**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.
_____/

# PETITIONER'S INITIAL BRIEF ON THE MERITS

On Certified Question Of Great Public
Importance From The Fourth District Court Of Appeal

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## STATEMENT OF THE CASE AND FACTS

### Introduction

This appeal arose from a final judgment for $4 million dollars entered against the Respondent, James Sullivan, in a wrongful death action after a jury found Sullivan guilty of hiring a third party to murder his estranged wife, Lita McClinton Sullivan, in Georgia. (R. 989-990; 991-992) Lita Sullivan was shot in the head by someone masquerading as a flower delivery man on the day that a crucial hearing was scheduled to commence in Georgia on her pending divorce from Palm Beach resident, James Sullivan. (R. 722, 713).

As the Fourth DCA below noted in its opinion (at 662 So2d 706, 707), Sullivan did not raise any issue on appeal challenging the sufficiency of the evidence to support the jury's finding that he had arranged his wife's contract murder. He did challenge the jury's finding of fraudulent concealment, in order to toll the statute of limitations. However, the very nature of the contract murder in this case, the reason Sullivan hired a "hit man" to commit the murder and Sullivan's later attempts to lead the police investigation onto a different path are all affirmative acts to conceal his own complicity in the murder. As such, the details of how this planned operation was carried out, and how Sullivan tried to cover his own tracks before and after the murder was committed, are relevant to the fraudulent concealment issue that the Fourth DCA has certified to this court.

## FACTS RELEVANT TO SULLIVAN'S FRAUDULENT CONCEALMENT OF HIS COMPLICITY IN THE MURDER

Three days before the murder of Lita Sullivan, she narrowly escaped an earlier similar attempt on her life. On January 13, 1987, in the very early morning hours (about 4:00 a.m.) there was a disturbance at Lita's Atlanta townhouse when someone repeatedly pounded on her front door but, at that time, she would not answer her door. (R. 670) There was a man outside her house and a car that had the engine running. (R. 670) A few hours later on that same day James Sullivan (from his home in Palm Beach) called Lita's next door neighbor (Mr. Christenson) to ask whether he had recently observed any unusual occurrences or had seen a car around Lita's house. (See R. 666-669; 659, 720; T. 341)

On that same day, at 7:24 in the morning, three individuals checked into a Holiday Inn, Room 518, that was just a short distance from Lita Sullivan's townhouse in Atlanta. (R. 717-718; T. 339, 426) They were driving a Toyota with a North Carolina registration. (R. 728; T. 339, 426) Within minutes after they checked in there were telephone calls placed from that room to James Sullivan's home in Palm Beach, Florida, and there were also calls later that same morning from Sullivan's Palm Beach residence to the Atlanta Holiday Inn, Room 518. (R. 685-686, 717-718; T. 338, 375, 498) The name used on the Holiday Inn registration card (Johnny Furr) and the North Carolina address that was filled in on the card was later determined to be false. (R. 727-728; T. 338-339, 426)

On the following day's entry (January 14, 1987) on James Sullivan's personal diary, Mr. Sullivan wrote "get flowers." (T. 344, 617)

Two days after that, on January 16, 1987, Lita Sullivan's killer bought a box of flowers at a florist that was just a few minutes drive from Lita's Atlanta townhouse. This was at about 8:10 in the morning. (R. 711, 721; T. 324-325) The store employee who put the flower arrangement together (and who identified the flowers and the box, which was left at the scene of the murder) remembered that he sold the flowers to a very rough looking bearded man who was driving a white Toyota and who had at least one other male companion in the car with him. (R. 712; T. 330-331, 437, 754, 759-760, 766)

The murder occurred about ten minutes after the flowers were purchased. (R. 721) Lita's neighbors observed the gun man deliver flowers to Lita's front door at about 8:20 in the morning, they heard shots ring out and one neighbor saw the gun man run away from the scene. (R. 659-664; 695, 721; T. 612) The fatal bullets traveled through the box of flowers before they entered Lita's head. (R. 505; T. 321) According to law enforcement officials, the murder had all the indicia of being a "contract killing," (R. 725-726; T. 332, 395) and the manner in which it was performed was meant to conceal James Sullivan's involvement. (T. 394-395)

About 40 minutes after the shooting a phone call was placed to James Sullivan's Palm Beach residence from a roadside pay telephone just north of Atlanta. (R. 687, 716, 721; T. 338, 578)

It was a collect call, Sullivan accepted the charges and was on the phone for about one minute. (R. 687, 716; T. 338, 502, 578) The pay telephone was about a 40 minute drive north of the scene of the murder and was on the interstate highway that led back to North Carolina. (R. 687-688, 715-716; T. 338)

On the day of her murder, Lita was scheduled to appear in court in Atlanta for a hearing to determine whether the court would enforce a post-nuptial agreement between Lita and James Sullivan. (R. 722, 713). James Sullivan had told others that he perceived he was not doing well in his pending divorce proceedings. (T. 680,687. See also T.701, 706-707) Once Lita had died, however, the divorce proceeding terminated and James Sullivan no longer stood to lose any of his property. (T. 714) He probably saved about a million dollars by not going through the divorce. (See T. 939)

Sullivan later privately confessed to two people that he had Lita murdered. Sullivan told the woman he later married after Lita was killed that "life is cheap" in Georgia where you can hire people to do anything; and Sullivan admitted he had hired someone to murder Lita. (See Testimony of Suki Sullivan at T. 676, 687) Sullivan also later confessed to an inmate in jail (while Sullivan was incarcerated on another charge) that he had Lita murdered, but that the police would never prove it because he had an explanation for everything except the roadside telephone call placed to his residence 40 minutes after the murder. (See T. 809, 818, 820, 822-825)

Although Sullivan privately admitted his complicity to two people, he publicly did everything he could to get the police off his tracks and onto other false leads that he provided. At one point he told the police and he told Lita's neighbors that Lita was involved with the illegal drug trade and that her murder was probably a "drug hit." (R. 676-677; T. 334, 381, 628) He also told Lita's neighbors that Lita had been shot with a 9mm automatic pistol which was the weapon of choice for Columbian drug dealers. (R. 677; T. 381, 384) Ironically, the information about the type of gun used was accurate but the police had never disclosed that information to anyone outside the official police investigation. (R. 729; T. 381-382) The only person who could possibly know what type of weapon was used, outside the police investigating the crime, was the person responsible for the shooting. The police later ruled out the suggestion that this was a "drug hit." (T. 574)

At other times Sullivan used other means to get the police investigation focused onto someone else. First he suggested to the police that they should investigate a former friend of his named Marvin Marable. (T. 395-396) Next, he suggested to the police that they should investigate a man named Michael Hollis, who Lita was dating and who (according to Sullivan) had Mafia connections. (See T. 483-485, 573-575, 577) Sullivan also suggested to the police that they should investigate another man named Bob Daniels who, as the police later found out, was recuperating from a triple bypass operation when Lita was murdered and could not possibly have been the murderer. (T. 486, 573) The

police chased all the rabbits that Sullivan pointed out to them and they all came to a dead end. (See T. 471, 573, 574, 577, 875, 938) When the police questioned Sullivan about the phone calls he placed to the Atlanta Holiday Inn on January 13, 1987 he said, at first, that he was probably calling to make reservations for himself; but when the police told Sullivan his calls were traced directly to Room 518, he had nothing further to say on that subject. (T. 340, 632) At trial, Sullivan even tried to direct suspicion toward Lita's father by cross examining him about his receipt of life insurance benefits after Lita's death. (T. 834-835)

The police determined that there were three participants in Atlanta that were involved in the actual carrying out of the murder. (T. 618) The official investigation of the murder was performed by several law enforcement agencies , including the FBI (T. 318-320), and it is uncontroverted that the facts learned by the police during their investigation were kept completely secret from the public. (See R. 729; T. 381) There is absolutely no evidence that the Plaintiffs in this case (Lita's parents) were informed by the police of the information being gathered, or that they were otherwise "in the loop" with respect to the police investigation. However, Sullivan's confession to his later wife, Suki Sullivan, was a revelation that first became known on September 6, 1990 during a police interview with Suki. (See T. 397-398, 587, 874, 876) Sullivan's jailhouse confession also first became public in 1990. (See T. 874, 876) This wrongful death action was filed within two years after these confessions by Sullivan were finally revealed. (See R. 1)

Sullivan has had no contact with anyone in Lita's family since the time of Lita's death. (T. 833) He did not send any flowers, or sympathy card, nor did he attend the funeral. (T. 833-834) The law enforcement agents that interviewed Sullivan testified that he did not appear to show any remorse or sadness over Lita's death. (T. 397) In fact, just days after Lita's death James Sullivan and his new love interest (Suki) celebrated with champagne and caviar. (See T. 934-935)

The foregoing discussion is not exhaustive of all the circumstantial evidence that was presented at trial (since Sullivan is not challenging the sufficiency of the evidence of his complicity in the murder), but it summarizes the salient facts bearing directly on the "fraudulent concealment" issue that the Fourth DCA has certified to this court.

## STATEMENT OF PROCEEDINGS LEADING TO THE FOURTH DCA'S CERTIFIED QUESTION

The Fulton County Administrator was appointed by the Georgia probate court to act as personal representative for the estate of Lita Sullivan. After a wrongful death trial that lasted eight days, the jury returned a verdict specifically finding that Sullivan arranged the murder of his wife, Lita, and that he actively participated in the fraudulent concealment of his involvement in arranging Lita's murder. (R. 989) Although Sullivan had, earlier in the trial, orally moved for a directed verdict, after the jury returned its verdict Sullivan did not renew his earlier motion for directed verdict, or otherwise ask the trial court to enter a judgment in his favor notwithstanding the verdict.

The only post-trial motion Sullivan filed was a motion for new trial. (R. 993), which was denied by the trial court (R. 1143a).

Sullivan appealed to the Fourth DCA. In his appellate briefs, Sullivan never argued there is a distinction between fraudulently concealing a cause of action, as opposed to concealing the identity of the perpetrator. Neither was any such argument ever raised by Sullivan at the trial level. However, just a few days before oral argument the Fourth DCA issued a sua sponte order (App. "A") directing the parties to be prepared to discuss the applicability of International Brotherhood of Carpenters and Joiners of America v. United Association of Journeymen and Apprentices, 341 So2d 1005 (Fla. 4th DCA 1976). In that case, the Fourth DCA held (20 years ago) that fraudulent concealment of a cause of action will toll the statute of limitations, but fraudulent concealment of the identity of the responsible party will not.

Based on the International Brotherhood case, the Fourth DCA entered an order reversing the final judgment and remanding to the trial court with instructions to enter judgment in favor of Sullivan. That opinion is published at Sullivan v. Fulton County Administrator, 662 So2d 706 (Fla. 4th DCA 1995). (App. "C") In that opinion, the Fourth DCA stated that it was reluctant to reverse the final judgment, but felt itself compelled to do so based on the International Brotherhood case. The Fourth DCA spent the majority of its written opinion explaining why the result it felt itself compelled to reach in this case makes no sense and

creates bad public policy, and the Fourth DCA certified the question to this court as one of great public importance. A timely motion for rehearing of the court's September 13, 1995 opinion was filed by the Fulton County Administrator on September 28, 1995 and was denied by the Fourth DCA on November 29, 1995. (App. "B") The Fulton County Administrator timely filed its notice to invoke this court's discretionary jurisdiction on December 27, 1995.

## QUESTION CERTIFIED

**ARE STATUTES OF LIMITATIONS FOR CIVIL ACTIONS TOLLED BY THE FRAUDULENT CONCEALMENT OF THE IDENTITY OF THE DEFENDANT?**

## SUMMARY OF ARGUMENT

Sullivan's entitlement to judgment as a matter of law was not preserved for appeal in the absence of a post-trial motion for judgment notwithstanding the verdict. He is not permitted to ask an appellate court to enter a judgment in his favor notwithstanding the verdict, nor does an appellate court have the power to do so in the absence of a Rule 1.480(b) motion having first been presented to the trial court. In this regard, Florida follows the same rule that applies in federal appeals.

Also, the question certified by the Fourth DCA should not have been addressed at all since it was not raised by Sullivan at

the trial level or in his appellate briefs. Sullivan did not, at any time, argue that there is a distinction between fraudulently concealing a cause of action, as opposed to merely concealing the identity of the perpetrator. That was brought up by the Fourth DCA sua sponte. This court has previously indicated (in a case involving fraudulent concealment issues) that appellate courts should not go outside the issues raised by the parties in order to dispose of an appeal on its merits.

On the merits, a civil statute of limitations should certainly be tolled by the type of fraudulent concealment involved in this case. When this court (in 1953) adopted the equitable doctrine of fraudulent concealment as a means of tolling the statute of limitations, this court's opinion implied that the doctrine encompasses fraudulent concealment of either the cause of action or the identity of the perpetrator. The rationale supporting the doctrine is tailor-made for a case like this one, and the modern trend in other states also has been to apply the doctrine to either type of fraudulent concealment. There is no policy justification whatsoever for making a distinction between fraudulent concealment of a cause of action and fraudulent concealment of the identity of the perpetrator when, in either case, the defendant's wrongful conduct has prevented the plaintiff from timely filing suit.

## ARGUMENT

### A. SULLIVAN'S ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW WAS NOT PRESERVED FOR APPEAL IN THE ABSENCE OF A POST-TRIAL MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Although the Fourth DCA did not discuss this issue in its opinion, it was raised by the Fulton County Administrator in its brief, at Page 20.[1] Although Sullivan had orally moved for a directed verdict during the course of the trial, after the jury returned its verdict Sullivan did not renew his earlier motion for directed verdict, or otherwise ask the court to enter a judgment in his favor notwithstanding the verdict pursuant to Fla. R. Civ. P. 1.480. He filed a post-trial motion for new trial (R. 993) and four months after the trial he filed a motion for relief from judgment under Rule 1.540 (R. 1028); however, Sullivan never filed a post-trial motion renewing his earlier motion for directed verdict under Rule 1.480.

By failing to properly renew his motion for directed verdict, Sullivan is not permitted to ask an appellate court to enter a judgment in his favor notwithstanding the verdict. See General Motors Acceptance Corp. v. City of Miami Beach, 420 So2d

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1. The Fourth DCA briefs should be part of the record that has been transmitted to this court. The Fulton County Administrator filed a motion for rehearing with the Fourth DCA addressing the fact that Sullivan did not preserve for appeal the issue found by the court to be dispositive, and filed a separate motion to include the Fourth DCA briefs in the record to be transmitted to this court. The Fourth DCA denied rehearing, but granted the motion to include the Fourth DCA briefs in the record to be transmitted to this court. (App. "B")

601 (Fla. 3d DCA 1982)(Held: Failure to file a post-trial Rule 1.480(b) motion waives the motions for directed verdict made at trial, and deprives an appellate court of power to order entry of judgment in Defendant's favor), review denied, 431 So2d 988 (Fla. 1983). Cf. 6551 Collins Ave. Corp. v. Miller, 104 So2d 337 (Fla. 1958); The Keys Co. v. Shea, 372 So2d 493 (Fla. 4th DCA 1979).

Although this court has not yet squarely addressed this procedural requirement under Rule 1.480(b), it should be noted that the United States Supreme Court has resolved this issue under the federal counterpart to Florida's rule. Fla. R. Civ. P. 1.480(b) is identical to Fed. R. Civ. P. 50(b), under which a federal appellate court is powerless to reverse a trial court and direct the entry of a judgment in accordance with a prior motion for directed verdict when the appellant failed to move for judgment after the verdict under Federal Rule 50(b). Cone v. West Virginia Pulp & Paper Co., 330 US 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); Globe Liquor Co. v. San Roman, 332 US 571, 68 S.Ct. 246, 92 L. Ed. 177 (1947); Johnson v. New York, New Haven & Hartford R.R., 344 US 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952).

The fact that Florida Rule 1.480(b) is identical to Federal Rule 50(b), ordinarily requires that the Florida rule be construed to be consistent with the federal rule upon which it is patterned. See Miami Transit Co. v. Ford, 155 So2d 360 (Fla. 1963); Savage v. Rowell Dist. Corp., 95 So2d 415 (Fla. 1957). The policy to be served by requiring a post-trial motion to be filed under Rule 1.480(b) is that it gives the trial court a last

opportunity to revisit an earlier motion for directed verdict after closing arguments and after the jury reaches its verdict. During trial, the court might believe it is a very close question and decide to play it conservative by allowing the jury to reach a verdict and then, if it is still necessary, revisit the issue when a post-trial motion for judgment under Rule 1.480(b) is filed. The trial courts have been encouraged by the appellate courts to follow this practice on close motions for directed verdicts. Dysart v. Hunt, 383 So2d 259 (Fla. 3d DCA 1980); Freeman v. Rubin, 318 So2d 540 (Fla. 3d DCA 1975); Ditlow v. Kaplan, 181 So2d 226 (Fla. 3d DCA 1965).[2]

Florida Rule 1.480(b) specifically states, "When a motion for directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." That language authorizes a trial court to delay ruling on a close call until after the jury's verdict, but when a litigant fails to file the necessary post-trial motion to allow the court to revisit the issue, the design of the rule has been frustrated and the right to argue for a judgment notwithstanding the verdict on appeal should be deemed to be waived. That is the reason the Third DCA stated in General Motors Acc. Corp, supra (at 603, n.1); "The defendant filed

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2. The policy is somewhat similar to a trial court reserving ruling on a motion for mistrial until after the verdict has been rendered. See Ed. Ricke & Sons v. Green, 468 So2d 908 (Fla. 1985).

a post-trial motion for new trial rather than for a judgment to be entered in accordance with a motion for directed verdict. In such a posture, we cannot enter a judgment for the defendant."

Accordingly, Sullivan did not preserve this issue (regarding his right to have judgment entered in his favor) for appeal at the Fourth DCA level, and the Fourth DCA's opinion should be quashed for that reason alone without even reaching the merits of the certified question.

### B. THE QUESTION CERTIFIED BY THE FOURTH DCA SHOULD NOT HAVE BEEN ADDRESSED, SINCE IT WAS NOT RAISED BY SULLIVAN AT THE TRIAL LEVEL OR IN HIS APPELLATE BRIEFS.

In the first paragraph of the Fourth DCA's opinion it is stated; "Sullivan appeals, arguing that fraudulent concealment of the identity of a tortfeasor does not toll the statute of limitation." That statement is not accurate. As discussed in this brief supra at p. 8, Sullivan did not, at any time (either in the trial court or in his appellate briefs) argue that there is a distinction between fraudulently concealing a cause of action, as opposed to merely concealing the identity of the perpetrator. In fact, the position taken in Sullivan's Fourth DCA brief was that, "Plaintiff's cause of action accrued [when] Plaintiff had reason to believe that defendant might have had something to do with the

homicide." (Sullivan's Initial Brief to the Fourth DCA at p. 38)[3] When one looks at Mr. Sullivan's Fourth DCA briefs (especially the Table of Contents and Page 1 of Sullivan's Initial Brief which delineates the issues he was raising to the Fourth DCA) one would find that the only issues raised by Mr. Sullivan regarding the statute of limitations were:

1. Plaintiff had to prove that Defendant's concealment efforts succeeded until at least December 23, 1989.
2. Plaintiff had to prove that it pursued its potential claim with due diligence.
3. Plaintiff had to prove that Defendant did more than merely deny liability and maintain silence.
4. The trial court should have asked the jury to decide whether Plaintiff used due diligence, and whether Plaintiff reasonably relied on Defendant's affirmative misrepresentations, and when Plaintiff received notice of its potential claim.

There is not a single sentence in Sullivan's briefs that mentions anything about a legal distinction between concealing "the identity of the tortfeasor" vis a vis concealing "the existence of the cause of action." The first time that issue came up was just a few days before oral argument when the Fourth DCA issued a sua

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3. See Footnote 1, at p. 11, supra.

sponte order directing the parties to be prepared to discuss the applicability of the International Brotherhood case. (App. "A") The Fourth DCA's opinion states that the International Brotherhood case was "inexplicably" omitted from the briefs. It was omitted because the point of law it stands for was never raised by Sullivan at the trial level or at the appellate level.

It is one thing to ask the parties to be prepared to discuss the applicability of a particular case at oral argument; but it is quite another thing for the Fourth DCA to reverse a $4 million dollar judgment based upon a new defense theory that was never raised by Sullivan at either level of the proceedings. This court has previously indicated that appellate courts should not go outside the issues raised by the parties and dispose of an appeal on its merits based on a point that was not preserved. Dober v. Worrell, 401 So2d 1322 (Fla. 1981) (Held: Fraudulent concealment issues must be preserved before they may be considered by an appellate court). There is also some authority for the proposition that an appellate court does have limited authority to address issues not raised by the parties, but such power should be used sparingly. Dralus v. Dralus, 627 So2d 505 (Fla. 2d DCA 1993).

When an appellate court reverses a final judgment for a reason that the appellant did not argue at either level, the court departs from its judicial function and takes on the role of an advocate. That is what happened here when the Fourth DCA injected an entirely new theory into this appeal that Sullivan himself never raised. Certainly the equities of this case do not justify the

Fourth DCA picking up the slack for Sullivan when he failed to raise the specific point that the Fourth DCA believed to be dispositive. For this reason (as well as the fact that Sullivan failed to file a post-trial motion under Rule 1.480(b)), the Fourth DCA's opinion should be quashed without even reaching the merits of the certified question.

### C. ON THE MERITS, A CIVIL STATUTE OF LIMITATIONS SHOULD CERTAINLY BE TOLLED BY THE TYPE OF FRAUDULENT CONCEALMENT INVOLVED IN THIS CASE.

The Fourth DCA felt constrained to reverse the final judgment in this case due to prior case law emanating from that same court (The International Brotherhood case) and due to dicta from this court in Nardone v. Reynolds, 333 So2d 25 (Fla. 1976). However, the Fourth DCA indicated that it would not reach this result if it were writing on a clean slate because it does not make sense and it creates bad public policy. In this respect, of course, we agree with the Fourth DCA and we can hardly add much more to the discussion contained within the Fourth DCA's opinion.

When this court, in 1953, first adopted the equitable doctrine of fraudulent concealment as a means of tolling the statute of limitations, this court did so with language that certainly implies the doctrine is broad enough to encompass fraudulent concealment of either the cause of action or the identity of the perpetrator. This court noted; "One who wrongfully conceals material facts and thereby prevents discovery of his wrong

or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong..." [emphasis supplied]. Proctor v. Schomberg, 63 So2d 68, 72 (Fla. 1953). Not only is the language used by this court in Proctor broad enough to encompass the type of facts presented in the present case, but the rationale supporting the doctrine of fraudulent concealment is tailor made for a case like this one.

This court did not subsequently intend to restrict the doctrine of fraudulent concealment in Florida by its dicta in Nardone v. Reynolds, 333 So2d 25, 37 (Fla. 1976) when it stated that a plaintiff "must show both successful concealment of the cause of action and fraudulent means to achieve that concealment." The Nardone case only involved an allegation that the defendant fraudulently concealed the existence of a cause of action, and this court was therefore only focusing on the elements necessary to support that type of allegation. It surely was not meant to recede from the broader language used by this court in Proctor, supra, when the equitable doctrine of fraudulent concealment was first adopted by this court.

The Fourth DCA below noted in its opinion that when it previously decided the International Brotherhood case, supra, it was following what it believed to be the "unanimity of authority elsewhere"; however, since that time the trend has been in the opposite direction and even some of the cases cited by the International Brotherhood court have since been overruled. See,

eg, Bernson v. Browning-Ferris Ind. of Calif., Inc., 873 P. 2d 613 (Cal. 1994) (overruling Staples v. Zoph, 9 Cal. App. 2d 369, 49 P. 2d 1131 (1935)). See also Autocephalous Church v. Goldberg & Feldman Arts, 917 F.2d 278 (7th Cir. 1990); Royal Indem. Co. v. Petrozzino, 598 F.2d 816, 819 (3d Cir. 1979); Layton v. Blue Giant Equip. Co., 105 F.R.D. 83 (E.D. Pa. 1985); O'Keefe v. Snyder, 416 A.2d 862, 870, 83 N.J. 47 (1980); Spitler v. Dean, 436 NW2d 308, 310, 148 Wis.2d 630 (1989); DeRugeriis v. Brener, 348 A.2d 139 (Pa. 1976); Arceneaux v. Motor Vehicle Cas. Co, 341 So2d 1287 (Ct. App. La. 1977). These cases hold that fraudulent concealment of the identity of a defendant will estop the defendant from relying upon a statute of limitations defense. Such cases even existed before the time the International Brotherhood case was decided. See eg. McCampbell v. Southard, 22 NE2d 954 (Ct. App. Ohio 1937); Sonnenfeld v. Rosenthal-Sloan Millinery Co., 145 SW 430 (Mo. 1912). As the California Supreme Court very recently noted in Bernson v. Browning-Ferris, supra at 618; "There seems little justification in principle for limiting the estoppel rule to concealment of the cause of action."

The Fourth DCA below also noted another recent case to be "on all fours." In Allred v. Chynoweth, 990 F.2d 527 (10th Cir. 1993) the Tenth Circuit refused to allow a murderer, who had fraudulently concealed her identity for ten years, to rely on the wrongful death statute of limitations.

The Fourth DCA, even in its International Brotherhood opinion, expressed displeasure with the result it had reached

because it only served to reward "those who by criminal skill not only stealthfully destroy another's property but avoid detection during the statutory period." International Brotherhood at 1006. In the present case, the Fourth DCA was even more forthright in expressing its displeasure with the result that it is reaching. The Fourth DCA stated; "We see no reason to distinguish between fraudulent concealment of the cause of action and fraudulent concealment of the identity of the perpetrator. In either case the defendant's wrongful conduct has prevented the plaintiff from timely filing suit." Sullivan v. Fulton County Admin., supra at 709. (App. "C")

This court, in Nardone v. Reynolds, supra, explained that the philosophy behind the tolling of the statute of limitations for fraudulent concealment is that the courts will not protect defendants who are directly responsible for the delays of filing because of their own willful acts. That philosophy has direct application to the present case, and it also serves to strengthen the public policy underlying Florida's "Victim Assistance" legislation (and the "Crimes Compensation Trust Fund"), for the reasons discussed by the Fourth DCA below in its opinion. Sullivan v. Fulton Co. Admin., supra at 709. (App. "C")

The illogic of creating a legal distinction between concealing a cause of action and concealing the identity of the perpetrator is best summed up by the Fourth DCA in the following two sentences from its opinion:

> If Sullivan had arranged his wife's disappearance, so that her parents would not have known that a crime had been committed until the body was discovered after the statute of limitations had run, the statute would have been tolled because the existence

> of the cause of action would have been concealed. It is difficult to justify a distinction here, since in either case the only competing interest is that of a criminal wrongdoer who is guilty of fraudulent concealment. Id. at 709. (App. "C")

The Fourth DCA's opinion is unmistakably written in a manner to urge this court to quash the opinion and to reach the more logical result. We respectfully urge this court to do likewise.

## CONCLUSION

The certified question should be answered in the affirmative, the opinion of the Fourth DCA should be quashed and the case should be remanded for reinstatement of the final judgment.[4]

Respectfully submitted,

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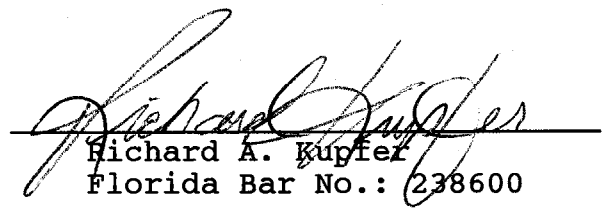
By: 
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4. The Final Judgment has not yet actually been set aside since the Fourth DCA below granted the plaintiff's motion to withhold the issuance of its mandate pending the conclusion of these proceedings before this court (App. "B"). However, the validity of the Final Judgment should be reaffirmed by this court.

## CERTIFICATE OF SERVICE

**IT IS HEREBY CERTIFIED** that a true and correct copy of the foregoing document has been furnished, this 1st day of February, 1996 to: **RANDALL NORDLUND, ESQ.**, Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, Miami, Florida 33131, counsel for Appellant; **JOHN B. MOORES, ESQ.**, Montgomery & Larmoyeux, P.A., 1016 Clearwater Place, West Palm Beach, Florida 33401, co-counsel for Petitioner; **DAVID W. BOONE, ESQ.**, 3155 Roswell Road, Suite 100, The Cotton Exchange, Atlanta, Georgia 30305, co-counsel for Petitioner; **ROY WASSON, ESQ.**, Suite 402 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, counsel for Amicus Curiae, Academy of Florida Trial Lawyers.

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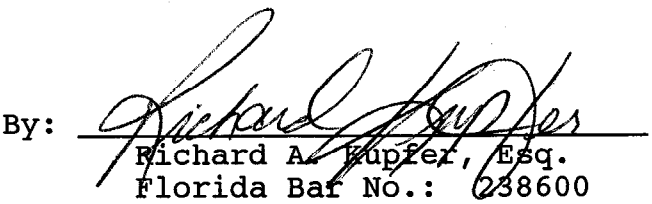
By: 
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