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CLERK, SUPREME COURT
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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 SUPPLEMENTAL BRIEF

(Pursuant To This Court's Order
Directing The Filing Of Supplemental Briefs)

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(407) 684-8600
Counsel for Petitioner/Plaintiff

-and-

JOHN B. MOORES, ESQUIRE
Co-Counsel for Petitioner/Plaintiff

-and-

DAVID W. BOONE, ESQUIRE
Co-counsel for Petitioner/Plaintiff

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(Florida):

§95.051, Fla. Stat. 1

§95.10, Fla. Stat. 3

(Georgia):

§9-3-96, O.C.G.A. 2

SUPPLEMENTAL ISSUE

**WHETHER THE PROPER LAW TO APPLY TO THIS CASE,
UNDER THE "MOST SIGNIFICANT RELATIONSHIP TEST"
IS THE GEORGIA STATUTE OF LIMITATIONS RATHER
THAN THE FLORIDA STATUTE OF LIMITATIONS?**

SUPPLEMENTAL ARGUMENT

The majority opinion of this court expressly acknowledges it is reaching an "unjust result" under the facts of this case, but finds itself compelled to do so because of the "tolling" statute in Florida, Section 95.051. The present result literally allows Mr. Sullivan to get away with murder and rewards him for being skillful enough to direct the police onto one false lead after another and thereby fraudulently delay the filing of this action against him until after Florida's two year statute of limitations (for wrongful death actions) expired.

It is obviously unjust for a statute of limitations to expire before the Plaintiffs could reasonably have known that Sullivan was implicated due to his own fraudulent concealment. This clashes with any reasonable person's sense of fairness.

There is, however, a straight-forward reason why this court is not compelled to reach an unjust result in this case, and this reason does not require the majority to alter its analysis of

Florida law. This is because the law that should be applied to this case is the Georgia statute of limitations rather than the Florida statute of limitations, since it is Georgia that clearly has the most significant relationship to this wrongful death proceeding.

We raised this argument to the Fourth DCA below. (See Appellee's Answer Brief filed with the Fourth DCA at pp. 21-24, which is included in the record that was transmitted to this court.) However, we did not discuss this issue previously before this court because it is well beyond the question certified to this court by the Fourth DCA. Since the majority opinion of this court also goes beyond the parameters of the certified question, we requested this court's indulgence on rehearing in allowing us to do likewise in order to demonstrate how it should be Georgia's statute of limitations that applies to this case, rather than Florida's statute. We greatly appreciate this court's interest in reviewing the choice of law issue by directing the parties to file supplemental briefs on that issue.

As the dissenting Justices noted in their minority opinion in this case, Georgia law specifically provides by statute that when the defendant is guilty of "fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." Section 9-3-96, Georgia Code Annotated (1982). See also Brown v. Brown, 209 Ga. 620, 75 S.E. 2d 13 (1953); Hill v. Fordham, 367 S.E. 2d 128, 132 (Ga. Ct. App. 1988).

Georgia is among the majority of other jurisdictions having found that fraudulent concealment will toll the statute of limitations for wrongful death. Georgia accomplishes this with a "tolling" statute whereas other states (such as Florida) have created an equitable estoppel doctrine through the courts (which is now, apparently, legislatively overruled in Florida according to this court's majority opinion).

The Fourth DCA below found that Florida's statute of limitations must be applied to this case because Florida's "borrowing statute" (Section 95.10) requires it, even though the cause of action arose in Georgia. The Fourth DCA cited and followed the Third DCA's decision in Rodriguez v. Pacific Scientific Co., 536 So2d 270 (Fla. 3d DCA 1989) holding that the statute of limitations of the forum state must be applied except when there is a shorter limitations period in the state where the tort occurred.

However, very recently the Second DCA expressly disagreed with this, certified a conflict with Rodriguez, supra, and certified a question to this court as to whether the "most significant relationship" test should determine which state's statute of limitations applies. See Robinson v. Merkle, 700 So2d 723 (Fla. 2d DCA 1997).

The Second DCA is clearly correct in finding that Florida's "borrowing statute" means nothing more than what it says, and that the "most significant relationship" test should otherwise be applied to a choice of law/statute of limitations issue.

Florida's "borrowing statute," Section 95.10, simply provides that when a cause of action arises in another state whose laws would forbid the maintenance of the action because of lapse of time, the action cannot be maintained in this state. However, the reverse is not true. The statute does not say that if Florida's limitations period is the shorter one, Florida must apply its own shorter time period even though the cause of action arose in another state.

The Second DCA in Robinson v. Merkle, supra, correctly relied on this court's holding in Bates v. Cook, Inc., 509 So2d 1112 (Fla. 1987)(Held: Significant relationships test should be used to decide which state's statute of limitations applies to a tort action); and this court's holding in Bishop v. Fla. Specialty Paint Co., 389 So2d 999 (Fla. 1980)(setting forth the criteria to determine which state has the most significant relationship to a tort action).

The Second DCA has even more recently revisited this same issue in Mezroub v. Capella, 22 FLW D2665 (Fla. 2d DCA, Nov. 19, 1997), which contains an excellent discussion of the applicable law.

In the present case, the trial court expressly found that Georgia has the most significant relationship to this action and that the Georgia Wrongful Death Act would apply. (See T. 905) The death occurred in Georgia (which is the single most important factor), the victim of the murder was a Georgia resident, the murder was investigated by the Georgia Bureau of Investigation and

the Atlanta police, the statutory beneficiaries of this wrongful death action (the victim's parents) are Georgia residents, the marital domicile and the divorce proceeding was pending in Georgia, and the most significant actions taken by the co-conspirators were taken in Georgia, although it was arranged and planned, at least in part, from Sullivan's residence in Florida. (See T. 902-903, 905). One of the factors influencing Sullivan's decision to carry out his crime was his expressed belief that "Life is cheap in Georgia." (See T. 676, 687)

Clearly, the State of Georgia has the most significant relationship to this wrongful death action, and Georgia has a statutory tolling provision for fraudulent concealment. That being the case, why would Florida's statute of limitations apply at all to this action?

Since the Fourth DCA below erroneously followed Rodriguez, supra, and applied Florida law to this case, and since the Second DCA in Robinson, supra, has just created a conflict on this very issue and has certified the question to this court, and since this is an issue that this court has not yet had an opportunity to consider in the present case (because we limited our briefs to the specific question certified by the Fourth DCA to this court), it is respectfully requested that this court grant rehearing and reconsider its majority opinion in this case.


CONCLUSION

For the reasons stated above, Petitioners respectfully move for rehearing and ask this court to enter a new opinion quashing the Fourth DCA and directing that the Final Judgment against Mr. Sullivan be reinstated.

Respectfully submitted,

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(407) 684-8600
Counsel for Petitioner/Plaintiff

By:

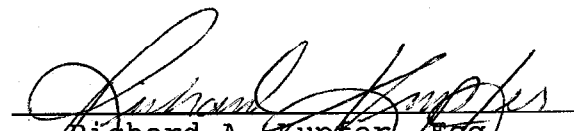

Richard A. Kupfer
Florida Bar No.: 238600

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished, this 1st day of March 12, 1998 to: **JOSEPH E. ALTSCHUL, ESQ.**, Gilbride, Heller & Brown, P.A., One Biscayne Tower, Suite 1570, Miami, Florida 33131, counsel for Respondent; **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.

RICHARD A. KUPFER, P.A.
The Forum - Tower C - Suite 810
1655 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(407) 684-8600
Counsel for Petitioner

By:


Richard A. Kupfer, Esq.
Florida Bar No.: 238600