IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,110

THE FULTON COUNTY ADMINISTRATOR,
as ADMINISTRATOR OF THE ESTATE
OF LISA McCLINTON SULLIVAN,

Petitioner,

-vs.-

JAMES VINCENT SULLIVAN,,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

ROY D. WASSON
Attorney for Amicus Curiae
Suite 402 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

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ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

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ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from a judgment entered on a jury verdict against the Respondent, following trial of a wrongful death action. R-991-92. The Defendant below, James Sullivan, arranged for an assassin to murder his estranged wife, Lita McClinton Sullivan, and Mr. Sullivan's conspiratorial participation in Ms. McClinton's assassination was the basis for the jury's verdict against him for her wrongful death. R-989-90. The Amicus Curiae, The Academy of Florida Trial Lawyers ("Academy") otherwise adopts and incorporates the Petitioner's Statement of the Case and of the Facts.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

SUMMARY OF THE ARGUMENT

The Amicus Curiae, the Academy of Florida Trial Lawyers, ("Academy") supports the position of Petitioner that the decision of the Fourth District Court of Appeal in this case should be quashed. The Academy submits that the decision was erroneous under any of four analyses. First, Sullivan did not properly preserve any appellate argument that he was entitled to judgment as a matter of law because he failed to renew his Motion for Directed Verdict following the verdict against him. Second, the grounds upon which the Fourth DCA's decision was based--that the fraudulent concealment doctrine does not extend to fraudulent concealment of a tortfeasor's identity, as oppose to fraudulent concealment of the cause of action--was not properly preserved for appellate review, in that it neither was presented for consideration by the trial court nor identified as an issue on appeal before the Fourth District. Third, this action was not time-barred against Sullivan because of his fraudulent concealment which precluded Plaintiff from bringing the cause of action against him within two years of his wife's murder.

On the first issue concerning the need for renewal of a motion for directed verdict after an adverse jury verdict, the Academy adopts and incorporates Petitioner's argument and authorities thereon. On the second issue, this Court should quash the decision below on the ground that the Fourth District impermissibly reversed upon an issue which had not been properly preserved at the trial court level nor properly raised as an issue on appeal. This Court should articulate a standard for appellate consideration of issues not preserved by the parties which limits review of such matters to issues involving fundamental error.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

This action was not time-barred against Sullivan because of his fraudulent concealment which prevented the Plaintiff from bringing suit against him within two years of the murder. In the first place, the certified question whether statutes of limitation for civil actions are tolled by fraudulent concealment of the Defendant's identity should be answered in the affirmative because the historical reason underlying the fraudulent concealment doctrine--the need to suppress rather than encourage fraud--is advanced by this Court's recognition of the applicability of the doctrine to such cases. Second, whether or not this case answers the certified question in the affirmative, this Court should hold that the fraudulent concealment doctrine applies anyway, because more than the Defendant's identity was concealed. The very existence of a conspiratorial relationship between the gunman who pulled the trigger and another person was concealed by Mr. Sullivan, so the existing doctrine which tolls the statute of limitations for fraudulent concealment of a cause of action should be held to be applicable here.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

ARGUMENT

I.

THE ACADEMY ADOPTS PETITIONER'S ARGUMENT THAT SULLIVAN'S ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW WAS NOT PRESERVED FOR APPEAL

The Academy agrees with Petitioner's position that Sullivan's entitlement to judgment as a matter of law was not preserved for appeal because he failed to renew his motion for directed verdict after trial. The Petitioner has thoroughly briefed that argument and the Academy need not present any further argument or authority thereon.

II.

THIS COURT SHOULD RESTRICT JUDICIAL ACTIVISM OF THE APPELLATE COURTS BY LIMITING REVIEW OF MATTERS NOT RAISED BY THE PARTIES TO FUNDAMENTAL ERRORS

The decision of the Fourth District epitomizes a current trend of well-intentioned judicial activism in which appellate courts of Florida seem dedicated to achieving the correct result in each case, even where the legal theories upon which the decision must be based to support it have not been pleaded and argued at trial, not been raised as issues on appeal, and otherwise have not been preserved for appellate review in the usual sense of the preservation of error doctrine. The Academy submits that such judicial activism, however well-intentioned, is dangerous to the fabric of the adversarial judicial system and should be controlled by this Court. This proceeding provides an opportunity for the Court to fashion a limitation upon appellate courts' authority to address issues not

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

preserved, which the Academy submits should be similar to the definition of fundamental error, at least in cases such as this one, where the parties are represented by capable attorneys.

There is abundant authority that error should not ordinarily form the basis of an appellate court's decision unless they have been properly preserved in the trial court. "[I]n the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court." Abrams v. Paul, 453 So. 2d 826, 827 (Fla. 1st DCA 1984).

However correct and desirable may be the result in a given case, the notion that appellate courts are free to reach down into the record and pull up issues for review which have not been argued at the trial court level or properly briefed on appeal is contrary to our adversary system of justice and philosophically troubling to an organization such as the Academy which recognizes the absolute necessity of limiting issues to be litigated to those selected by the advocates for the parties, not to those selected by the judges deciding the cases.[1] There are two sets of reasons perceived by the Academy why judicial activism should be controlled. First, although doubtless calculated to increase the quality of justice

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[1] One of the paramount Objectives and Goals set forth in the Bylaws of the Academy is the following: "Encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by a jury shall be secure to all and remain inviolate." (emphasis added).

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

dispensed by ignoring errors of counsel in failing to recognize and preserve meritorious issues, there is the risk of the opposite result from recognition of issues not preserved. Second, less likely to occur but more sinister in its effect, is the risk that judges through judicial activism may allow their personal preferences for a given result to influence the outcome of litigation in some cases, giving one party an unfair advantage.

On the first reason why there should be a limit on the power of courts to decide cases on issues not properly raised, even well-intentioned judicial activism can have the opposite effect of that which usually is intended, thereby leading to greater uncertainty in the law and unevenness in the quality of results obtained, instead of improving the measure of justice dispensed. First, judicial activism may result in cases being decided on issues consciously avoided by parties' counsel as strategic choices to forgo one theory of recovery or avenue for relief because of tactical difficulties in establishing that theory, or because of problems which litigating that issue will cause to another theory which the litigant counsel chooses instead to advance.

Second, where judges are able to exercise the power to decide cases on issues not raised by the parties, but have no duty to do so in the usual case, the learned expectation that the courts will do the right thing (however the case is presented) will cause the parties to lessen their vigilance in presenting their cases. It should be presumed in the adversary system that meritorious issues will be fully and fairly raised and addressed by the parties, but a policy of judicial activism which lulls litigants into believing that all meritorious issues may be considered by the court even without being raised will cause advocates to lose attentiveness to their duty. Where the court then refrains from engaging in active review

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

for errors on their own, the client's cause will suffer.

Finally on this issue, although it is a remote risk that an appellate judge in Florida will permit personal preference for a given outcome in a case to influence his or her decision whether to raise an issue which has not been preserved for appeal (or whether to vote to consider such an issue observed by another judge to be present in the record which has not been preserved), the theoretical risk of that sort of thing occurring as part of the subconscious decision-making process prompts the Academy to suggest a rule which limits that small risk.

Therefore, this Court should announce a limitation on the scope of review of issues not preserved in the usual sense of that doctrine to permit appellate courts to review issues not raised by the parties, only where to fail to do so would result in a miscarriage of justice through fundamental error.

III.

THIS ACTION WAS NOT TIME-BARRED AGAINST SULLIVAN BECAUSE OF HIS FRAUDULENT CONCEALMENT WHICH PRECLUDED PLAINTIFF FROM BRINGING THE CAUSE OF ACTION AGAINST HIM WITHIN TWO YEARS OF THE MURDER

A. The Certified Question Whether Statutes of Limitation for Civil Actions are Tolled by Fraudulent Concealment of the Defendant's Identity Should Be Answered Affirmatively:

Albeit reaching different conclusions, the Fourth District in its decision and the Petitioner in its brief thoroughly discuss the evolution in Florida of the fraudulent concealment doctrine as an avoidance to the statute of limitations defense. The Academy writes on this point only to add something to the historical perspective in support of

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

Petitioner's position.

The doctrine of fraudulent concealment has been evolving outside of Florida for more than 100 years before this Court recognized it in 1953 in Proctor v. Schomberg, 63 So. 2d 68 (Fla. 1953). In the early nineteenth century the doctrine was widely recognized to provide relief where the fraud which concealed the cause of action also was the subject of the cause of action. See H.G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 275 (1883)(hereinafter "Wood"). Also in the early 1800's, the doctrine was recognized in actions at law by courts in states including Pennsylvania, Missouri, and Maine. Id. § 274.

The courts of England also recognized fraudulent concealment as an exception to the statute of limitations defense in both equitable actions and actions at law. See J.K. Angell, A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty § 183 (6th ed. 1876)(hereinafter "Angell"), in which the author, citing several English cases from the first two decades of the 1800's, noted that although he "has not been able to meet with any direct decision in England upon this important question, it would seem, from the . . . indirect authorities in that country . . . , that where there is concealed fraud on the part of the defendant, the plaintiff will not lose his remedy [at law to the statute of limitations]." See also generally Sherwood v. Sutton, Fed. Cas. No. 12,782, 5 Mason 143 (1828)("[i]t does not strike me, therefore, that the expositions of the [exception to] the statute by courts of chancery are to be rejected in such cases, unless they turn, not on the words of the statute, but upon some equity peculiar to those courts").

By the latter part of the 19th Century, at least twenty-three states had enacted

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

statutes recognizing the tolling effect of fraudulent concealment of at least some causes of action. Wood, supra, § 274. In twelve of those twenty-three states, including Florida, statutes provided that "in bills or actions for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery of the fraud." Id. Statutes in eleven other states by 1883 expanded the application of the doctrine to cases other than those involving actions based on fraud, and "expressly provided that, where the cause of action is fraudulently concealed, or where it arises from fraud, the statute shall not begin to run except from the time of its discovery." Id. (emphasis added).

The fraudulent concealment exception continued to thrive in the twentieth century. By 1946 the U.S. Supreme Court stated: "This equitable doctrine is read into every federal statute of limitation." Holmberg v. Ambrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L. Ed. 743 (1946).

A policy of broadly applying the fraudulent concealment doctrine in those jurisdictions where it is recognized is supported by the following early explanation for the reason underlying the doctrine articulated by Mr. Justice Story of the United States Supreme Court:

> It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, for an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason on which the exception is built . . . .

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

Sherwood v. Sutton, Fed. Case No. 12,782, 5 Mason 143 (1828)(quoted in Angell, supra, at 192-93)(emphasis added).

Application of the fraudulent concealment doctrine to cases of concealment of the identity of a tortfeasor would further the underlying purpose of the statute of limitation itself: to suppress fraud rather than to encourage it. Conversely, refusal to recognize the exception because of a narrow interpretation of the doctrine would work to encourage fraud by rewarding its perpetrator for his misconduct. The long history of the evolution of the exception and the policy reason on which it is based supports the application of the fraudulent concealment doctrine to cases of concealment of the wrongdoers' intentities, so the certified question should be answered in the affirmative.

B. Regardless of this Court's Answer to the Certified Question, the Decision Under Review Should be Quashed Because Defendant Concealed Not Just His Identity, but the Cause of Action for Tortious Conspiracy to Commit the Decedent's Murder:

Whether or not this Court should respond to the certified question in the affirmative, the decision under review should be quashed because this case did not involve only a concealment by defendant of his identity as a tortfeasor. Instead, the Defendant in the present lawsuit concealed not merely his identity as an accomplice to the murder, but he concealed the entire existence of a cause of action against any person for having conspired with the paid assassin to kill his wife. 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.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

The interrelationship between the Plaintiff's entire cause of action against the Defendant and the fraudulent concealment avoidance to the statute of limitations defense has been known to both parties since well before the trial of this matter. As noted by the Defendant in his Initial Brief before the Fourth DCA: "In Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Sever, Plaintiff argued that no evidence could address limitations issues other than Plaintiff's evidence on the merits." Sullivan in that Brief went on to quote from the Plaintiff's argument in opposition to the Motion to Sever:

> There is no way to separate the statute of limitations issue in this case from the liability issue. To prove the statute of limitations should be tolled, the Plaintiff will have to proof that the Defendant was a conspirator in the murder of his wife and that he concealed his involvement until Plaintiff could uncover it. This is the same thing Plaintiff will have to proof in the liability trial. There is no way to proof concealment without proving the entire murder for higher conspiracy.

R-378-79. Thus, much more was being fraudulently concealed than the Defendant's mere identity. The existence of the cause of action for the conspiracy itself was fraudulently concealed.

Mr. Sullivan's participation as a procuring cause of his wife's death was actual under a different set of facts from the facts which gave rise to a cause of actionable against the trigger man, alone. Therefore, even if this Court should answer "no" to the certified question, the "cause of action" against someone other than the shooter was concealed by the Defendant in the traditional sense of the fraudulent concealment exception, and the judgment under review should be quashed anyway.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

CONCLUSION

WHEREFORE, the certified question should be answered in the affirmative, but the decision of the Fourth District should be quashed regardless of the ruling on the certified question.

Respectfully submitted,

ROY D. WASSON
Florida Bar No. 332070
Attorney for Amicus Curiae
ACADEMY OF FLORIDA TRIAL LAWYERS
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail, upon Richard A. Kupfer, P.A., Attorney for Plaintiff/Petitioner, The Forum, Tower C, Suite 810, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401; Randall Nordlund, Esq., GILBRIDE, HELLER & BROWN, P.A., Attorneys for Appellant, Two South Biscayne Boulevard, One Biscayne Tower, Suite 1570, Miami, Florida 33131; John B. Moores, Esq., MONTGOMERY & LARMOYEUX, P.A., Attorneys for Former Plaintiff/Emory C. McClinton, 1016 Clearwater Place, West Palm Beach, Florida 33401; David W. Boone, Esq., Attorney for Former Plaintiff/Emory C. McClinton, 3155 Roswell Road, Suite 100, The Cotton Exchange, Atlanta, Georgia 30305, on this, the 2nd day of February, 1996.

ROY D. WASSON
Florida Bar No. 332070
Attorney for Amicus Curiae
ACADEMY OF FLORIDA TRIAL LAWYERS
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919