ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96004

MAJOR LEAGUE BASEBALL, et al.,

Petitioners,

vs.

FRANK L. MORSANI, individually, and for the use and benefit of TAMPA BAY BASEBALL GROUP, INC., and TAMPA BAY BASEBALL GROUP, INC., individually, a Florida corporation,

Respondents.
_____/

RESPONDENTS BRIEF ON THE MERITS

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CERTIFICATE OF TYPE STYLE

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I. STATEMENT OF THE CASE AND FACTS

The petitioners' "Introduction" and "Statement of the Case and the Facts" are more argument than introductory statement, and they are not entirely accurate. We are therefore constrained to restate the case and facts. The issue before the Court, of course, is the certified question that provides the Court with jurisdiction:

> Does section 95.051, Florida Statutes (1993), prohibit the application of the doctrine of equitable estoppel to an action filed outside of the applicable statute of limitations?

Actually, the question appears to have been inartfully worded. We think what the district court meant to ask is the following:

> Does section 95.051, Florida Statutes (1993), prohibit assertion of an equitable estoppel defense to a statute of limitations defense?

This question arises from the following factual and procedural background.

The respondents, Frank Morsani and Tampa Bay Baseball Group, Inc., were plaintiffs below in a multi-count action against numerous defendants, nearly all of whom were associated with Major League Baseball in one capacity or another at the relevant times. The gravamen of the plaintiffs' action was two-fold: (1) that the defendants had tortiously interfered with various contractual rights and advantageous business relationships which the plaintiffs had developed over the years in their efforts to acquire ownership of a major league baseball team for the Tampa Bay area; and (2) that, by conspiring together and acting in combination to prevent the plaintiffs from succeeding in that endeavor, the defendants had violated Florida's anti-trust laws. At the insistence of the defendants, the trial court dismissed the plaintiffs' First Amended Complaint in its entirety for failure to state legally cognizable claims; on

appeal, however, a unanimous panel of the District Court of Appeal, Second District, reversed the order of dismissal in its entirety, holding that the plaintiffs' allegations stated valid causes of action. *Morsani v. Major League Baseball*, 663 So.2d 653 (Fla. 2d DCA 1995), *review denied*, 673 So.2d 29 (Fla. 1996).

The present appellate proceeding involves the plaintiffs' Third Amended Complaint (R. 1-30). According to the allegations of Count I of that complaint, in 1984, the owners of a majority of the stock of Minnesota Twins, Inc., Calvin Griffith and Thelma Griffith Haynes, agreed to sell their controlling interest to the plaintiffs on condition that they first buy H. Gabriel Murphy's 42.14% minority interest in the corporation. The plaintiffs then negotiated and entered into a fully-executed written contract with Murphy for the purchase of his interest, at a purchase price of $11,500,000.00 (Exhibit A to Third Amended Complaint). Thereafter, with full knowledge of these agreements, various of the defendants conspired together and used improper means to prevent the plaintiffs from consummating their purchase. They caused Griffith and Griffith-Haynes to sell their majority interest to Karl Pohlad. They also demanded that the plaintiffs assign their contract with Murphy to Pohlad, and that Murphy consent to the assignment. At the time this assignment was demanded, the value of the minority interest purchased by the plaintiffs had increased from $11,500,000.00 to $25,000,000.00.

The plaintiffs balked at the demand and sought payment for the $13,500,000.00 increase in the value of the contract, as well as reimbursement of the $2,900,000.00 previously expended, as a condition to assigning the contract to Pohlad. Various of the defendants then threatened the plaintiffs that they would never own an interest in a major league baseball team, and that there would never be a major league baseball

team in the Tampa Bay area, unless the plaintiffs (1) assigned the contract as demanded, (2) accepted only $250,000.00 as reimbursement for the expenses incurred, and (3) agreed to forbear pursuing any legal remedies for the additional $16,150,000.00+ in damages in exchange for obtaining an ownership interest in another team in time to begin the 1993 season. In exchange for the prospect of another team, the plaintiffs succumbed to the defendants' tactics, assigned their contract to Pohlad, and withheld their plainly substantial claims.

Count II of the complaint alleges a similarly aborted attempt to purchase the Texas Rangers in 1988. Count III of the complaint alleges a similarly aborted attempt to obtain a 1993 expansion team. Count IV is an action for violation of Florida's anti-trust laws, bottomed upon the facts underlying each of the three separate transactions.[1/] The defendants answered, denied liability, and alleged affirmatively (among other things) that the plaintiffs' claims were barred by the statute of limitations (R. 31-46). Because the plaintiffs' complaint had anticipated this defense by alleging facts supporting an equitable estoppel defense to the statute of limitations defense, there was no need for the plaintiffs to plead further to the defense.

The defendants moved for summary judgment on all four counts (R. 47-51). In their moving papers and accompanying memoranda, the defendants acknowledged that equitable estoppel was a viable defense to a statute of limitations defense, and contended merely that there was no factual support in the record for the plaintiffs' equitable estoppel defense (R. 49 [¶3C3], 91-96, 1203-18). The defendants also

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[1/] To eliminate possible confusion on the point, we advise the Court that Tampa Bay's present baseball franchise, the Tampa Bay Devil Rays, was later awarded to another group of investors (after the instant suit was filed) -- not to the plaintiffs.

squarely conceded that the defense of equitable estoppel was not a "tolling" defense of the type addressed in §95.051, Fla. Stat.: "Contrary to plaintiffs' claim, defendants acknowledge that estoppel may apply notwithstanding the (otherwise) exclusive list of tolling circumstances set forth in §95.051 of the Florida Statutes; . . ." (R. 1212, n. 7).

Notwithstanding this concession, the trial court suggested at one of the several lengthy hearings on the motion that the settled law on the point may have been changed by a decision filed a month earlier by this Court -- that *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999), appeared to bar use of an equitable estoppel defense to a statute of limitations defense (T. 81-85). This issue was then briefed and argued at some length, during which the defendants changed their position on the point and aligned themselves with the trial court's suggestion (e. g., R. 1262-72). The defendants' motion for summary judgment was thereafter granted in part and denied in part (R. 1273-93).

As to Count I, the trial court rejected the defendants' contention that there was no factual support for the plaintiffs' equitable estoppel defense. At page 7 of their brief, the defendants assert that "the trial court had no occasion to address" the evidence on this defense and "found it unnecessary to reach a conclusion" about it. This is inaccurate. In its written order (drafted by defendants' counsel), the trial court explicitly noted, "At a hearing held on October 29, 1997, the Court found that disputed issues of material fact exist with regard to equitable estoppel, i. e., whether defendants 'misled or lulled [Plaintiffs] into inaction . . . in some extraordinary way'" (R. 1281). We will detail the evidence supporting that ruling in our argument under

Issue B.

Notwithstanding its ruling that the defense was factually supported by the evidence, the trial court concluded that, as a matter of law, an equitable estoppel defense could no longer be asserted against a statute of limitations defense after *Fulton County Administrator* (R. 1275-82). It therefore granted the defendants' motion and entered judgment against the plaintiffs on Count I:

> 1. On the basis of Fulton County Administrator v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 29, 1997), defendants' motion for summary judgment based on the statute of limitations is GRANTED with regard to Count I of the Third Amended Complaint, and with regard to so much of Count IV as relates to the same subject matter as Count I, i. e., the Minnesota Twins transaction. Therefore, as to those counts, plaintiffs shall take nothing by this action and defendants shall go hence without day.

(R. 1290-91). The motion was denied as to Counts II and III (R. 1291). The motion was granted as to Count IV, and judgment was entered against the plaintiffs on that count as well (*id.*).

A timely appeal followed to the District Court of Appeal, Second District (R. 1294-1316). In our "Statement of Judicial Acts to be Reviewed," we advised the defendants and the district court that the issue on appeal would be limited to "the trial court's conclusion that *Fulton County Administrator v. Sullivan* . . . invalidates the plaintiffs' equitable estoppel defense to the defendants' statute of limitations defense as a matter of law, and its consequent entry of summary judgment in the defendants' favor on Count I of the Third Amended Complaint" (R. 1321). We did not quarrel with the trial court's disposition of the anti-trust violations alleged in Count IV. The district court thereafter concluded that the trial court misunderstood and misapplied

Fulton County Administrator; it reversed the summary final judgment as to Count I, and certified the issue to this Court for resolution. *Morsani v. Major League Baseball*, 739 So.2d 610 (Fla. 2d DCA 1999).

The defendants then filed multiple post-decision motions in the district court. Before they were ruled upon, the defendants removed the case to federal court. The district court denied the motions nevertheless, and the defendants then invoked the discretionary review jurisdiction of this Court; and, as the Court's file will reflect, the briefing schedule was stayed pending resolution of the plaintiffs' motion to remand the case to the state courts. Recently, the federal court concluded that the defendants' removal was improper, and it remanded the case to the state courts -- and this Court's jurisdiction to proceed (finally) is therefore no longer in doubt.

We mention these things because the defendants have complained (at page 31 of their brief) that the tortious misconduct alleged in Count I occurred (in their words) "almost *16 years* ago." Most respectfully, the instant suit was filed in 1992 (*see* R. 1273). The nearly eight-year delay that followed has been caused entirely by the procedural maneuvering of the defendants and their persistent efforts to avoid meeting the plaintiffs on the merits of their claims. First, they obtained a dismissal of the action in its entirety which the plaintiffs were forced to appeal, and which the district court unanimously reversed. Next, they obtained a summary judgment on Count I which the plaintiffs were forced to appeal, and which the district court unanimously reversed. Next, they removed the case to federal court, a maneuver which the plaintiffs were forced to challenge, and the removal was declared improper. Most respectfully, if the claim alleged in Count I is "stale" at this point in time, as the defendants insist over and over again in their brief, it is the *defendants* who have

made it so by their persistent maneuvering in an effort to avoid a trial of its merits -- and we respectfully urge the Court to keep that point in mind as it proceeds.

II. ISSUES PRESENTED FOR REVIEW

A single legal question has been certified to the Court, which we rephrase as follows:

> A. DOES SECTION 95.051, FLORIDA STATUTES (1993), PROHIBIT ASSERTION OF AN EQUITABLE ESTOPPEL DEFENSE TO A STATUTE OF LIMITATIONS DEFENSE?

Apparently concerned that the district court's negative answer to this question will be approved by this Court, the defendants have advanced a "right for the wrong reason argument," contending that the trial court and the district court erred in concluding that a genuine issue of material fact was presented on the plaintiffs' equitable estoppel defense. Although the Court has the power to decide this issue, it is not required to do so. If it chooses to go beyond answering the certified question, a second issue is presented for review:

> B. DID THE TRIAL COURT AND DISTRICT COURT ERR IN CONCLUDING THAT A GENUINE ISSUE OF MATERIAL FACT WAS PRESENTED ON THE PLAINTIFFS' EQUITABLE ESTOPPEL DEFENSE?

III. SUMMARY OF THE ARGUMENT

A. The doctrine of equitable estoppel has co-existed peaceably with statutes of limitations for more than 150 years. And because our argument will of necessity have to survey the rather extensive jurisprudence developed on the subject in that century and a half, it cannot easily be summarized in a page or two. Suffice it to say

that our argument will be constructed upon a simple, perfectly logical syllogism: §95.051, Fla. Stat., arguably abolishes *tolling* defenses, except those explicitly recognized therein; the 150-year old defense of equitable estoppel is *not* a tolling defense; and §95.051 therefore does not abolish the defense of equitable estoppel. We will support the major and minor premises of this syllogism with abundant authority in the argument which follows, and we will urge the Court to answer the certified question in the negative and approve the district court's decision.

B. The defendants have advanced a "right for the wrong reason" argument concerning the "sufficiency of the evidence" which we think the Court is unlikely to reach. And because a recitation of the factual evidence supporting the plaintiffs' equitable estoppel defense is not susceptible to ready summarization in any event, we will spare the Court the details here. Suffice it to say that the defendants' argument concerning the acknowledged lack of a *formal commitment* to award a franchise to the plaintiffs is a straw man. Numerous informal promises, assurances, and less than subtle threats were made to induce the plaintiffs to forbear from filing suit to recover the enormous damages that the defendants' tortious conduct caused them, and all four of the judges who passed upon the sufficiency of the evidence below therefore correctly concluded that material issues of fact exist on the plaintiffs' equitable estoppel defense.

IV. ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT §95.051, FLA. STAT. (1993), DOES NOT PROHIBIT A PLAINTIFF FROM ASSERTING AN EQUITABLE ESTOPPEL DEFENSE TO A STATUTE OF LIMITATIONS DEFENSE.

We are faced at the outset with an interesting conundrum. The trial court's ruling was based upon its interpretation of this Court's initial majority opinion in *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999). The district court's disagreement with the trial court was based upon a different reading of that opinion, and the issue presented here was certified to this Court for an explanation of the reach of that opinion. In the interim, that opinion was withdrawn. And in the opinion substituted in its place, the Court expressly "decline[d] to answer the certified question as to Florida law concerning statutes of limitations" -- the question that was answered in the initial majority opinion, now withdrawn. *Fulton County Administrator v. Sullivan*, 24 Fla. L. Weekly S557, S557-58 (Fla. Nov. 24, 1999). If that were the only development relevant to the issue presently before the Court, it would seem that our argument could be written on a clean slate, without the need to tilt at the windmill represented by the withdrawn opinion.

Unfortunately, this Court issued another decision while it was debating whether it should actually decide the certified question presented in *Fulton County Administrator*: *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So.2d 1119 (Fla. 1998). And in that decision, perhaps because of the constraints of the doctrine of *stare decisis*, it followed the initial majority opinion in *Fulton County Administrator*. It is here that the conundrum is presented. Does the reference in *Federal Insurance Co.* to the Court's initial majority opinion in *Fulton County Administrator* breathe life into its ghost despite its subsequent exorcism, or is *Federal Insurance Co.* no longer viable now that its underpinnings have been removed and the question expressly left open in this Court? We do not know the answer to that

question. And because we do not know the answer, we have little choice but to assume (as the defendants have) that the ghost of the initial majority opinion in *Fulton County Administrator* still haunts the Southern Reporter.

Our argument will be tailored accordingly. First, we will present the essentials of the argument we made below, which was accepted by a unanimous panel of the district court. We will then address the semantic muddle with which the defendants have attempted to confuse the Court into abolishing a 150-year old fixture of Florida law.

1. Our position.

a. Our position on the certified question is simple and straightforward. The doctrine of equitable estoppel has a *very* long history and a venerable pedigree. It was a fixture of the English common law. *See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234, 79 S. Ct. 760, 3 L. Ed.2d 770, 773 (1959) (the doctrine of equitable estoppel, and its availability as a defense to a statute of limitations defense, is a "principle of law . . . older than the country itself"). And the doctrine was inherited by Florida and given statutory recognition in 1829 by what is now §2.01, Fla. Stat.: "The doctrine of estoppel is a part of the common law of the state adopted by statute, section 87(71), Comp. Gen. Laws . . . ." *New York Life Ins. Co. v. Oates*, 122 Fla. 540, 166 So. 269, 276 (1935).

The doctrine has been recognized and applied in numerous contexts by this Court since the inception of statehood, more than 150 years ago. *See, e. g., Camp v. Moseley*, 2 Fla. 171 (1848); *Collins v. Mitchell*, 5 Fla. 364 (1853); *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391 (1889); *New York Life Ins. Co. v. Oates*, 141 Fla. 164, 192 So. 637 (1939); *Steen v. Scott*, 144 Fla. 702, 198 So. 489 (1940); *State ex rel. Watson v.*

Gray, 48 So.2d 84 (Fla. 1950); *Miami Gardens, Inc. v. Conway*, 102 So.2d 622 (Fla. 1958); *Noble v. Yorke*, 490 So.2d 29 (Fla. 1986); *Branca v. City of Miramar*, 634 So.2d 604 (Fla. 1994). There are, of course, many dozens more -- but these should be sufficient to make the point. And, of course, the doctrine can be asserted against all manner of claims and defenses; it is not merely an "exception" to the statute of limitations, as the defendants insist.

The doctrine of equitable estoppel has also been recognized by this Court as a valid defense in the particular context presented here, as a defense to a limitations-period defense. *See Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9 (Fla. 1965). Notwithstanding this *very* long line of authority, the trial court concluded that, as a matter of law, the doctrine of equitable estoppel was no longer available to the plaintiffs to avoid the defendants' statute of limitations defense. It purported to derive this conclusion from this Court's initial majority opinion in *Fulton County Administrator*, now withdrawn, which holds that the running of a statute of limitations can be *tolled* only by those events explicitly listed in §95.051, Fla. Stat., and by no others.

Most respectfully, the trial court misunderstood and misapplied that opinion. In the instant case, the plaintiffs are not contending that the statute of limitations was *tolled* by the defendants' conduct and therefore had not run when suit was filed. They are contending instead that, although their suit was filed after the statute of limitations had run, the defendants are equitably estopped by their conduct to assert the bar of the expired statute to the plaintiffs' claims. The initial majority opinion in *Fulton County Administrator* addresses the defense which the plaintiffs are *not* asserting here. It does not address in any way the equitable doctrine upon which the plaintiffs *are* relying here. The two concepts are entirely different -- and we submit that the

difference between a *tolling* defense and an equitable estoppel defense is thoroughly settled in the jurisprudence of this nation.

A cogent explanation of the distinction can be found in *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978), in which the court held that a statute of limitations which permitted no *tolling* could nevertheless be avoided by an equitable estoppel defense:

> Though we might well agree with the district court that the unequivocal language of 15 U.S.C § 1711 presents an insurmountable barrier to the *tolling* of the three-year limitations period contained therein, we cannot agree that the "In no event" terms in which the three-year limitations period is expressed forecloses possible application of the separate and distinct doctrine of equitable estoppel. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the language of the statute of limitations itself, and thus it is not surprising that several district courts have held that the three-year limitations period of 15 U.S.C. § 1711 is not subject to being tolled. [Citations omitted]. Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abro-

> gating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed.
>
> *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959), is instructive in this regard. In that case, the Supreme Court was confronted with a federal statute of limitations that was just as unequivocal as the one before us now. Yet, notwithstanding the fact that the Federal Employers' Liability Act provided that
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> > "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued,"
>
> the Court held that the doctrine of equitable estoppel applied in suits brought under the statute. In so holding, the court reasoned that the principle that no man may take advantage of his own wrongdoing was so deeply rooted in and integral to our jurisprudence that it should be implied in the interstices of every federal cause of action absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel. *Id.* at 232-34, 79 S. Ct. 760. The court found no such intent in even the unequivocal language of the statute, and in this respect *Glus* is controlling here.

There are a number of decisions from well-respected courts which explain the considerable difference between the two concepts in exactly the same way. *See, e. g., Cange v. Stotler & Co.*, 913 F.2d 1204, 1209 (7th Cir. 1990); *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 586 (7th Cir. 1987); *Cook v. Deltona Corp.*, 753 F.2d 1552, 1562-63 (11th Cir. 1985); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *Barton v. Peterson*, 733 F. Supp. 1482, 1490-91 (N.D. Ga. 1990).

In Florida, there are numerous decisions which hold that a defendant may be equitably estopped by its conduct to assert a statute of limitations defense. For our purposes here, we collect only those decisions rendered *after* the 1974 enactment of §95.051, which contains the limited *tolling* provisions addressed in the initial majority opinion in *Fulton County Administrator*. Because the two concepts are entirely different, not one of these decisions even refers to the statute. *See Barnett Bank of Palm Beach County v. Estate of Read*, 493 So.2d 447, 449 (Fla. 1986) ("[A]s the facts of this case demonstrate, justice requires us to hold that §733.702 is a statute of limitations. Valid grounds, such as estoppel or fraud, may exist that would and should excuse untimely claims."); *Cape Cave Corp. v. Lowe*, 411 So.2d 887 (Fla. 2d DCA), *review denied*, 418 So.2d 1280 (Fla. 1982); *Baptist Hospital of Miami, Inc. v. Carter*, 658 So.2d 560 (Fla. 3d DCA 1995); *Jaszay v. H.B. Corp.*, 598 So.2d 112 (Fla. 4th DCA 1992); *Olenek v. Bennett*, 537 So.2d 160 (Fla. 5th DCA 1989); *Martin v. Monroe County*, 518 So.2d 934 (Fla. 3d DCA 1987), *review denied*, 528 So.2d 1182 (Fla. 1988); *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979); *J.A. Cantor Associates, Inc. v. Brenner*, 363 So.2d 204 (Fla. 3d DCA 1978).

These decisions provide fairly compelling evidence, we believe, that the *tolling* statute addressed in the initial majority opinion in *Fulton County Administrator* has no relevance to the entirely different defense of equitable estoppel. Indeed, one of them plainly recognizes that the concept of *tolling* is both separate and distinct from the defense of equitable estoppel, and that an equitable estoppel defense can be maintained even when no tolling provision is available to defeat a statute of limitations defense. *See Baptist Hospital of Miami, Inc. v. Carter, supra* (holding that

the two-year statute of limitations for the filing of a claim against an estate was not susceptible to a tolling defense, but that the defense of equitable estoppel could nevertheless be asserted to avoid the estate's statute of limitations defense). *See also Glantzis v. State Automobile Mutual Ins. Co.*, 573 So.2d 1049 (Fla. 4th DCA 1991) (concluding that the plaintiffs had two separate and distinct defenses to the defendant's statute of limitations defense -- a tolling defense under §95.051, and a separate equitable estoppel defense).

Moreover, at least one district court of appeal has explicitly addressed the effect of §95.051 upon the continued viability of the defense of equitable estoppel in the context presented here, and has concluded that the two concepts are different and that the statute has no bearing on the defense:

> While continuing negotiations regarding settlement do not "toll" the running of a statute of limitations, such negotiations, if infected with an element of deception, may create an estoppel. . . . This is true even subsequent to the 1975 [sic] enactment of subsection (2) of section 95.051, which states that "no disability or other reason shall toll the running of any statute of limitations except those specified in this section . . . ." *See Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA 1979). . . .

City of Brooksville v. Hernando County, 424 So.2d 846, 848 (Fla. 5th DCA 1982). This decision has not been disapproved by this Court, and there is not a word in the initial majority opinion in *Fulton County Administrator* which even arguably suggests that it was wrongly decided.

The remaining decision which requires discussion is *Alachua County v. Cheshire*, 603 So.2d 1334, 1337 (Fla. 1st DCA 1992), which holds that a statute of limitations defense asserted by a governmental entity can be avoided by the defense

of equitable estoppel:

> The equitable estoppel doctrine has frequently been employed to bar inequitable reliance on a statute of limitations. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959). A party will be estopped from asserting the statute of limitations defense to an admittedly untimely action where his conduct has induced another into forbearing suit within the applicable limitations period. *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). Like the application of equitable estoppel in federal courts, the application of equitable tolling has been applied in Florida when a plaintiff has been misled or lulled into inaction and has in some extraordinary way been prevented from asserting his rights. *Machules v. Department of Administration*, 523 So.2d 1132, 1134 (Fla. 1988).
>
> In this case, officials of the federal government made repeated oral and written representations to Cheshire that he should file his claim with GSA, that the recipient of the property would pay the valid liens, and that his lien was "valid," according to the government fact sheet. Cheshire reasonably relied upon these representations. Clearly, the government's conduct induced Cheshire into forbearing suit within the applicable limitations period. *Bomba v. W.L. Belvidere*, 579 F.2d at 1070.

If this passage had not contained the phrase "equitable tolling," there could be no question that the decision fully supports the plaintiffs' position here. The plaintiffs' position is not undercut by the reference, however, because there is nothing in the passage which even arguably suggests that the defense of equitable tolling and the defense of equitable estoppel are the same defense. In fact, when the decisions cited in the passage are examined, it is perfectly clear that the district court did not mean to suggest any such thing. The case of *Bomba v. W.L. Belvidere, Inc., supra*,

is twice cited in the passage (and cited a third time in the decision). This is the case with which we began our discussion -- the one which carefully explains the difference between tolling and estoppel, and which holds that the defense of equitable estoppel will lie even where the statute of limitations permits no tolling defenses. It is therefore impossible that the district court could have understood or meant to suggest that the two defenses were one and the same.

This conclusion is reinforced by the citation to *Machules v. Department of Administration*, 523 So.2d 1132 (Fla. 1988), in which this Court approved use of an equitable tolling defense in administrative proceedings. An examination of *Machules* will reveal that this Court, like the *Bomba* court, also distinguished between the defenses of equitable tolling and equitable estoppel, observing that the first focuses on the reasonableness of the claimant's conduct, and the latter focuses on the defendant's conduct. 523 So.2d at 1134.[2/] Because every decision cited in the

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[2/] *See Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997):

> In arguing that the doctrine of equitable tolling may not be invoked in this case because it has not engaged in any misconduct which led Hanna to defer filing suit in a timely fashion, AT&T appears to be confusing, as apparently do many litigants and courts, the doctrines of equitable tolling and equitable estoppel. Equitable estoppel does require an allegation of misconduct on the part of the party against whom it is made, but equitable tolling does not require any misconduct on the part of the defendant. . . .

For additional decisions explaining the difference between equitable tolling and equitable estoppel, *see Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328-29 (8th Cir. 1995); *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990); *Smith v. City of Chicago Heights*, 951 F.2d 834, 838-42 (7th Cir. 1992).

passage makes the distinction between the two defenses perfectly clear, it is, once again, simply impossible that the district court could have understood or meant to suggest that the two entirely different defenses were one and the same.

By its reference to the "equitable tolling" doctrine approved in *Machules*, all that the district court was saying in *Alachua County v. Chesire* was this: since the Supreme Court has approved use of the doctrine of equitable tolling against the government, we have no difficulty in approving use of the different defense of equitable estoppel against the government as well. The decision plainly does not equate the two distinct defenses in any way. And the decision therefore provides no support at all for any notion that the majority's strict reading of §95.051's *tolling* provisions in the now-withdrawn opinion in *Fulton County Administrator* abolishes the separate and distinct defense of equitable estoppel as well.

Most respectfully, the initial majority opinion in *Fulton County Administrator* addresses a defense upon which the plaintiffs are *not* relying here. It does not address in any way the distinctly different defense upon which the plaintiffs *are* relying here. Florida law plainly recognizes the defense of equitable estoppel, which prevents defendants from asserting that an untolled statute of limitations has run where their conduct has induced the plaintiffs to forbear from filing suit within the limitations period -- and the initial majority opinion in *Fulton County Administrator* does not even arguably suggest otherwise. We therefore respectfully submit that that now-withdrawn opinion has no bearing on the issue presently before the Court -- and that the defendants' initial concession that §95.051 has no relevance to the plaintiffs' defense (made in the trial court, and now repudiated here) was well advised.

b. The trial court ultimately concluded otherwise, of course, and it remains for

us to address its reasoning (or more accurately perhaps, the defendants' reading of the initial majority opinion in *Fulton County Administrator*, since defendants' counsel drafted the order). According to the trial court, "there is no legally significant distinction between fraudulent concealment, which the Supreme Court rejected as a basis for avoiding the statute of limitations in Fulton County, and equitable estoppel, on which plaintiffs rely here." We disagree. Fraudulent concealment, unlike equitable estoppel, is a species of "delayed discovery" -- and "delayed discovery," when recognized as a ground for avoiding a statute of limitations defense, is treated in Florida as a ground for *tolling* the running of the statute of limitations. The Court will find a thorough and thoughtful explanation of this in Judge Van Nortwick's recent opinion in *Hearndon v. Graham*, 710 So.2d 87 (Fla. 1st DCA 1998).

The Court will also find an explanation of this in the initial majority opinion in *Fulton County Administrator* itself, in the majority's own analysis of the problem:

> We begin our analysis by tracing the evolution of the fraudulent-concealment doctrine as announced by this Court and the legislature's statements on *tolling* provisions for the statute of limitations. The fraudulent-concealment doctrine was first recognized by this Court in *Proctor v. Schomberg*, 63 So.2d 68 (Fla. 1953). In *Proctor*, we found that a person who wrongfully conceals material facts and prevents the discovery of either the wrong or the fact that a cause of action has accrued against the person should not be able to take advantage of the person's wrong and assert the statute of limitations as a bar to the action. . . . Under this rule, the statute of limitations would begin to run from the date the action was discovered or from the date on which, through the exercise of ordinary diligence, it might have been discovered. At the time of our decision in *Proctor*, the legislature had only expressly set forth limited circumstances which would *toll* the statute of limitations,

and these circumstances did not address any *tolling* provisions or exclude the possibility of judicially recognized *tolling* provisions for fraudulent concealment. . . .

We continued to recognize the viability of this court-fashioned rule in *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976). In *Nardone*, a medical malpractice action, the defendants answered the complaint by asserting the affirmative defense that the four-year statute of limitations barred the bringing of a cause of action in 1971 for a wrong which occurred in 1965. . . . In answering these questions in *Nardone*, we reiterated the rule that defendant's successful fraudulent concealment of a cause of action which prevented the plaintiff from discovering the cause of action would *toll* the statute of limitations until the facts of such concealment could be discovered through reasonable diligence. . . . Similar to *Proctor*, our analysis of the statutes in *Nardone* was not affected by any legislative statement on the *tolling* of the statute of limitations for fraudulent concealment.

However, in 1974, the legislature enacted section 95.051, Florida Statutes . . . in which it enumerated several bases for *tolling* the statute of limitations, including defendant's use of a false name or concealment in Florida to avoid service of process . . . Notably absent from this list was fraudulent concealment of the identity of the actual tortfeasor. While section 95.11(4)(b) provided a *tolling* provision for fraudulent concealment of the discovery of the plaintiff's injury in medical malpractice actions, there was no similar *tolling* provision for wrongful death causes of action. . . . Moreover, in section 95.051(2), the legislature stated, "No disability or other reason shall *toll* the running of any statute of limitations except those specified in this section . . . ." This exclusivity provision is applicable to this action.

Thus, the issue presented by the certified question is the continued viability of our court-made *tolling* provision for

> fraudulent concealment in the face of section 95.051. . . .
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> . . . [W]e find the plain language of section 95.051 does not provide for the *tolling* of the statute of limitations in cases in which the tortfeasor fraudulently conceals his or her identity. . . .

Fulton County Administrator, supra, 22 Fla. L. Weekly at S579 (emphasis supplied).

Most respectfully, the majority plainly declined to recognize any *tolling* defense not recognized by §95.051; its opinion nowhere addressed the continued viability of the altogether different defense of equitable estoppel. And as we have already demonstrated, there most certainly is a thoroughly-settled, legally-significant distinction between a *tolling* defense and an equitable estoppel defense -- a point which ought to be repeated here for the emphasis it deserves:

> . . . Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the language of the statute of limitations itself . . . . Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. . . .

Bomba v. W. L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978). In short, the

trial court's conclusion that there is no legally significant distinction between the two defenses was plainly wrong.

The trial court also read Justice Anstead's dissenting opinion to state that fraudulent concealment creates an equitable estoppel defense; and with this reading of the opinion as a predicate, it reasoned that the majority's rejection of the dissent necessarily meant that there was no legally significant distinction between a tolling defense and an equitable estoppel defense. Most respectfully, Justice Anstead's dissenting opinion says no such thing, and it therefore deserves to be parsed briefly for what it does say. It begins by surveying prior Florida decisions holding that fraudulent concealment *tolls* the running of a statute of limitations, and it concludes that §95.051 should not be read to abolish that well-recognized *tolling* doctrine. It then turns to decisions from *other* jurisdictions which recognize fraudulent concealment as a defense to a statute of limitations, noting that some jurisdictions (like Texas) treat it as an equitable estoppel defense, and that the majority of jurisdictions treat it as a tolling defense. It then goes on to opine that, under whatever label the concept is given, it is a firm fixture in the jurisprudence of the nation, and that the inherent equitable powers of the Court were broad enough to recognize the concept as a defense to a statute of limitations, §95.051 notwithstanding.

In short, there is nothing in Justice Anstead's dissent which even arguably suggests that Florida has ever treated fraudulent concealment as anything but a *tolling* defense, and the fact that *Texas* may treat it as an equitable estoppel defense does not change Florida's treatment of it as a *tolling* defense in any way. Nor is there anything in the dissent which even remotely suggests that there is no legally significant distinction between a tolling defense and an equitable estoppel defense. The majority

opinion also nowhere addresses the doctrine of equitable estoppel. It concludes simply that, in Florida, fraudulent concealment is a *tolling* defense, and because it is not listed as a recognized tolling defense in §95.051, it is not available to postpone the running of a statute of limitations in Florida. We therefore respectfully submit that the initial majority opinion in *Fulton County Administrator* does not address the entirely different defense at issue in this case -- and that it provides no reason for this Court to hold, as the trial court did, that §95.051 abolished a defense which is "older than the country itself"; which arrived in Florida in 1829 with the state's statutory adoption of the English common law; and which has been rigorously and consistently applied ever since.

c. Most respectfully, the doctrine of equitable estoppel is a fixture of the common law, and its displacement by statute cannot be lightly inferred:

> Statutes in derogation of the common law are to be construed strictly . . . . They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. . . .

Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977). *Accord Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997); *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. 1997). A similar rule of construction exists, of course, where statutes of limitations are concerned: ". . . [W]e must also keep in mind the pertinent rules of construction applicable to statutes of limitations . . . . Thus, ambiguity, if there is any, should be construed in favor of the plaintiffs."

Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184, 1187 (Fla. 1992).

The title of §95.051, Fla. Stat., is "When limitations *tolled*" (emphasis supplied). The statute then lists several circumstances in which "the running of the time under any statute of limitations . . . is *tolled* . . . ." (emphasis supplied). And the statute then provides that "[n]o disability or other reason shall *toll* the running of any statute of limitations except those specified in this section . . . ." (emphasis supplied). The statute therefore plainly addresses only *tolling* defenses. The word "estoppel" is nowhere to be found in it. And once it is understood that an equitable estoppel defense and a tolling defense are two entirely different things, as they plainly are, then the settled rules of construction quoted above simply *require* a conclusion that the statute does not abolish the common law defense of equitable estoppel in the context presented here. The same rule of construction should also inform this Court's reading of the initial majority opinion in *Fulton County Administrator*; if the opinion did not clearly and unequivocally abolish the defense of equitable estoppel -- and it plainly did not -- then it should not be read as abolishing the long-recognized 150-year old defense.

It is also worth noting that, in its initial opinion in *Fulton County Administrator*, the majority explicitly acknowledged that its reading of §95.051 led to an obviously "unjust result" in need of an immediate fix by the legislature. 22 Fla. L. Weekly at S579. That "unjust result" may (or may not) have been required by the plain language of the statute where *tolling* defenses are concerned, but surely that injustice should not be compounded in the instant case by reading the statute to abolish an entirely different defense which has been in existence for more than 150 years, and which is not even mentioned in the statute.

The point can be made another way. There is another 150-year old common law defense to all manner of claims and defenses, including statutes of limitations defenses -- the defense of waiver. The defense of waiver is a fraternal twin of the defense of estoppel, and like the defense of estoppel, its availability as a defense to a statute of limitations defense has long been recognized in Florida.[3/] *See, e. g., Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So.2d 46 (Fla. 1988); *Aboandandolo v. Vonella*, 88 So.2d 282 (Fla. 1956); *Akin v. City of Miami*, 65 So.2d 54 (Fla. 1953); *Hood v. Hood*, 392 So.2d 924 (Fla. 2d DCA 1980); *Pritchett v. Kerr*, 354 So.2d 972 (Fla. 1st DCA 1978). Indeed, this Court has recently held that, in order to obtain a dismissal for *forum non conveniens*, a defendant must agree to waive any statute of limitations which may have expired on the plaintiff's claim, so the continued viability of the defense of waiver in the context presented here is not open to debate. *See Kinney System, Inc. v. Continental Insurance Co.*, 674 So.2d 86 (Fla. 1996).

Waiver, like estoppel, does not *toll* the statute of limitations; it is assertable as a defense, like the defense of estoppel, only after a statute of limitations has expired, and for reasons relating to conduct by the defendant which is inconsistent with reliance upon a statute of limitations defense. For the defendants to contend that §95.051 abolishes all "exceptions" to the statute of limitations not specified therein,

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[3/] That the two defenses are fraternal twins is amply illustrated by the fact that both of them are combined into a single article in *Florida Jurisprudence*. *See* 22 Fla. Jur.2d, *Estoppel & Waiver*. Similarly, in 35 Fla. Jur.2d, *Limitations and Laches*, tolling defenses are treated in §§89-100, and the separate and distinct defenses of estoppel and waiver are treated separately (under the general heading "Estoppel and Waiver") in §§114-15.

including the defense of equitable estoppel, they must logically insist that §95.051 abolishes the long-settled defense of waiver as well -- and the slippery slope and dangerous slide that faces acceptance of such an argument should be enough to convince any court to avoid the precipitous first step suggested by the contention.[4/]

[4/] In a lengthy footnote, the defendants dismiss this argument with a wave of the hand. They argue that waiver and estoppel are not fraternal twins -- that, unlike estoppel, waiver is merely a "procedural doctrine" which arises only under Rule 1.140(h), Fla. R. Civ. P., when a defendant fails to plead the statute of limitations as an affirmative defense. Most respectfully, the defendants are plainly extemporizing here, and their argument is simply wrong. Waiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right; litigants can waive various claims and defenses, including limitations defenses, in *numerous* ways; and the failure to *plead* a claim or defense is simply *one* of those ways. *See Fletcher v. Dozier*, 314 So.2d 241 (Fla. 1st DCA 1975); 22 Fla. Jur.2d, *Estoppel & Waiver*, §§111-121 (and numerous decisions collected therein); 54 C.J.S., *Limitations of Actions*, §§22-23 (and numerous decisions collected therein). And after this Court's decision in *Kinney System, Inc. v. Continental Insurance Co., supra*, that point ought to be beyond debate.

Agreements to waive a statute of limitations have also become essential under today's comparative negligence regime, as interpreted by this Court in *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). Plaintiffs will frequently choose for good reasons not to sue persons and entities only tangentially related to a claim in suit, yet they face the prospect that the named defendants will name the non-parties as tortfeasors in an "apportionment defense" after the statute of limitations has run, when they can no longer be joined as defendants in the suit. Because the possibility exists that such a non-party will ultimately be named and found liable in part for the plaintiff's damages at the insistence of the defendants, plaintiffs' attorneys have little choice but to sue everyone that the named defendants might later name as "non-party defendants," whether they believe they have a legitimate claim against them or not -- at the risk of suffering an adverse award of attorney's fees for filing a frivolous lawsuit, and at great cost to those defendants.

This is one of the more nonsensical results of the legislature's ill-conceived enactment of §768.81, Fla. Stat. (as interpreted by this Court in *Fabre*), and it has become both customary and prudent to finesse the problem by agreeing with the potential "non-party defendants" not to sue them unless the defendants name them in

Most respectfully, §95.051 plainly and unambiguously abolishes only *tolling* defenses, and it does not abolish the separate and distinct, and altogether different, defenses of waiver and estoppel. Neither §95.051 nor the initial majority opinion in *Fulton County Administrator* required the "unjust result" reached by the trial court below, and we respectfully submit that the district court correctly concluded that the trial court misunderstood and misapplied both the statute and the opinion, and thereby erred in entering summary judgment in the defendants' favor on Count I of the plaintiffs' Third Amended Complaint. And that was the sum and substance of the argument that we presented to the district court -- and that is our position here.

2. The defendants' position.

The defendants' response to our position is constructed upon three persistent themes. First, they argue that statutes of limitations serve important purposes and should therefore be rigorously enforced. To this we reply simply that the doctrine of equitable estoppel serves important purposes as well, which is why it has been recognized in the law of Florida for over 150 years. The two concepts have co-existed peaceably throughout that lengthy period of time, and no good reason suggests itself why they cannot continue to do so for time immemorial. Most respectfully, this aspect of the defendants' response is really no argument at all.

Second, the defendants argue that the distinction we have drawn between

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their "apportionment defense," in exchange for a waiver of the "non-party defendants'" statutes of limitations defenses in the event they ultimately have to be joined as parties to the suit. For obvious reasons, these types of agreements clearly deserve the protection of this Court, and the defendants' suggestion that a statute of limitations cannot be waived except by failure to plead it should be given the short shrift that it plainly deserves.

tolling defenses and the defenses of estoppel and waiver is (in their various characterizations of it) "artificial," "dubious," "illusory," "irrational," and a "semantic distinction without a difference." Of course, the defendants did not think so when they initially conceded the existence of the settled distinction in the trial court: " . . . defendants acknowledge that estoppel may apply notwithstanding the (otherwise) exclusive list of tolling circumstances set forth in §95.051 of the Florida Statutes; . . ." (R. 1212, n. 7). But then, as the facts alleged in the plaintiffs' Third Amended Complaint demonstrate in spades, consistency is not the defendants' strong suit.

The argument also impugns the intelligence and integrity of numerous courts that have recognized that the two types of defenses are separate and distinct, dependent upon different types of facts, and serving altogether different purposes -- like the Florida appellate courts (including this Court) referenced at pages 14-17, *supra*; like the federal appellate courts referenced at pages 12-13, 17, *supra*; and, indeed, the highest Court in the nation: "We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. . . ." *Zipes v. Trans World Airways, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed.2d 234, 243 (1982). *See also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959). Most respectfully, unless all of these courts are simply stupid, this aspect of the defendants' response is also no response at all.

Third, the defendants engage in an elaborate game of semantics with the Court. They insist that §95.051 abolishes not only "tolling" defenses but all "exceptions" for

avoiding the statute of limitations (except those "exceptions" explicitly recognized therein). There are at least two things substantially wrong with this argument. First, the defendants' expansive reading of §95.051 is insupportable. The word "exception" does not appear in the statute. In effect, the defendants have rewritten the statute, substituting the broader word "exception" wherever the narrower word "toll" (or one of its variants) appears. As noted previously, the title of §95.051 is "When limitations *tolled*" (emphasis supplied). The statute then lists several circumstances in which "the running of the time under any statute of limitations . . . is *tolled* . . . ." (emphasis supplied). And the statute then provides that "[n]o disability or other reason shall *toll* the running of any statute of limitations except those specified in this section . . . ." (emphasis supplied). We repeat, the word "exception" appears nowhere in the statute.

The statute therefore addresses only *tolling* defenses -- those which "toll the running of any statute of limitations." And given the settled rule of construction that statutes in derogation of the common law must be narrowly read and strictly construed, and will not be interpreted to displace the common law any further than its explicit terms require, there is no way in which §95.051 can legitimately be read to abolish all "exceptions" for avoiding the statute of limitations, including those which do *not* "toll the running of any statute of limitations," as the defendants claim. The statute plainly addresses only *tolling* defenses -- and once it is understood that an equitable estoppel defense and a tolling defense are two entirely different things, as they plainly are, then this settled rule of construction simply *requires* a conclusion that the statute does not abolish the 150-year old common law defense of equitable estoppel in the context presented here.

Moreover, even if the defendants' expansive reading of §95.051 were supportable, the fact remains that the defense of equitable estoppel is not an "exception" to the statute of limitations. As we have taken some pains to make clear, the doctrine of equitable estoppel can be asserted as a defense to all manner of claims and defenses. In addition, only *tolling* defenses serve to delay or suspend the running of a statute of limitations. In contrast, the defense of equitable estoppel comes into play only after the limitations period has run, and it addresses itself to the circumstances in which a party will be estopped from asserting an expired statute of limitations as a defense because his conduct has induced another into forbearing suit within the limitations period. The defense has nothing to do with discouraging claimants from filing stale claims; its purpose is to prevent defendants from profiting from their own misconduct -- and it is therefore not an "exception" to the statute of limitations at all. The defendants' expansive reading of §95.051, even if correct, therefore fails altogether to finesse the defense of equitable estoppel.

Neither do any of the several decisions upon which the defendants rely support their third argument. To be sure, some of them contain the word "exceptions." As always, however, context is important. In each case, the word appears in the context of the court's discussion of a *tolling* exception. In *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So.2d 1119 (Fla. 1998), for example, this Court addressed the propriety of reading a "discovery rule" into a statute of limitations which did not contain one. Because a "discovery rule" prevents a statute of limitations from beginning to run until the cause of action is discovered, it is plainly a *tolling* defense, as Judge Blue rather explicitly stated in the dissenting opinion with which this Court explicitly agreed in *Federal Insurance*:

Judge Blue wrote in his dissent:

> The majority opinion makes the claim against the bonding company actionable more than ten years after completion of the bonded construction. It does this by explaining that the cause of action does not accrue until the latent defect is discovered and only then does the five-year statute of limitations begin to run. This analysis purely and simply attaches a *tolling* period to the statute of limitations applicable to the bond. It is the *tolling* provision in section 95.11(3)(c) which permits a cause of action beyond the four-year limitations period in this section. To make the latent defects actionable against the bonding company requires imposing a *tolling* period within section 95.11(2)(b), which *School Board of Volusia County* and this court have held is a legislative determination . . . .
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> . . . .
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> . . . On this issue we agree with Judge Blue's dissent and quash the majority's decision . . . .

Federal Insurance Co., supra, 707 So.2d at 1120-21 (emphasis supplied).

Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer v. Flanagan, 629 So.2d 113 (Fla. 1993), also addresses the propriety of reading a "discovery rule" into a statute of limitations which does not contain one. *Hearndon v. Graham*, 710 So.2d 87 (Fla. 1st DCA 1998), also addresses the propriety of reading a "discovery rule" into a statute of limitations which does not contain one. *Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532 (Fla. 4th DCA 1999), also addresses the propriety of reading

a “discovery rule” into a statute of limitations which does not contain one. And *Dobbs v. Sea Isle Hotel*, 56 So.2d 341(Fla. 1952), simply declines to read a particular “tolling” defense into a statute of limitations which does not contain one. In short, because the defense of equitable estoppel is *not* a “tolling” defense, these decisions add nothing to the debate here.

Our position here is simple and straight forward, and can be condensed into a simple, perfectly logical syllogism: §95.051, Fla. Stat., arguably abolishes *tolling* defenses, except those explicitly recognized therein; the defense of equitable estoppel is *not* a tolling defense; and §95.051 therefore does not abolish the defense of equitable estoppel. Most respectfully, §95.051 abolishes only *tolling* defenses, not “exceptions” to the statute of limitations, and it does not abolish the separate and distinct, and altogether different, defenses of estoppel and waiver (which are not “exceptions” to statutes of limitations in any event). The major and minor premises of our syllogism, we respectfully submit, are plainly correct; and the validity of its conclusion -- that §95.051 does not abolish the 150-year old defense of equitable estoppel -- ought to be beyond debate. The certified question should be answered in the negative, and the district court’s decision should be approved.

B. THE LOWER COURTS DID NOT ERR IN CONCLUDING THAT MATERIAL ISSUES OF FACT EXISTED ON THE PLAINTIFFS' EQUITABLE ESTOPPEL DEFENSE.

Apparently uncomfortable with their position on the one ground which they succeeded in selling the trial court, the defendants advance a "right for the wrong reason" argument in an effort to salvage their summary judgment here. They argue that even if the trial court erred in concluding that the plaintiffs' equitable estoppel

defense was barred as a matter of law, it also erred in concluding that a material issue of fact existed on the defense -- and they ask the Court to declare the trial court twice in error, and uphold their summary judgment in the end.

The Court may wish to limit its consideration of the case to the legal question certified to it for resolution. In its discretion, however, it has the power to examine the entire record and pass upon the sufficiency of the evidence to support the denial of the defendants' motion for summary judgment on this ground. Since four judges have already examined the record in depth and have concluded that a material issue of fact exists on the plaintiffs' equitable estoppel defense, we doubt that the Court will see any need to reach the issue. But because the possibility exists that it might, we will respond to the defendants' argument, albeit briefly.

The defendants recognize what they must -- that in order to prevail on this alternative position, they must convince this Court that the record construed in every light most favorable to the plaintiffs *conclusively* disproves any factual basis for the defense, and that they cannot prevail if the "slightest doubt" remains in that regard. *See, e. g., Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977); *Dettloff v. Abraham Chevrolet, Inc.*, 534 So.2d 745 (Fla. 2d DCA 1988), *review denied*, 542 So.2d 1332 (Fla. 1989); *Knight v. Roberts RV Resort*, 671 So.2d 298 (Fla. 2d DCA 1996). Of course, the constitutional right to a jury trial of the facts demands no less.

The defendants' argument is constructed upon a single theme -- that there is documentary evidence in the record proving that the plaintiffs had not been formally promised a future franchise and had no formal commitment for one. The documentary evidence supporting the argument exists, but the argument itself is a

straw man -- a point which ought to be evident from the face of the plaintiffs' Third Amended Complaint alone. Surely, if the plaintiffs had been formally promised a future franchise and had a formal commitment for one, they would have sued the defendants for breach of contract. They did not. They sued the defendants for three separate instances of tortious interference with contracts and advantageous business relationships they had developed to further their prospects for landing a franchise -- claims which the district court declared actionable when it reversed the dismissal of the plaintiffs' initial complaint in the first appeal. The lack of formal promises and commitments is therefore of no import. The plaintiffs' defense of equitable estoppel is bottomed upon entirely different facts.

As the number of defendants named in the Third Amended Complaint makes clear, Major League Baseball is an enormous enterprise with numerous players; and as the Constitutions of the American League and the National League make clear, obtaining a franchise in either league is an enormously complicated task requiring the final assent of numerous organizations. The end point of the process, obtaining a formal commitment to a future franchise, is therefore simply that -- an end point, and an extremely difficult end point, requiring a great deal of preliminary groundwork and maneuvering, to reach. In addition, like any enterprise of comparable size, Major League Baseball has major players and minor players, and it has a public face and a private face -- and a considerable amount of the process goes on behind the scenes, and has no formal face at all. It is in this complex practical context that the plaintiffs' equitable estoppel defense arises and must be judged -- and the viability of the defense simply does not turn on the fact that, because of the defendants' tortious interference with their business relationships, the plaintiffs never reached the formal

end point of their pursuit.

The evidence supporting the plaintiffs' equitable estoppel defense is collected and discussed in some detail in the "Plaintiffs' Supplemental Memorandum in Response to Defendants' Motion for Summary Judgment," and supported by the lengthy evidentiary appendix attached thereto (R. 1161 *et seq*.). For the convenience of the Court, we have excerpted the relevant pages of the memorandum (which contain appropriate references to the supporting appendix) and included them in an appendix to this brief, together with two affidavits which were supplied with the memorandum. We refer the Court to the brief's appendix for the details. For our purposes here, we will simply paraphrase and summarize what the evidence reflects.

The evidence reflects, as the Third Amended Complaint alleges, that the plaintiffs spent nearly $3,000,000.00 in their efforts to obtain the Minnesota Twins franchise for the Tampa Bay area, and that they entered into a written contract with H. Gabriel Murphy for the purchase of his 42.14% minority interest in the Twins. The purchase price of this minority interest was $11,500,000.00. These undertakings were based on the representations of Baseball's major players that the plaintiffs' purchase of the Twins, and their relocation to the Tampa Bay area, would be approved. Unfortunately, a local investor, Karl Pohlad, intervened in an effort to keep the Twins in Minnesota, and Baseball changed its mind. Commissioner Kuhn forbid the plaintiffs from pursuing further negotiations for the purchase of the rest of the Twins' stock, and demanded that the plaintiffs assign their contract with Murphy to Pohlad. At the time the assignment was demanded, the value of the minority interest purchased by the plaintiffs had increased from $11,500,000.00 to $25,000,000.00.

The plaintiffs balked at the demand and sought payment for the $13,500,000.00 increase in the value of the contract, as well as reimbursement of the nearly $3,000,000.00 previously expended, as a condition to assigning the contract. Baseball responded with promises, assurances, and threats. The plaintiffs were told, "Do you want baseball for Tampa, or do you want to make money?" In other words, if you cooperate, you will get baseball for Tampa; if you do not cooperate, you won't. The plaintiffs were also told that, if they cooperated with Baseball and assigned the contract to Pohlad for their "transactional expenses" of $225,000.00, they would become an "absolute front runner," "the top of the list," for the next available franchise. They were also told that they could accede to Baseball's demands and "down the road you'll get a franchise, or you could make a profit on the transaction and give up forever any chance of ever having a franchise."

In addition, one of the plaintiffs' officers advised one of Baseball's major players, Jerry Reinsdorf, that "you guys have an awful lot of legal liability to us for tortious interference," and Mr. Reinsdorf responded, "Yeah, I agree with you . . . But it doesn't matter because you guys are going to get an expansion team in a year or two and everybody is going to be happy, so it is irrelevant." One of the plaintiffs' principals was also told by the President of the American League, "You're doing the right thing, your market's great, you all are great and I'm confident you are going to be rewarded with a baseball team." Baseball also demanded that the plaintiffs not bring suit over the aborted Twins transaction -- that, "if we wanted a baseball team, we couldn't take legal action," that "the only way we could have a baseball team was if we played ball with them."

Because of these promises and threats, the plaintiffs forbore bringing their

lawsuit -- something they would not have done if they had not been assured that there was a baseball franchise in their future. The plaintiffs delayed their suit further when it appeared that Baseball would make good on its promises in 1988. When the plaintiffs were pursuing purchase of the Texas Rangers, the new Baseball Commissioner, Peter Uberroth, told them to "go ahead, complete the acquisition with Mr. Chiles. You will receive the ownership. You should go ahead and apply for relocation at the same time, and it was very probable that you would be approved for relocation." Of course, filing suit over the Minnesota Twins transaction would have destroyed any chance the plaintiffs had of purchasing and relocating the Texas Rangers, so suit was withheld. Unfortunately, the Texas Rangers transaction was then derailed by baseball as well. (This aspect of the controversy is the subject of Count II of the plaintiffs' Third Amended Complaint, which remains pending below). The plaintiffs were told once again, "Do not sue or you will never get major league baseball."

Still believing that they were "on the top of the list" and that Baseball would make good on its repeated informal promises and commitments, the plaintiffs applied for an expansion team, which was scheduled to begin play in 1993. In 1990, baseball announced its "short list" of prospective expansion-team owners. Because the defendants had also interfered with the plaintiffs' ability to obtain an expansion team, the plaintiffs were not on the list. (This aspect of the controversy is the subject of Count III of the plaintiffs' Third Amended Complaint, which also remains pending below.) At this point, it became obvious to the plaintiffs that the informal assurances which Baseball had given them in order to forestall their lawsuit were never going to be honored, and the plaintiffs therefore filed suit shortly thereafter.

Most respectfully, it is a perfectly fair inference from these facts that the plaintiffs were induced to forbear bringing suit for the substantial damages they suffered in the Minnesota Twins transaction by numerous informal assurances from Baseball's major players that they were a front runner for a future franchise, and that their cooperation in withholding suit would ultimately bear that fruit. To be sure, they had no formal promise or formal commitment to a future franchise -- but they are not required to prove such a thing to support their defense of equitable estoppel; all that they need to show is inequitable conduct by the defendants:

> The equitable estoppel doctrine has frequently been employed to bar inequitable reliance on a statute of limitations. [Citation omitted]. A party will be estopped from asserting the statute of limitations defense to an admittedly untimely action where his conduct has induced another into forbearing suit within the applicable limitations period. . . .

Alachua County v. Cheshire, 603 So.2d 1334, 1337 (Fla. 1st DCA 1992). *See also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959); *Tillman v. City of Pompano Beach*, 100 So.2d 53, 65 A.L.R.2d 1273 (Fla. 1958); *Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9 (Fla. 1965).

Surely the behind-the-scenes, informal conduct of Baseball's major players meets that test -- and the fact that the plaintiffs never obtained a *formal* commitment for a franchise, despite the numerous informal assurances that a franchise would be forthcoming in exchange for their cooperation in withholding suit, is simply not enough to take that question away from a jury as a matter of law. The constitutional right to a jury trial of the facts demands no less. We therefore respectfully submit that the defendants' "right for the wrong reason" argument is without merit -- and that the

lower courts did not err in concluding that material issues of fact exist on the plaintiffs' equitable estoppel defense.

V. CONCLUSION

It is respectfully submitted that the certified question should be answered in the negative, and that the district court's decision should be approved.

Respectfully submitted,

CUNNINGHAM CLARK & GREIWE, P.A.
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Suite 100
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-and-
PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
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Miami, Florida 33130
(305) 358-2800

By:_____
JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of March, 2000, to: John W. Foster, Sr., Esq., Baker & Hostetler LLP, Post Office Box 112, Orlando, Fla. 32802; and Robert E. Banker, Esq., Fowler White Gillen, et al., Post Office Box 1438, Tampa, Fla. 33601.

By:_____
JOEL D. EATON

1. **Testimony** of William **Mack**

The deposition testimony of Wiiam **Mack,** in most relevant part, indicates:

1. Based on the **clear** representations of various defendants, plaintiffs expended some three million dollars in pursuit of the Minnesota Twins and in furtherance of stadium construction in **Tampa, Florida. Mack** at 29-3 **1, 99**.

2. **Plaintiffs successfully** negotiated a contract for the purchase of Murphy's 42% **interest** in the Twins, and had made substantial progress in negotiations to purchase the 52% interest of **Griffith/Haynes** (the "control" **owners** of the Twins). **Mack** at **42-44, 46.**

3. Al a meeting with Commissioner Kuhn, American League President Bobby Brown and others on May **17, 1984, Mack** learned that (a) Kuhn deemed the 42% stock ownership acquired of Murphy a **"control"** interest requiring extraordinary majority approval **from** the American League and **majority** approval **from** the National League; **(b)** Kuhn forbade **plaintiffs** from continuing **negotiations** with **Griffith/Haynes,** and stated that **baseball** would not approve the Murphy **sale;** (c) Kuhn stated that defendants would, **as** a result of their discontinuation of **efforts** to acquire the Twins, **become** an "absolute front **runner"** to acquire an expansion team; and (d) expansion would take **place** within a **"year** or two." **Mack at 77-80.**

4. **As** a result **of the** meeting on May 17, **Mack** and **his** fellow investors concluded that they had **"no** other **choice"** but to accede to **defendants' demands. Mack at 84.**

5. In addition to requiring that plaintiffs discontinue efforts to acquire the Griffith/Haynes stock, defendants also required that plaintiffs assign their contract to purchase Murphy's stock for "transactional expenses" of some $225,000 together with the originally-agreed purchase price of $11.5 million -- notwithstanding the fact that defendants had invested some $3 million in an effort to acquire the Twins and relocate them to Tampa Bay, and notwithstanding the fact that the stock had a potential market value (based on the value of the Griffith/Haynes stock) of some $25 million. Mack at 99-100.

6. **In Mack's belief, "Dr.** Brown and Mr. **Pohlad** [the **assignee of Murphy's stock]** had **joined forces to conspire to see that I got out of this deal what they deemed they wanted me to get out of it, rather than what was reasonable under the circumstances** for the price of my coo&on" **Mack at 100-101.**

7. Mack maintained contact with baseball commissioners throughout the 1980's in an attempt to get defendants to make good on their promise of a franchise, but was put off with claims that the delay in promised expansion "was a matter of politics amongst the clubs and not being able to get their act together." Mack at 13 1-132.

8. In 1988, after encouragement and tentative approval from Commissioner Ueberroth, Mack and various plaintiff interests contracted to purchase a 58% interest in the Texas Rangers, which transaction like the original Twins transaction was dependent on the approval of defendants. Mack at 143-144.

9. Eventually, plaintiffs were compelled to rescind the contract to purchase the Rangers' interest, after which the team was purchased by another owner. According to Mack, "I don't think that [the original Rangers' owners] had anything to do with the ultimate sale of the Texas Rangers. I think that was staged by Baseball. They decided who they wanted to sell to, and just as they interfered with our relationship and conspired against us with the Minnesota Twins, they hand-picked who they wanted to have on the team and those, that group got the team." Mack at 157. As he further stated, "if Major League Baseball. . . had any intention of honoring the things that they said to us many times over from various commissioners and from Bobby Brown [American League President at pertinent times], then we would have been the owners of the Texas Rangers today." Mack at 15%.

10. Upon the defendants' announcement of the "short-list" for expansion teams in 1990, the plaintiffs were conspicuously absent from the list. As stated by Mack, "Not only were we not favored in the expansion, not only was the expansion many times more expensive than the purchase *of* either the Twins or an interest in the Twins or the Texas Rangers, but we were -- it was indicated to the then Tampa Bay Baseball Group that local participation was of prime importance and we weren't local participation or deemed to be local participation." Mack *at 11* 1-112.

11. Reflecting on his experience, Mack observed, "They promised to do a lot of things and they gave lip service to the things that they indicated they would do. So what they said and what they said in print is not . . . consistent with the way they handled themselves when it came to the results of delivering." Mack at 110.

2. Testimony of Edward McGinty[2]

The testimony of Edward McGinty indicates in most relevant part:

[2]McGinty's evidence is elaborated in his affidavit contained in Appendix 1.

1. In 1982, McGinty and others were encouraged to pursue the acquisition of the Minnesota Twins, an economically "sick" team, by Commissioner Kuhn and various other defendant-owners. I McGinty at 3 1-42.

2. The plaintiffs commenced an expensive campaign to acquire the Twins and relocate them to Tampa Bay. Activities included signing a lease with the Tampa Sports Authority, contracting with an architectural firm for stadium design, arranging stadium financing, and working on the acquisition of necessary governmental permits. II McGinty at 129-130.

3. In the spring of 1983, the plaintiffs reached a "deal" for the purchase of the 52% stock interest of Griffith-Haynes in the Twins; a draft agreement was submitted by the plaintiffs. II McGinty at 91, 96.

4. In the four to six weeks following submission of the draft agreement, Griffith received several "threatening" phone calls from Commissioner Kuhn, complaining of political pressure to stop the proposed transaction. II McGinty at 97-97.

5. Griffith decided to postpone final contracting till the end of the current baseball season. II McGinty at 103.

6. In the summer of 1983, Kuhn disclosed his "verbal" policy in opposition to team relocation, II Mack at 127, and "campaigned" with baseball owners to oppose the plaintiffs acquisition of the Twins. II McGinty at 147-148.

7. Testifying about Kuhn's change in policy, McGinty commented: "The problem is that this becomes a pattern; that he would say, 'Go do this,' and then if you actually went and did it, he would say, 'No, I changed my mind, I don't want you to do that, I want you to do this other thing now.' And that's a problem for us because not only, of course, did we go off and do it and expend a lot of effort, we expended a lot of money at the same time. And for him to switch, once he saw that we were actually doing it, was a big problem for us, and we didn't know how to deal with that. And there's no competitor; you can't go to anybody else in the Major League expansion franchise for relocation, you could only go to them. So, you know, we were caught in a position that we had to maintain the relationship, and at the same time do everything we could to encourage them to do the right thing." II McGinty at 148-149.

8. $1984, Commissioner Kuhn had switched to yet a third position: "If no one came forward in Minnesota to match [plaintiffs'] offer . . . he would be supportive of a move." II McGinty at 176.

9. Upon the plaintiffs' contracting to acquire Murphy's 42% interest in the Twins, Kuhn ordered plaintiffs to assign that right to a newly-appearing "local" buyer for the Twins, Carl Pohlad. II McGinty a! 185. Pohlad, who was now seeking to acquire the majority interest of Griffith-Haynes, indicated that he needed to also acquire the Murphy minority interest in order to

secure tax advantages available only if he owned at least 80% of the Twins stock. II McGinty at 185.

10. When plaintiffs informed Kuhn that they expected to receive fair market value for their 42% interest, Kuhn informed plaintiffs that Pohlad would only pay the original purchase value of the stock and not its current value (which had dramatically increased). When plaintiffs spoke of their reluctance to surrender the stocks' increased value, Kuhn responded: "Well, I suppose in a way I really can't tell you that, but I can tell you, you have a choice; you can either follow these instructions and sell it for what it's worth and then down the road you'll get a franchise, or you can make a profit on the transaction and give up forever any chance of ever having a franchise." XI McGinty at 188.

11. The plaintiffs ultimately acceded to Kuhn's wishes, and McGinty recalls Bill Mack stating: "I'm going to tell him that I will go ahead and accede to his wishes, but I will expect him to honor his position, his promise that we will get a franchise shortly." II McGinty at 187.

12. According to McGinty, Mack summa&d their position when he stated, "its our position that we either sue now or, you know, go along with it and then get a franchise, and sue if we don't get a franchise." II McGinty at 188.[3]

13. After Kuhn ordered plaintiffs to sell their stock, McGinty advised defendant, Jerry Reinsdorf that, "you guys have an awful lot of legal liability to us for tortious interference. . . ." To which Reinsdorf responded, "Yeah, I agree with you. . . . But it doesn't matter because you guys are going to get an expansion team in a year or two and everybody is going to be happy, so it is irrelevant." III McGinty at 268. Subsequently, plaintiffs decided to comply with Kuhn's order. III McGinty at 270.

3. Testimony of J. Bob Humphries

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[3]Defendants' memorandum plainly distorts McGinty's deposition testimony on this point. Defendants argue that "McGinty expressly his advised his clients that although they did not have to sue at that point, the statute of limitations would begin to run." Def.'s Mem. At 31, n.16. But the transcript clearly states differently:

> And [Mack] said, "If we accede to his threats and demands, do we lose our rights that we've got now to sue later, if it doesn't work out?" I said, "No. The statute says that. But we don't lose our rights at that point." II McGinty at 186 (emphasis addai).

At no place in the deposition did McGinty state, "the statute of limitations would begin to run."

The testimony of J. Bob Humphries essentially reaffirms the allegations set forth in the depositions of Mack, Morsani, and McGinty. Some of the more pertinent testimony of Humphries includes:

1. After meeting with numerous American League club owners at their winter meeting in 1982, Humphries concluded that "we had 14 out of 14 votes" authorizing plaintiffs to acquire the Twins and relocate them to Tampa Bay. I Humphrics at 55.

2. At the winter meeting of 1982, Commissioner Kuhn responded to Humphries' inquiry about his support for the plaintiffs' acquisition of the Twins, "We do need to move the Minnesota Twins. . . . I am in favor of that." I Humphries at 57-58.

3. Based on the representations of defendants, plaintiffs commenced negotiations with majority owners of the Twins, Calvin Griffith and Thelma Haynes, as a result of which Humphries concluded that they had reached agreement. In addition to having orally agreed as to the details of the sale, plaintiffs had taken action in reliance on the parties' understanding and had commenced performance, thus convincing Humphries that their agreement was legally binding I Humphries at 109-111.

4. In the fall of 1983, Griffith-Haynes attempted to increase the purchase price for the Twins, based on the recent acquisition price for the Detroit Tigers. I Humphries at 150.

5. Notwithstanding the sellers' suggestion that the agreed price for the Twins be reconsidered, plaintiffs continued to believe that they had an agreement with Griffith-Haynes that was enforceable in a court of law. I Humphries at 152. Based on plaintiffs' belief that the sale would ultimately be consummated and that litigation would impact their efforts to obtain a baseball team, plaintiffs deferred legal action against Griffith-Haynes. I Humphries at 153-154.

6. On April 25, 1984, plaintiffs entered into a contract with Gabriel Murphy for the purchase of a 42% interest in the Twins. I Humphries at 160. This contract was consummated notwithstanding efforts to interfere with that contract by defendant Bobby Brown. II Humphries at 129.

7. Ultimately, the Murphy contract was assigned to Carl Pohlad, at the insistence of Commissioner Kuhn; Kuhn further insisted that plaintiffs receive no profit for the now-increased value of the Twins – an amount believed by Humphries to exceed $10 million. II Humphries at 13-18.

8. According to Humphries, "Mr. Pohlad gave us the price that was edicted by baseball. . . . At the time I didn't pay much attention because if they'd have said 25 cents, we'd

have taken it. . . . We would have taken anything baseball told us to do because we had no choice." II Humphries at 20.

9. Subsequent to the failed Twins acquisition, plaintiffs attempted to acquire a majority interest in the Texas Rangers from Eddie Chiles, after assurances from new baseball commissioner, Peter Ueberroth, to "go ahead' complete the acquisition with Mr. Chiles. You will receive the ownership. You should go ahead and apply for relocation at the same time, and it was vay probable that you would be approved for relocation." II Humphrics at 36-37.

10. According to Humphries, Chiles subsequently changed his mind about the Rangers transaction and "conspired" with minority-interest owner, Gaylord, to frustrate the completion of tk contract. These actions' in violation Chiles' obligation of good faith under the contract, were discussed at a meeting of baseball owners. II Humphries at 61-64.

11. Following the failed acquisition of the Rangers, plaintiffs attempted to acquire an expansion team but were informed by Commissioner Giamatti that Bill Mack, an important financial partner in the plaintiffs' acquisition team, was not a Tampa Bay "local" and thus could no longer participate as owner of an expansion franchise team in Tampa Bay. Throughout the preceding eight-year period when plaintiffs had pursued a baseball franchise for Tampa Bay, no official with baseball had ever indicated that Mack's ownership interest in a Tampa Bay franchise would preclude such franchise. II Humphries at 80, 93, 97, 100.

12. In 1990, defendants announced their shortlist of prospective expansion-team owners ad called plaintiffs to inform them that they were not on that list. According to Humphries, "Our main goal was to obtain a major league franchise for play in the Tampa Bay area. . . , Baseball had informed us that we would get it, and until that call . . . we believed them." II Humphries at 128.

Plaintiffs have also attached to this memorandum as Appendix 2 the affidavit of Humphries in which he addressed several points not fully explored in his deposition. As that affidavit testimony indicates:

1. Humphries, as counsel for TBBG, advised his clients at to the illegality of defendants' forced assignment of the Murphy contract.

2. Humphries advised TBBG that, as a condition of plaintiffs deferring legal action against plaintiffs, they had been assured of approval for the purchase of an existing or expansion team.

3. Plaintiffs agreed to defer litigation in response to defendants' promise.

4. Humphries advised TBBG that, so long as plaintiffs deferred legal action in reliance on defendants' promise to award plaintiffs a franchise, the statute of limitations on their claims relating to the Murphy contract assignment would not begin to run.

5. When, in 1990, Humphries learned that defendants had dishonored their promise to award them a baseball franchise, he advised plaintiffs to commence legal action within two years.

4. Testimony of Frank Morsani

The extensive, detailed testimony of Frank Morsani strongly reaffirms those matters test&d to by Mack, McGinty, and Humphries. For sake of brevity, a few of the more pertinent parts of that testimony are set forth below.

1. The plaintiffs received encouragement from defendant owners to acquire the Twins from the inception of their quest. I Morsani at 91, 145-152.

2. When, upon plaintiffs' acquisition of a 42% interest in the Twins, defendants compelled plaintiffs to assign that interest without profit, numerous promises and threats were made, including:

a. Morsani was told by American League President Bobby Brown, "You're doing the right thing, your market's great., you all are great and I'm confident you are going to be rewarded with a baseball team ...." II Morsani at 46; and

b. Morsani was told by Kuhn, "Do you want baseball for Tampa, or do you want to make money?" As explained by Morsani, "In other words, he said if you want baseball then you must sell the stock for the same price that you bought it for." II Morsani at 33.

3. As Morsani explained the plaintiffs' decision to surrender their multimillion dollar contract rights, "I don't think you understand that this is total coercion. I mean, they had the only game in town and we were given no alternative. I mean, do you really think that I would give up thirteen million dollars in profit for two hundred and twenty-five thousand dollars? Is that consideration? Where in the hell do you think I would be? You had mentioned yesterday that I was a prudent businessman. I wouldn't have done that if I wasn't assured that they were going to get baseball. That ... thing doesn't make sense." II Morsani at 38-39 (emphasis added).

4. Regarding plaintiffs' delay in bringing suit against defendants for their interference with the Twins transaction, Morsani testified: "Well, if we wanted a baseball team, we couldn't take legal action. I mean, they said if you ... the only way we could have a baseball team was if

we played ball with them." II Morsani at 111. According to Morsani, baseball "demanded not to sue" at a meeting in May of 1984. II Morsani at 112.

5. Regarding plaintiffs' delay in bringing suit against defendants for their interference with the Rangers transaction, Morsani testified: " [I]t was the same demand: Do not sue or you w-ill never get major league baseball." II Morsani at 113. "We did not bring a lawsuit because their demands were if we brought a lawsuit we would never get major league baseball, so some of us, or maybe all of us, said we weren't going to bring a lawsuit." II Morsani at 116.

In summary, there is a bounty of testimonial evidence that, in light of the monopoly power of baseball, and in light of the repeated assurances and threats of defendants" plaintiffs were "mislead" and "lulled" into deferring legal action until it was clear in 1990 that defendants would not honor their word. We suggest that the issue of equitable estoppel is not even remotely suited for summary judgment.

'Minutes of the May 17, 1984 meeting among plaintiffs, Commissioner Kuhn, American League President Bobby Brown, and others -- as recorded by Brown -- all but capture the threats of Commissioner Kuhn following plaintiffs' acquisition of the Twins' stock: "He [Kuhn] felt that exerting such leverage or instituting such negative attitudes on their prospective sale could only incur the enmity of Baseball, with possibly disastrous effects to the Tampa Bay area for future Major League Baseball. Minutes of Bobby Brown, tab 25, p. 3 (emphasis added). Similarly, Brown testified "As I recall in the meeting it was -- it was pointed out or at least emphasized that the 42 percent being a controlling interest would have to be voted upon and that the chances of the vote going through are -- would be somewhat slim, that if the -- the Tampa Bay group tried to utilize that 42 percent as leverage and maintained a strong position on that fact, that the -- certainly, the -- the ownership in baseball would remember that to their disadvantage." I Brown at 59-60.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FRANK L. MORSANI, individually,
and for the use and benefit of
TAMPA BAY BASEBALL GROUP, INC.,
and TAMPA BAY BASEBALL GROUP, INC.,
individually, a Florida corporation,

Plaintiffs,

vs.

MAJOR LEAGUE BASEBALL, et al.,

Defendants.

CASE NO.: 92-9631

DIVISION: "W"

/

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

On this day before me, the undersigned authority, personally A. Edward McGinty, who being first duly sworn, deposes and says:

1. My name is A. Edward McGinty. I reside at 4820 Cypress Tree Drive, Tampa, Florida 33624

2. I have previously been employed by the law firm of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A. and with the law firm of Rudnick and Wolfe and am currently practicing as a sole practitioner.

3. I was admitted to the Florida Bar as an attorney in the October of 1972 and have continually engaged in the practice of law since that time.

4. I have provided continuous legal representation from the inception of the Tampa Bay Baseball Group ("TBBG") until approximately 1991. I was also a Vice President of the Tampa Bay Baseball Group ("TBBG")

5. Mr. Mack related to me the following: .

a. Mr. Kuhn, the Commissioner, told him, Mr. Mack, that he had determined that the 42% minority stock interest in the Minnesota Twins that we had under contract to purchase from Mr. Murphy fox $11,500,000.00 was a "control" interest in the Twins;

b. That a control interest required the voted approval of the American League clubs and of the National League clubs;

c. That he, the Commissioner, would see to it that we did not get the necessary approval;

d. That we, therefore, had no *choice* but to sell the 42% of the Twins to Carl Pohlad;

e. Further, that even though the fair market value of our 42% of the Twins appeared to be about $23,000,000.00 to $25,000,000.00, he required that we sell it to Mr. Pohlad for our cost, $11,500,000.00, plus an allowance of $225,000.00 for costs incidental to the transaction only, and not for all of our costs in pursing a Major League Baseball franchise; and

f. That if we complied with his directive, we would be at the top of the list for a franchise and would enjoy his strong support, but if we did not comply, then we would never get a Major League franchise.

I said to Mr. Mack that coming from the Commissioner, his threats to declare our minority interest a control interest and to prevent us from getting approval of our contract and to prevent us from ever getting a franchise if we didn't sell our 42% of the. twins to Pohlad for far less than its value was a clear case of tortious interference with our contract with Murphy, violated the antitrust law and amounted possibly to a case of extortion.

Mr. Mack's response to me was that he believed Kuhn could and would succeed with his threats if we didn't go along with him and that if we sued now, we would never get a franchise. Then he asked me, "If we accede to his threats and demands, do we lose our rights we've got now to sue later, if it doesn't work out?" I answered, "No. The statute says that. But we don't lose our rights at that point."

The reason for my answer war that I was informing them that the Commissioner had violated our legal rights at the time he used the powers of his office and the monopolistic power of Major League Baseball to threaten and intimidate us into giving up our contractual rights for substantially less than their value. I was telling them "No" that we didn't lose our rights merely because the statute said "that". I was informing them that it was my opinion (and is still my opinion) that by their promises and agreements to be performed in the future, i.e. a franchise; that if they failed to live up to their agreements then they would be estopped from raising the statute of limitations.

FURTHER AFFIANT SAYETH NAUGHT.

A. Edward McGinty

SWORN To and SUBSCRIBED before me this 12th of September, 1997, by A. Edward McGinty, who is personally known to me or and who did/did not take an oath.

NOTARY PUBLIC
My Commission Expires:

ANGELA L DEAL
My Commission CC397280
Expires Aug. 02, 1998
Bonded by HAI
800-422-1555

IN THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CIVIL DMSION

FRANK L. MORSANI, et al.,

Plaintiffs,

v.

MAJOR LEAGUE BASEBALL, et al.,

Defendants.

CASE NO. 92-963 1

Division "W"

Affidavit

STATE OF FLORIDA }

COUNTY OF HILLSBOROUGH }

On this day before me, the undersigned authority, personally appeared, J. Bob Humphries, who being first duly swom, deposes and says:

1. My name is J. Bob Humphries. I reside at 3000 Hawthorne Road, Tampa, Florida, 33661.

2. I am now employed and have been so employed since July, 1976, by the law firm of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A

3. I was admitted to the Florida Bar as an 'attorney in the spring of 1972 and since July, 1972 have continuously engaged in the practice of law. I am also admitted to the State Bar of Georgia and admitted and qualified as an Attorney and Counselor of the Supreme Court of the United States.

4. As an attorney I incorporated the corporation designated as Tampa Baseball Group, Inc., now known as Tampa Bay Baseball Group, Inc. ("TBBG") and have provided continuous legal representation since the formation of said corporation in conjunction with other attorneys in addition to serving as Secretary and Treasurer.

5. As legal counsel to Frank L. Morsani ("Morsani") and TBBG, I advised them that Major League Baseball had used its monopoly power when, in 1984, it dictated that they assign their contractual rights with Gabriel Murphy for the purchase of his ownership interest in the Minnesota Twins. I further advised them that such action by major league baseball was illegal and actionable.

6. As counsel to Morsani and TBBG, I advised them that their acceptance of Major League Baseball's agreement in connection with the Murphy contract precluded them from filing legal action so long as baseball honored its agreement. I further advised them that the statute of limitations relating to their legal claims against Major League Baseball arising out of the assignment of the Murphy contract would not begin to run so long as they refrained from filing suit in reliance on Major League Baseball's outstanding agreement to approve their acquisition of a team franchise in the future.

7. Upon learning, in 1990, that TBBG had been excluded from the "short list" of groups being considered for ownership of an expansion franchise, I informed Morsani that Major League Baseball's previous agreement to approve TBBG for an expansion team was a lie. I then requested authority to explore legal action against Major League Baseball' which authority was granted. I further informed Morsani that the statute of limitations on his legal claims against Major League Baseball would now begin to run and any suit should be filed as soon as practical.

8. As stockholder and officer of' and legal counsel to, TBBG since the date of incorporation to present' I was never provided with or apprised of any drafts of a 1987 stock offer in which a statement was made, as referred to at page 34 of Defendants' Memorandum in Support of Motion for Summary Judgment' concerning the absence of a commitment by Major League Baseball to TBBG principals. No such position was ever adopted or authorized by any person of authority with TBBG or by Morsani.

9. Commissioner Giamatti's letter to Senator Connie Mack dated August 15, 1989 constitutes the first occasion on which Major League Baseball expressly communicated a policy requiring that the owners of an expansion team reside in the immediate locale of the franchise, and not merely within the same state as the franchise. This policy had the effect of excluding from consideration the TBBG group as then comprised, as Bill Mack was then in a majority position with the TBBG group and did not satisfy the "local" requirement announced by Giamatti. Prior to that time, Major League Baseball was fully aware of Bill Mack's majority position in the TBBG group and had expressed no concern with his involvement.

10. Based primarily on the newly-announced policy of Major League Baseball regarding local ownership, I informed Bill Mack and he withdrew from his position as majority owner of the TBBG group. The loss of Mack's participation as

majority owner appreciably weakened the financial strength of TBBG and thus its competitiveness for an expansion franchise.

11. While in Dallas, Texas, with two Tampa accountants, accomplishing due diligence on the Rangers purchase, I received a call from Mr. Morsani that Mr. Reinsdorf had informed Eddie Chiles that it was the intent of the TBBG group to move the Texas Rangers to Tampa Bay and that Mr. Chiles had ceased best efforts and asked the other owners not to approve the contract and Mr. Morsani ordered me to cease further work on the sale of the Rangers. This occurred prior to any notification to the TBBG group by Mr. Gaylord or his attorney that he was exercising the right of first refusal.

Further Affiant sayeth not.

J. Bob Humphries

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Subscribed and sworn before me this 12th day of September, 1997, by J. Bob Humphries:

✓ who is personally known to me; or
____ who has produced _____ as identification.

SEAL:

ANGELA L DEAL
My Commission CC387280
Expires Aug. 02, 1998
Bonded by HAI
800-422-1555

(Signature of person taking acknowledgment)

Angela L. Deal
(Name typed, printed, or stamped)

Notary Public
(Notary Public)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of March, 2000, to: John W. Foster, Sr., Esq., Baker & Hostetler LLP, Post Office Box 112, Orlando, Fla. 32802; and Robert E. Banker, Esq., Fowler White Gillen, et al., Post Office Box 1438, Tampa, Fla. 33601.

By: Joel D. Eaton
JOEL D. EATON