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 REPLY BRIEF ON THE MERITS

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QUESTION CERTIFIED

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

REPLY ARGUMENT

Sullivan's brief spends minimal time addressing the Fourth DCA's certified question, but spends the bulk of its time discussing other issues that failed to persuade either the trial court or the Fourth DCA. Sullivan spends 48 pages (comprised of mostly single-spaced quotations and footnotes) resurrecting all the issues (and more) that it presented to the Fourth DCA, even though the issue now presented by certified question to this court is a very narrow issue. We will respond as best we can, within the space limits of a reply brief, to these other issues raised by Sullivan, while noting that these other issues are not the reason why this case is currently before this court.

Sullivan argues that the Fourth DCA was in error to have found there was sufficient evidence to support the jury's finding that Sullivan actively participated in the fraudulent concealment of his involvement in arranging the murder of Lita McClinton Sullivan. Sullivan claims there was insufficient evidence that Lita's parents relied on any fraudulent concealment, or that they exercised due diligence in discovering the identity of those

responsible for murdering their daughter and pursuing their claim for wrongful death. The Fourth DCA summarized some of the evidence relating to this issue and stated: "We conclude that this evidence was sufficient to support a finding that Sullivan had fraudulently concealed his involvement."

If Sullivan had intended to challenge the Fourth DCA's conclusions in this regard, he should have filed a cross notice to invoke this court's jurisdiction, just as any appellee who wishes to present a cross appeal to an appellate court is supposed to file a notice of cross appeal.

The provision in Fla. R. App. P. 9.110(g) regarding the filing of a notice of cross appeal was intended to apply also to cross petitions for certiorari (by which this court's jurisdiction used to be invoked). See 1977 committee notes to Rule 9.110 which provides, "The term 'cross appeal' should be read as equivalent to 'cross-petition'." It should also apply to cross notices to invoke this court's jurisdiction under modern practice. We acknowledge that this court's jurisdiction is not necessarily limited to answering a certified question. Trushin v. State, 425 So2d 1126 (Fla. 1981) (Held: Jurisdiction to entertain issues ancillary to a certified question exists, but should be utilized only under limited circumstances.) However, if a respondent fails to file a cross notice to invoke this court's jurisdiction then this court should decline to address the respondent's arguments that fall outside the range of the certified question, just as an appellate court would normally decline to entertain a cross appeal that is

argued in a brief when no notice of cross appeal had ever previously been filed.

Aside from Sullivan's failure to file a cross notice to invoke this court's jurisdiction, his argument is substantively invalid. There was certainly sufficient evidence to support a finding that Sullivan actively participated (not just through passive silence) in the fraudulent concealment of his involvement in arranging Lita's murder, and that Lita's parents acted as diligently as it was reasonably practical to do under the circumstances in bringing this wrongful death action, and that they were only deterred in doing so because of Sullivan's many attempts to cover his own tracks.

The victim of this murder was lured to answer her front door through the artifice of an imposter posing as a flower delivery man. The murder itself was perpetrated through deception. Ever since that time Sullivan did not just claim ignorance and remain silent; he led the police on one wild goose chase after another in a continuing effort to conceal his own involvement. First he told the police (and told Lita's neighbors) that Lita was involved in trafficking drugs and her murder was probably a "drug hit." After that was ruled out by the police Sullivan suggested that the police should investigate a man named Marvin Marable. Later he gave another false lead and suggested the police should investigate a man named Michael Hollis who, according to Sullivan, had Mafia connections. Later Sullivan suggested that the police investigate a man named Bob Daniels. The police acted upon all

those suggestions and they all came to a dead end. At trial Sullivan even had the temerity to try to create suspicion against Lita's father, Emory McClinton. The jury was definitely justified to find that Sullivan's efforts to conceal his own complicity amounted to active concealment.

With regard to Sullivan's claim that the real plaintiffs in interest (Lita's parents) did not prove they exercised due diligence in their investigation and pursuit of this claim, the jury was also justified in finding otherwise. (Actually, Sullivan never really mentioned "due diligence" to the jury or the trial court.) Sullivan's brief argues that some of the evidence against him was collected by the police soon after they began investigating the murder and that the police considered him to be a suspect from an early point in the investigation. However, there is no evidence that Lita's parents were privy to the information being gathered by the police. They can not possibly be chargeable with knowledge of facts that the police were gathering as part of a homicide investigation that was being kept a secret from the public. The evidence at trial was uncontroverted that the facts being gathered by the police were kept a well-guarded secret. (See R. 179; T. 381)

Sullivan seems to suggest that Lita's parents should have independently hired their own private investigators to uncover these facts even though the homicide was being officially investigated by the F.B.I., the Georgia Bureau of Investigation and the Atlanta Police. It makes absolutely no sense to hold anyone to such a standard when their daughter has been murdered and the

police are doing everything possible to determine who is responsible.

It was not until the bombshell exploded in 1990 and two witnesses testified that Sullivan confessed to them he had Lita murdered that the plaintiff had more to go on than just speculation. Until the bombshell exploded in 1990, the only information Lita's parents had is that their daughter was murdered on the day she was scheduled to have a crucial hearing in her divorce case, and that James Sullivan was in Florida at that time. There is no evidence they knew about phone calls being traced, or any other information that the police were keeping close to their vest. While the timing of the murder alone could lead one to wonder whether it might be more than just a coincidence, it certainly is not enough, by itself, to support a lawsuit by Lita's parents claiming that their son-in-law murdered their daughter. Certainly it is not the policy of the statute of limitations to force someone to file an official claim of "murder" when they do not yet have a sufficiently solid basis to make such a claim.

It is one thing to harbor a bare suspicion about someone's possible involvement in a murder, but when the confessions became known it was a whole new ball game. When Sullivan moved for a directed verdict in the trial court, plaintiff's counsel pointed out that the two confessions did not come to light until 1990 and the plaintiff did file the lawsuit within two years after that. (T. 874, 876)

Sullivan implies in his brief (at p. 3) that the only witnesses to testify for the plaintiff were Lita's parents, and the plaintiff then immediately rested its case. That is not true. There were sixteen witnesses who appeared at trial (either live or by deposition) on behalf of the plaintiff and their cumulative testimony painted a vivid portrait of Sullivan's complicity and his desperate attempts to conceal it. It was Sullivan who failed to present a single witness, or his own testimony, at trial.

Sullivan argues in his brief (at p. 6) that he was "forced to represent himself pro se because of the last minute withdrawal of his counsel." That statement also is not true. It was Sullivan's strategic decision not to be represented at trial (as testified to by his trial attorneys at the hearing on their motion to withdraw). He discharged his attorneys, and then he wanted to comment to the jury about his lack of funds to hire an attorney in order to make himself appear indigent. He did not want the trial court to give him a continuance in order to hire new counsel, and he told the court he could not afford to retain counsel. This is discussed in depth in the briefs filed with the Fourth DCA (which are part of the record that was transmitted to this court); however, it is not relevant to the question certified to this court. We do not have the space (within the parameters of a 15 page reply brief) to respond to this non-issue in greater detail; however, we would direct the court's attention to pages 7-

13, 15-16 and 32-35 of the brief (Appellee's Answer Brief) we filed with the Fourth DCA.

It is stated in Sullivan's brief (at p. 6) that Sullivan has previously been prosecuted in federal court "based on the same factual grounds" and the federal court directed a judgment of acquittal in Sullivan's favor after the federal government presented its case in chief. There is no evidence in the record describing the federal prosecution. However, since Sullivan brings it up in his brief, we need to respond because what he says is misleading. The federal charges brought against Sullivan involved violations of federal interstate communications laws (not murder, for which Sullivan has not yet been prosecuted). Additionally, the federal government's burden of proof in the criminal case was much different than the plaintiff's burden of proof in this civil wrongful death action. Florida courts have recognized that a conviction or an acquittal in a criminal case is not admissible in a later civil case due to the differing burdens of proof. Wirt v. Fraser, 30 So2d 174 (Fla. 1947); Carter v. Carter, 88 So2d 153 (Fla. 1956); Hamilton v. Liberty Nat'l. Life Ins. Co., 207 So2d 472 (Fla. 2d DCA 1968). We are attaching to this brief, as Appendix "A," a certified copy of the federal court's order directing a judgment of acquittal in Sullivan's favor. We would invite this court's attention, in particular, to the comment made by the federal court at footnote 2 on page 5 of the order.

It is incorrectly argued in Sullivan's brief that the plaintiff did not properly raise "fraudulent concealment" in the pretrial pleadings. To the contrary, the plaintiff's amended complaint stated:

> As a result of defendant's subsequent intentional affirmative acts to conceal his own complicity in the murder, the estate of Lita McClinton Sullivan was unwittingly deterred in bringing a wrongful death action until certain facts were independently discovered to unearth the defendant's scheme to conceal his own involvement. (R. 246)

Sullivan also perpetuates his argument concerning the jury instructions and the verdict form. He asserts that the jury should have been instructed on, and asked to make specific findings on whether Lita's parents acted with due diligence, or whether they reasonably relied on Sullivan's fraudulent concealment, or when they received sufficient information to put them on notice of having a cause of action against Sullivan. The Fourth DCA did not address this argument because Sullivan never asked for these things at trial and did not preserve the issue for appeal.

Sullivan never asked the trial court to include additional questions on the verdict form concerning plaintiff's due diligence, or whether plaintiff reasonably relied on Sullivan's fraudulent concealment, or when the plaintiff received sufficient notice of having a cause of action. The question on the verdict form that went to the jury reads; "Do you find by the greater weight of the evidence that Defendant, James Vincent Sullivan, actively participated in fraudulent concealment of his involvement in arranging the murder of Lita McClinton Sullivan? (R. 989). The only language that Sullivan wanted to be added was "for the purpose

of precluding knowledge of his being a suspect," and "so their knowledge of his being a suspect was denied for the purposes of this lawsuit." (See T. 919-920) Sullivan never mentioned adding any questions about "due diligence," or whether the plaintiff reasonably relied on Sullivan's concealment, or when the plaintiff received sufficient notice to file a lawsuit. These are new arguments that were raised by Sullivan's new attorneys in post-trial motions (See R. 1052), but they were not articulated at trial by Sullivan when the court was discussing with both parties what verdict form should be used. These arguments are not preserved for appeal. See, Nat Harrison Assoc., Inc. v. Byrd, 256 So2d 50, 55 (Fla. 4th DCA 1971) (Held: When a party does object at trial he cannot raise a new basis for the objection on appeal); Lollie v. General Motors Corp., 407 So2d 613, 618 (Fla. 1st DCA 1982) (Held: An objection to a jury instruction or verdict form must state distinctly the reason for the objection and will not preserve for appeal new grounds for the objection); Henningsen v. Smith, 174 So2d 85 (Fla. 2d DCA 1965) (same holding).

Not only did Sullivan fail to articulate these arguments orally at the jury charge conference, but he submitted no written verdict forms nor any written instructions that he wanted the court to read, or submit, to the jury. Fla. R. Civ. P. 1.470(b) requires any party who wants the court to read a jury instruction or use a particular verdict form to submit such a request to the court in writing at the close of the evidence. See Jackson v. Harsco Corp.,

364 So2d 808 (Fla. 3d DCA 1978). Sullivan never did so. Since Sullivan elected to act as his own attorney he must be held to the same standards as a "reasonably competent attorney" with respect to preserving issues for trial and for appeal. Kohn v. City of Miami Beach, 611 So2d 538 (Fla. 3d DCA 1992); Paulson v. Evander, 633 So2d 540 (Fla 5th DCA 1994).

Sullivan, during his closing argument, stated in his own words what he wanted the jury to consider:

> The issue is again...did I do something which would have prevented Lita's family from bringing this lawsuit earlier...All along, all I did was maintain my innocence and that is not fraudulent concealment.
>
> (T. 961)

The jury obviously believed that Sullivan did more than just maintain his innocence, and that his actions did prevent Lita's parents from bringing this lawsuit earlier. There is more than sufficient evidence to support that finding of fact by the jury.

Finally, we would reply to Sullivan's arguments concerning the real issue before the court; the Fourth DCA's certified question. This court will not find any discussion in the Fourth DCA briefs about the issue because neither party briefed the issue. It is not just that Sullivan failed to cite the International Brotherhood case; he failed to raise the issue that the International Brotherhood case stands for. Sullivan fails to point out to this court where or when he ever argued that there is

a legal distinction between fraudulently concealing a cause of action, vis a vis merely concealing the identity of the perpetrator. The Fourth DCA briefs are bereft of any such issue, as is the record from the trial court. It obviously is an argument that Sullivan could have raised, but since he did not, it should not have been gratuitously addressed by the Fourth DCA, let alone used as the basis for reversing the final judgment. It should also be noted that Sullivan admits he did not file a post-trial motion asking the trial court to enter a judgment in his favor notwithstanding the verdict. The significance of that is discussed at pp. 11-14 of Petitioner's Initial Brief.

Sullivan urges this court to follow the jurisdictions that decline to recognize fraudulent concealment of the identity of a wrongdoer as a basis to equitably estop that wrongdoer from relying on a statute of limitations. Those jurisdictions would permit Mr. Sullivan to benefit from his own fraud by allowing him to rely on the statute of limitations even while he was deliberately misdirecting the police investigating the murder. We are not convinced that those jurisdictions still represent the majority rule throughout the country, in light of the recent trend toward the other direction. However, there is no question that there are a number of jurisdictions that have come out on both sides of this issue.

We, obviously, are urging this court to follow the jurisdictions that would not allow Mr. Sullivan to benefit from his

own fraudulent concealment. We think that is what this court meant to do over 40 years ago in Proctor v. Schomberg, 63 So2d 68 (Fla. 1953). In any event, that is a policy decision this court is now being presented with in this case. In considering this issue, we believe this court should reflect upon its own words which were written in a case presenting a somewhat related (although not identical) context:

> It is an axiom of the common law supported by admirable concepts of common justice, that no person should be permitted to benefit from his own wrong. It is offensive to our sense of right that a wrongdoer be allowed to exploit his own wrongs to the injury of another and to the profit of himself.

Carter v. Carter, 88 So2d 153 (Fla. 1956)(Held: Wife who murdered her husband may not collect as a beneficiary under husband's life insurance policy, even though she may have been acquitted in criminal proceedings.)

Sullivan notes that the Florida legislature has not enacted a tolling statute to encompass the type of facts in this case, and therefore this court should not tread in such an area. Sullivan calls this an "exception" to the statute of limitations, but it is not an "exception." It is an "estoppel," within the traditional framework of the equity jurisdiction of the courts. Just as a court of equity can recognize a limitations period where the legislature has not (under the concept of "laches"), so too can

a court of equity prohibit a defendant from relying on a legislative statute of limitations (under the concept of equitable estoppel). The doctrine of fraudulent concealment is an equitable doctrine adopted by this court many years ago. The sole issue in this case is the scope of this court-made doctrine.

Sullivan suggests there should be a legal distinction between ignorance of a cause of action and ignorance of the wrongdoer, since it can be assumed that once the plaintiff is aware of the injury, there will be enough time left to provide an opportunity to discover the identity of all the wrongdoers. That is not true, however, when a defendant is fraudulently (and successfully) concealing his identity or his complicity (as Sullivan did in this case for several years). Unlike many of the authorities cited in Sullivan's brief, the present case is not just about a plaintiff who did not learn of the defendant's identity until after the statute of limitations expired. This case is about a plaintiff who was fraudulently deterred from learning defendant's identity due to the defendant's own actions which were calculated to deter the plaintiff from filing suit, and to deter governmental authorities from prosecuting him.

It should also be noted that Sullivan's discussion of the law in other jurisdictions neglects to cite the one case most closely on point with this one (as the 4th DCA below noted); Allred v. Chynoweth, 990 F.2d 527 (10th Cir. 1993). Sullivan also avoids even mentioning this court's decision in Proctor v. Schonberg,

supra, as if ignoring it will make it go away.

For the reasons stated above, and in Petitioner's Initial Brief, we would urge this court to align itself with those jurisdictions that follow the more sound public policy and refuse to allow a wrongdoer who has fraudulently concealed his complicity from relying upon a statute of limitations.

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.

Respectfully submitted,

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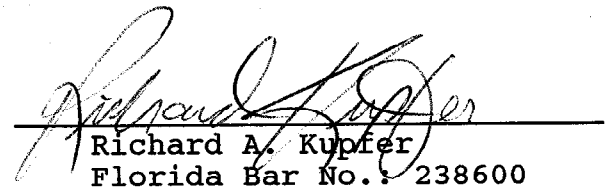
By: 
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished, this 13th day of March, 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, counsel for former Plaintiff/Emory C. McClinton; **DAVID W. BOONE, ESQ.**, 3155 Roswell Road, Suite 100, The Cotton Exchange, Atlanta, Georgia 30305, counsel for former Plaintiff/Emory C. McClinton; **ROY D. WASSON, ESQ.**, 402 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, counsel for Amicus Curiae.

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APPENDIX

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