant's fraudulent concealment, that the issue will even arise; among those few, it will be the rare and exceptional case in which the plaintiff could genuinely claim that he was aware of no defendant . . . .

Bernson, 873 P.2d at 619 (Cal. 1994).

Court's answer to that question irrelevant for the determination of this case.[15] Those grounds are addressed below.

A. PETITIONER FAILS TO ADDRESS THE TOTAL ABSENCE OF RECORD EVIDENCE SATISFYING THE UNDISPUTED ELEMENTS OF FRAUDULENT CONCEALMENT.

Petitioner makes no challenge to the proposition that Florida's statute of limitations governing wrongful death claims, to which the discovery rule does not apply, makes the statutory period accrue on the date of death. See Respondent's 4th DCA Init. Brief at 20-23 (citing abundant, uncontradicted Florida case law on this point) and Respondent's 4th DCA Reply Brief at 2 (pointing out Respondent's failure to challenge this point before the Fourth District).[16] Similarly, Petitioner does not challenge the

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[15] Hillsborough Ass'n for Retarded Citizens v. City of Temple Terrace, 332 So. 2d 610, 612 (Fla. 1976) ("[O]ur review extends to the 'decision' of the district court, rather than the question on which it passed."); Rupp v. Jackson, 238 So. 2d 86, 89 (Fla. 1970) ("privileged to review the entire decision and record," regardless of form of certified question); Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986) ("Once this Court has jurisdiction . . . it may, at its discretion, consider any issue affecting the case."). See also Art. V, § 3(b)(4), Fla. Const. ("supreme court . . . may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance . . . ."); Fla. R. App. P. 9.030(a)(2)(A) ("discretionary jurisdiction of the supreme court" applies to "decisions of the district courts of appeal that . . . (v) pass upon a question certified to be of great public importance") (emphasis added).

[16] See also Walker v. Beech Aircraft Corp., 320 So. 2d 418, 419-20 (Fla. 3d DCA 1975), cert. dismissed, 338 So. 2d 843 (Fla. 1976)("fraudulent concealment was specifically alleged" to avoid two-year limitation on claim for wrongful death caused by airplane crash, but defendant's summary judgment affirmed because claim barred "as a matter of law: appellant's cause of action accrued at the date of her husband's death, which factor was known to appellant as of the date of death, and the two-year

proposition that Petitioner must bear the burden of pleading and proving the alleged fraud with particularity. 4th DCA Init. Brief at 24-28 and 4th DCA Reply Brief at 2.

Petitioner does not contest its burden of pleading and proving three undisputed elements of fraudulent concealment, consistently applied by all jurisdictions employing the doctrine:

> The party asserting the fraudulent concealment doctrine has the burden of showing (1) the use of fraudulent means by the party who raises the ban of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action.
>
> [O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. A denial of wrongdoing does not constitute fraudulent concealment. . . .
>
> [Here,] all price fixing activity was concealed by Champlin. . . . All of Kings' witnesses testified that they had not known of Champlin's price fixing activities. The evidence shows that knowledge of the price fixing conspiracy was not revealed to anyone connected with King until 1975, the year that the action was filed.

King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1154-55 (10th Cir. 1981).

In this appeal, Petitioner never contested its burden to plead and prove that the alleged fraudulent concealment succeeded until at least December 23, 1989, two years before this lawsuit was initiated. 4th DCA Init. Brief at 28-31 and 4th DCA Reply Brief at

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statute of limitations commenced to run on that date.").

3. Likewise, Petitioner never contested its burden to plead and prove that the McClintons, as the representatives of the decedent's estate, pursued this potential claim with due diligence. 4th DCA Init. Brief at 31-32 and 4th DCA Reply Brief at 3. Finally, Petitioner did not contest its burden to plead and prove the McClintons's reasonable reliance upon particular, affirmative representations sufficient to deter the filing of the lawsuit. 4th DCA Init. Brief at 32-33 and 4th DCA Reply Brief at 3.

As a result of Petitioner's apparent acknowledgment of its burden to plead and prove these undisputed elements, one would expect Petitioner to point out how it satisfied these burdens. Instead, however, Petitioner fails to point to any pleading and proof in satisfaction of these legal requirements.

No one testified as a representative of the Fulton County Administrator, and the testimony of Emory and JoAnne McClinton wholly failed to address these points.[17] None of Petitioner's

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[17] Under Georgia's statutory scheme creating this wrongful death cause of action, only the McClintons had standing to bring this claim. See Ga. Code Ann. §§ 51-4-2 (1993)("The surviving spouse, or, if there is no surviving spouse, a child or children . . . may recover for the homicide of the spouse or parent . . . ."), 51-4-4 ("The right to recover for the homicide of a child shall be as provided in Code Section 19-7-1."), 19-7-1 ("In every case of the homicide of a child, minor or sui juris, . . . [i]f the deceased child does not leave a spouse or child, the right to recovery shall be in the parent or parents, ... "), and 51-4-5 ("When there is no person entitled to bring an action for the wrongful death of a decedent under Code Section 51-4-2 or 51-4-4, the administrator or executor of the decedent may bring an action for and recover and hold the amount recovered for the benefit of the next of kin."). See also Belco Electric v. Bush Kroger Co., 204 Ga. App. 811, 420 S.E.2d 602 (Ct. App. 1992) (mother sued for son's death); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (Ct. App. 1984) (parents sued for daughter's death). Petitioner has not contested this point on appeal,

citations to the record in its Initial Brief point out any specific, affirmative misrepresentations made by Respondent that misled anyone for any period of time.[18] Similarly, none of Petitioner's record citations demonstrate when any new information was ever later acquired by the McClintons, on the basis of which this cause of action might have accrued on some later date.[19]

In sum, Petitioner has not addressed the central issue before this Court: Did any specific and affirmative misrepresentations made by Respondent reasonably deter the McClintons from filing this lawsuit until December 23, 1989? The trial court record is

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effectively conceding that only the McClintons could serve as plaintiffs.

[18] Petitioner cites T. 471 (its own counsel's arguments at side bar about the admissability of autopsy evidence showing traces of inert cocaine in the decedent's body), T. 875 (its own counsel's argument against Respondent's motion for directed verdict), and T. 938 (its own counsel's closing argument). Petitioner also cites T. 483-85, 573-75, and 577 (Sullivan's pro se questions of witnesses at trial about other suspects, as though those trial questions form the basis of the alleged fraudulent concealment). Petitioner also cites the testimony of Georgia Bureau of Investigation Agent Robert Ingram at T. 628, stating that Respondent told the Agent about the decedent's "involvement with drugs" during the Agent's interview of Respondent on September 9, 1991.

Nowhere is there any testimony that Respondent's purported references to possible drug and mafia ties (to which Petitioner points at T. 334 and T. 575 only) ever misled anyone for any period of time, much less that the McClintons heard of such purported references and relied upon them until December 23, 1989.

[19] The trial court upheld Respondent's hearsay objection to Agent Lechter's testimony about what Suki Sullivan told him on September 6, 1990, to which Petitioner points at T. 397-98. Petitioner's other record citations to T. 874 and 876 point only to its counsel's arguments in opposition to Respondent's first motion for directed verdict, and not to any record testimony.

entirely void of any evidence upon which basis the jury could answer that question.

This Court has repeatedly addressed the issue of when medical malpractice cases accrue under statutory discovery rule that can toll those claims. In Tanner v. Hartog, 618 So. 2d 177, 181 (Fla. 1993), this Court refined its rule on that issue by holding that the potential plaintiff's "knowledge of the injury" alone causes the claim to accrue, as long as the plaintiff knew of "a reasonable possibility that the injury was caused by medical malpractice." Under this rule, the McClintons's cause of action accrued when the McClintons knew of the injury and of the reasonable possibility that Respondent had caused it. This rule comports with Florida law defining the accrual of causes of action generally.[20] A Second

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[20] "All that is necessary is that information be made available to Plaintiff so that she suspects, or after a reasonably diligent investigation should suspect," the basis for a possible claim against the defendant. Byington v. A.H. Robins Co., 580 F. Supp. 1513, 1517 (S.D. Fla. 1984)(entering summary judgment for defendant based on Florida statute of limitations). "When ground for suspicion exists, neglect to learn what might be known is counted as knowledge." Azalea Meats v. Muscat, 246 F. Supp. 780, 785 (S.D. Fla. 1965)(granting summary judgment to defendants based on Florida statute of limitations), rev'd on other grounds, 386 F.2d 5 (5th Cir. 1967). "[T]he sale of . . . stock . . . would have caused [Plaintiff] to suspect `a conspiracy' and would have caused him to investigate further [and] is sufficient in and of itself to have started the statute running . . . ." Id.

> [T]he plaintiff must show . . . successful concealment . . . [but] has not even alleged that he was ignorant of his cause of action. . . . In essence, the plaintiff suspected that he had a cause of action, but could not prove the infringement . . . . Such a showing is insufficient to toll the statute of limitations. . . .

District decision applied this rule to bar a wrongful death claim:

> This case arose following the death by electrocution of Curtis J. Parmenter on July 10, 1980. . . . Tests revealed that the vehicle had been altered by the replacement of an insulated wire with a steel-braided wire . . . . [Plaintiff] knew at the time of the accident that [defendant] was the previous owner of the truck, and that [defendant] had updated the truck with safety bolts and insulators.

Parmenter v. Davie Tree Expert Co., 462 So. 2d 492, 493 (Fla. 2d DCA 1984)(affirming summary judgment for defendant based on statute of limitations). Other jurisdictions have consistently imposed this same burden of due diligence upon wrongful death plaintiffs.[21]

> Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run. This standard is in line with the modern philosophy of pleading which has reduced the requirements of the petition and left for discovery and other pre-trial procedures the opportunity to flesh out claims . . . .
>
> This was merely ignorance of evidence, not ignorance of a potential claim. . . . The bells do not toll the limitations statute while one ferrets the facts.

Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971)(emphasis added)(affirming Southern District of Florida's summary judgment for defendant based upon Florida law).

[21]

> From the outset plaintiffs were aware that decedent Ollie died of carbon monoxide poisoning in a General Motors automobile, and could have proceeded against General Motors accordingly.
>
> "It would be an extremely dangerous rule of law that the accrual date of a cause of action is held in abeyance indefinitely until a prospective plaintiff obtains professional assistance to determine the

After seven years of preparing this case with the assistance of multiple lawyers, Petitioner has failed to explain the total absence of any pleading and proof of these undisputed elements of fraudulent concealment. Petitioner wholly fails to show that specific and affirmative misrepresentations made by Respondent actually deterred the McClintons from filing this lawsuit, despite the McClintons's due diligence in the pursuit of their potential claims.

B. PETITIONER FAILS TO ADDRESS THE ABSENCE OF ANY JURY DECISION ON THE ISSUES OF DUE DILIGENCE, REASONABLE RELIANCE UPON RESPONDENT'S AFFIRMATIVE MISREPRESENTATIONS, AND WHEN THE MCCLINTONS RECEIVED NOTICE OF THEIR POTENTIAL CLAIM.

Moreover, the erroneous jury instructions submitted to the jury over Respondent's clear and repeated objections, never asked the jury to answer this central question of whether specific and affirmative misrepresentations of Respondent reasonably deterred the McClintons from filing this lawsuit. Even if this Court should find that Petitioner did present some form of evidence in support

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> existence of a possible cause of action. Under such a theory, no limitations period would ever be binding."
>
> "It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim."

Stoneman v. Collier, 94 Mich. App. 187, 288 N.W.2d 405 (Mich. Ct. App. 1979) (citations omitted).

of these elements, nothing in the record suggests that the jury addressed these elements when neither the jury instructions nor verdict form mentioned them. (R. 937, 2132.)

The bare bones instruction given to the jury, over the specific and repeated objections of Respondent, did not ask the jury to decide whether the McClintons had used due diligence in the pursuit of their potential claim, whether they reasonably relied on any affirmative misrepresentations made by Appellant, or even when the McClintons actually did receive notice of their potential claim. (R. 937, 2132.) Similarly, the proposed verdict form made no reference to any of those essential elements, but instead stated the whole issue only in terms of whether Respondent "participated" in some form of fraudulent concealment. (R. 989.) Respondent has demonstrated reversible error by showing "that the requested instructions contain an accurate statement of the law, that the facts in the case supported a giving of the instructions, and that the instructions were necessary for the jury to properly resolve the issues in the case." Davis v. Charter Mortgage Co., 385 So. 2d 1173, 1174 (Fla. 4th DCA 1980) (reversing based upon insufficiency of jury instruction given).

At the charging conference, Appellant clearly objected to the fraudulent concealment instruction on the basis that it required no determination of the success of alleged fraudulent concealment and its prevention of the McClintons from coming to know about their potential claim. (R. 2079-81.) Plaintiff's proposed verdict form, adopted by the trial court over Defendant's objections, stated the

whole issue only in terms of whether Defendant "participated" in some form of fraudulent concealment. (R. 989.) Similarly, the jury instruction on the issue employed the same language, making no reference to any of these three essential elements. (R. 937, 2132.)

The Second District once upheld instructions that did require the jury to assess both the effect of the defendant's concealment efforts on plaintiff and plaintiff's due diligence: "The court, in his instructions, informed the jury . . . under the limitation plea [that they] should determine whether the plaintiff's failure to sue earlier was due to his lack of knowledge . . . because of the fraudulent concealment, including therein the question of whether the plaintiff lacked the opportunity of discovering the property . . . ." Metcalf v. Johnson, 113 So. 2d 864, 866-67 (Fla. 2d DCA 1959) (emphasis added).[22] On the other hand, the Fifth Circuit has addressed the impropriety under Florida law of a proposed jury instruction, similar to the instruction at issue here, which asked the jury to determine only whether the defendants had "kept information" from the plaintiff. Powell v. Radkins, 506 F.2d 763, 764-65 nn.2, 4 (5th Cir. 1975)(emphasis added)(affirming jury verdict for defendant on Florida statute of limitations).

Without any jury instructions on these essential elements of fraudulent inducement, it is impossible to conclude that the jury addressed these elements. Defendant properly and specifically

[22] Similarly, the First District once approved of jury instructions that placed upon a plaintiff the burden of proving the latency of a construction defect. Richardson v. Wilson, 490 So. 2d 1039, 1040 (Fla. 1st DCA 1986).

objected to the jury instruction and verdict form proposed by Plaintiff prior to their adoption by the trial court. See Init. Brief at 12-13 above. At a minimum, this Court must remand this case for a new trial in which the jury is asked to address these undisputed elements of fraudulent inducement.[23]

III. PETITIONER'S CHALLENGES BASED UPON PURPORTED PROCEDURAL DEFECTS FAIL.

Petitioner argues that Respondent waived his appellate challenges to the judgment entered against him on two grounds. First, Petitioner argues that Respondent could not challenge the sufficiency of the evidence because he failed to file a motion for judgment notwithstanding the verdict, despite his two motions for directed verdict and motion for new trial. Second, Petitioner argues that Respondent did not adequately raise the issue of what constitutes fraudulent concealment under Florida law, given that the Fourth District sua sponte directed the parties to address the significance of International Brotherhood before Respondent cited it in his briefing. As shown below, Petitioner's arguments about procedural waivers fail.

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[23] Petitioner relies upon the California Supreme Court's adoption of the minority rule in Bernson, supra at 873 P.2d 613 (Cal. 1994). Even in that case, however, application of the new, minority rule required remand to determine "whether, under the circumstances, defendants' anonymous commission, drafting and circulation of the allegedly defamatory dossier constituted intentional concealment; whether defendants actions thereby deprived plaintiff, in fact, of knowledge of defendants' identity; and whether plaintiff exercised reasonable diligence in attempting to discover defendants' identity." Bernson at 873 P.2d 620.

A. RESPONDENT DID NOT WAIVE THIS DEFENSE BASED UPON THE ABSENCE OF A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

First, Petitioner argues that Respondent waived his appellate arguments about the insufficiency of the evidence on fraudulent concealment by failing to title his post-trial motion a "motion for judgment notwithstanding the verdict," rather than a Motion for New Trial. Petitioner's Initial Brief at p. 11. Petitioner argues that Florida Rule of Civil Procedure 1.480 dictates that such post-trial practice will waive such arguments, but Petitioner nowhere points to any relevant language in the Rule. Id.

Instead, Petitioner cites only three cases, none of which address a waiver based upon the mere failure to submit a post-trial motion for judgment notwithstanding the verdict. Two of those three cases address only the failure to renew a motion for directed verdict at the close of all the evidence, after having first made that motion at the close of plaintiff's case in chief. Keyes Co. v. Shea, 372 So. 2d 493 (Fla. 4th DCA 1979); 6551 Collins Avenue Corp. v. Millen, 104 So. 2d 237 (Fla. 1958). In the third case cited by Petitioner, the Third District simply complained about the absence of any motions for directed verdict addressing the argument presented on appeal. General Motors Acceptance Corp. v. City of Miami Beach, 420 So. 2d 601, 603 n.1 (Fla. 3d DCA 1982).

This waiver argument simply ignores Respondent's motions for directed verdict, made at both the close of Petitioner's case in chief and at the close of all the evidence. (R. 2016, 2082-83.) Moreover, Petitioner cites no Florida authority in support of the

proposition that the absence of a post-trial motion for judgment notwithstanding the verdict, by itself, waives appellate arguments on the sufficiency of the evidence. Among the thousands of published decisions in which Florida appellate courts reverse and mandate entry of judgment in favor of the appellant, not one such decision refers to the appellant's motion for judgment notwithstanding the verdict as a procedural condition of such reversal.

B. RESPONDENT DID NOT WAIVE THE STATUTE OF LIMITATIONS DEFENSE BASED UPON THE ABSENCE OF ONE PARTICULAR CASE CITATION.

In its Order dated July 21, 1995, the Fourth District requested "that counsel be prepared to argue the applicability of International Brotherhood of Carpenters and Joiners of America v. United Association of Journeymen and Apprentices, 341 So. 2d 1005 (Fla. 4th DCA 1976)." Petitioner contends that the Fourth District's request to address the applicability of a rule set forth in binding precedent made this Court into an advocate for Mr. Sullivan by injecting an entirely new theory into this appeal. Petitioner's Initial Brief at 14-17.

No Florida case law or other authority supports this contention. No such case or other authority limits this Court's discretion to raise, on its own initiative, a particular case relevant to the issues addressed in both the trial and appellate courts.

In support of Petitioner's argument, Petitioner and the Amicus

cite only three cases combined, each of which address only the possible waiver of an entire ground for an appeal by failure to raise it before the trial court.[24] Neither those cases nor any other Florida authority address waiver based upon mere failure to cite a case. Moreover, neither Petitioner nor the Amicus cite an authority limiting an appellate court's power to cite a case on its own, asking in advance that all parties address that case at oral argument and by supplemental briefings.

The Florida Rules of Appellate Procedure no longer mandate specification of the trial court's erroneous reasoning, but only specification of the judicial acts challenged. "Assignments of error are neither required nor permitted." Fla. R. App. P. 9.040(e). The rule on briefing, "rule 9.200(a)(2), requires service of a statement of [only] the judicial acts for which review is sought." Id. at Committee Notes. See also Ratner v. Miami Beach First National Bank, 362 So. 2d 273, 274 (Fla. 1978)(1962 revision to appellate rules "liberalized the requirements for assignments of error, no longer requiring that an appellant include grounds for error in the assignments," with the more recently adopted Appellate

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[24] First, Petitioner cites Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981), in which this Court reversed the Fourth District's decision to remand so as to permit the addition of a new affirmative defense never previously raised. Second, Petitioner cites Dralus v. Dralus, 627 So. 2d 505 (Fla. 2d DCA 1993), in which the Second District held that an appellate challenge to the trial court's award of attorney's fee award was not waived by the failure to challenge the reasonableness of the underlying fee at trial. Third, the Amicus cites Abrams v. Paul, 453 So. 2d 826 (Fla. 1st DCA 1984), in which the First District held that the issue of whether the complaint stated a cause of action could not be raised for the first time on appeal.

Rules having "continued the liberalizing trend, eliminating entirely the requirement for filing assignments of error."); Nicholson v. Nicholson, 201 So. 2d 907, 908 (Fla. 4th DCA 1967)("Certainly it is no longer required of an appellant that he include grounds for error in the assignments.").

As the central issue both at trial and in his appellate briefs, Respondent argued that Petitioner failed to plead and prove fraudulent concealment, as defined by Florida law, sufficient to toll the statutory limitations period. The summary below outlines these arguments.

1. Respondent Repeatedly Addressed the Meaning of Fraudulent Concealment at Trial.

Respondent pled an affirmative defense based upon the statute of limitations, both in his initial Answer and in his later Answer to Amended Complaint. (R. 11, 278.) Respondent also made this the central grounds for his Motion to Dismiss. (R. 187-88, 262-65.) As a result, the trial court was repeatedly forced to compare the legal definition of fraudulent concealment with the pleadings and proof in this case.

When Respondent moved for a directed verdict at the close of Petitioner's case on the primary ground "that the filing of the case is barred by the statute of limitations" (R. 2012), the trial court indicated its own concern: "The statute of limitations gives me the most problem." (R. 2018.) Appellant responded: "It was the main issue throughout, Your Honor." (R. 2022.).

Respondent argued that his own silence about his alleged

participation in this contract killing could not, by itself, have constituted fraudulent concealment under Florida law. "As far as the issue of concealment is concerned, [Plaintiff's] counsel is attempting to say that silence or profession of innocence represents concealment and specifically it does not. . . . Specifically, the fact that by asserting my innocence is concealment, that is specifically not concealment." (R. 2033-34.)

In his closing argument, Respondent emphasized that he did not do anything other than maintain silence about his alleged involvement in this murder: "Did I do something that would have prevented Lita's family from bringing this lawsuit earlier . . . ?" (R. 2120.) Respondent made those same points in his objections to the jury instructions at the charging conference. (R. 2079-81.)

2. Respondent Repeatedly Addressed the Meaning of Fraudulent Concealment in his Briefs Before the Fourth District.

In Respondent's briefs filed in the Fourth District, Respondent repeatedly challenged whether any purported fraudulent concealment truly undermined Petitioner's suspicions that amounted to constructive knowledge of Petitioner's cause of action. Respondent's 4th DCA Initial Brief at p. 17. Respondent also appealed the issue of whether the record disclosed any affirmative misrepresentations made by Appellant that had anything to do with hiding the cause of action. Id.

As he did in the trial court, Respondent argued on appeal that Florida's cause of action for wrongful death accrues on the date of death, without regard to a potential plaintiff's uncertainties

about the identity of the wrongdoer or other collateral matters. Id. at pp. 20-23. In his Initial Brief, Respondent made extensive arguments about what it meant for a plaintiff such as Petitioner to prove the success of purported fraudulent concealment efforts, making it clear that any such success would have to hide the "cause of action." Id. at p. 28. Respondent also argued that a wrongdoer's mere silence about his alleged participation in wrongdoing does not constitute fraudulent concealment under Florida law. Id. at pp. 32-33.

Finally, Respondent addressed the well-established rule of Florida tort law that a potential plaintiff's knowledge of injury alone, without even knowledge of negligence or other wrongful activity, causes a tort claim to accrue. Id. at pp. 29-31, 36-39. "[T]he wrongful nature of the murder itself put Plaintiff on notice sufficient to start the clock running." Id. at 36. Respondent distinguished between Petitioner's adequate notice of a potential claim against the Respondent and the separate, additional evidence sought by Petitioner to substantiate the proof against Respondent at trial. Id. at p. 39.

Respondent argued, both before the trial court and in his appellate briefs, that the alleged concealment of his participation in this wrongful death did not fall within the legal definition of fraudulent concealment under Florida law. The three cases cited by Petitioner and the Amicus do not support this waiver argument, and the record in this case demonstrates that Respondent repeatedly addressed the central issue in this appeal both before the trial

court and in his appellate briefs.

CONCLUSION

If this Court chooses to accept jurisdiction, then this Court should answer the Fourth District's certified question in the negative. Binding Florida precedent limits the scope of the fraudulent concealment doctrine to the defendant's concealment of a cause of action. The Fourth District properly determined that this doctrine does not apply where the plaintiff knows that he has a claim based upon wrongfully-caused injuries, but simply does not know whom the proper defendants are. This limitation of the fraudulent concealment doctrine represents the majority rule in this country.

Petitioner fails to acknowledge the well-established public policies that justify barring untimely claims brought by plaintiffs who know about those claims but fail to investigate the wrongdoers with due diligence. If plaintiffs know of their injuries caused by wrongdoing, but are not required to pursue the wrongdoers with due diligence, then none of the policies supporting the enforcement of statutes of limitations are served. On the other hand, there is no justification for imposing any due diligence obligations upon plaintiffs who do not know that they have a cause of action based upon wrongfully-caused injuries.

Moreover, this Court should not even accept jurisdiction of this appeal because the decision of the Fourth District is

supported by other, substantive grounds which are self-sufficient in themselves. No record evidence shows that the undisputed elements of fraudulent concealment were satisfied so as to toll the statute of limitations. No testimony or other evidence suggests that the McClintons acted with due diligence, that they ever relied upon any specific and affirmative misrepresentations made by Respondent, or that any such misrepresentations reasonably deterred the McClintons from suspecting Respondent until December 23, 1989, two years before they filed this lawsuit.

Finally, the jury was neither instructed to address these undisputed elements nor asked whether any specific and affirmative misrepresentations made by Respondent reasonably deterred the McClintons from suspecting that they could sue Respondent until December 23, 1989. On these grounds alone, the Fourth District's mandate to enter judgment for Respondent must be upheld.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been mailed to John B. Moores, Esq., 777 South Flagler Drive, 8th Floor, West Tower, West Palm Beach, Florida 33401; David William Boone, Esq., 3155 Roswell Road, Suite 100, The Cotton Exchange, Atlanta, Georgia 30305; Richard Kupfer, Esq., The

Forum, 1655 Palm Beach Lakes Boulevard, Suite 810, West Palm Beach, Florida 33401; and Roy D. Wasson, Esq., Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, this _____ day of February, 1996.

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