IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96004

DISTRICT COURT OF APPEAL 2ND DISTRICT – NO. 2D98-1327

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., a Florida corporation,

Respondents.
_____/

PETITIONERS' BRIEF ON THE MERITS

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I.
INTRODUCTION

Statutes of limitations serve the vital public purposes of ensuring that claims are litigated when all parties have fair access to fresh evidence and witness memories. They also reduce the burden of litigation by preventing the tardy assertion of stale claims. To accomplish this purpose, the Legislature has required that no exceptions to the statute of limitations be allowed except those that the Legislature itself has chosen expressly to codify. This Court articulated this principle nearly 50 years ago in *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952), when it held: "The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally." Often in the intervening half century, and very recently, the Court reaffirmed this same bedrock principle: courts must not "write in exceptions [to a statute of limitations] when the legislature has not." *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119, 1122 (Fla. 1998).

In the case under review, however, the Court of Appeal for the Second District allowed this claim to be asserted more than four years after the statute of limitations concededly expired because the plaintiffs/respondents invoked the doctrine of "equitable estoppel": they made vague claims that they delayed filing suit over a

failed attempt to acquire a Major League Baseball team because the defendants/petitioners supposedly promised them a team in the future. The Second District's decision frustrates the basic principle of the statute of limitations as the Legislature carefully designed it, because it would allow any plaintiff clever enough to frame an argument labeled "estoppel" to evade the Legislature's enumeration of the limited and specific circumstances that allow a time-barred claim to escape the operation of the statute.

Equally important for this Court's review is the Second District's misapplication of the summary judgment standard where the admissions of the non-moving party establish the absence of any genuine issue of material fact. The uncontradicted, contemporaneous documentary record developed through discovery in this case proved that the defendants never made the alleged promises of a future team and that the plaintiffs—all of whom were experienced businessman and attorneys—knew, recognized, and admitted that no such promises were made. Thus, even if the statute of limitations could be avoided on the basis of "equitable estoppel," there was no basis for a claim of estoppel here that could survive summary judgment.

The Second District, however, concluded that a plaintiff's self-serving affidavits and deposition testimony, which contradicted the contemporaneous documentary record, could create a genuine, material issue of fact. If a party were allowed to defeat summary judgment simply by contradicting prior admissions, then

summary judgment would, as a practical matter, cease to be a meaningful tool for the efficient resolution of litigation. This case presents the Court with a clear opportunity to reaffirm the value of summary judgment as a procedural tool when an uncontradicted documentary record of admissions by the nonmoving party establishes that there is no genuine issue of material fact to be tried.

II.
STATEMENT OF THE CASE AND THE FACTS

The plaintiffs/respondents in this case, Frank L. Morsani and the Tampa Bay Baseball Group, Inc. ("TBBG"), are Tampa-area investors who made an attempt to acquire the Minnesota Twins baseball club. That attempt ended in 1984. There is no dispute that the cause of action, as alleged, accrued in 1984 at the latest. There is also no dispute that Florida's four-year statute of limitations applies to the plaintiffs' claim arising out of the Twins transaction. There is also no dispute that the statute of limitations expired with regard to the Twins transaction in 1988 at the latest. The plaintiffs' claim as to the Twins, Count I of their Third Amended Complaint, was not asserted until 1992, at least *four years after* the statute of limitations ran.

The defendants moved for summary judgment as to all counts of the complaint. As to the Minnesota Twins claim, the defendants pointed out the undisputed fact that the plaintiffs' claim was barred by the statute of limitations. Conceding the untimeliness of their claim, the plaintiffs maintained that even though the statute of

limitations expired long before they sued, the defendants were equitably estopped from relying on the statute of limitations because they had allegedly promised the plaintiffs a baseball team in the future, thus inducing the plaintiffs to delay filing suit on the Twins transaction.

The plaintiffs advanced this argument even though overwhelming and uncontradicted evidence from their own records showed that the plaintiffs knew very well that they had been given no promises of a baseball team. On several occasions, the plaintiffs expressly admitted the absence of any promise of a future team. Indeed, a stock purchase agreement that the plaintiffs ("Seller," in the excerpt below) prepared and sent to a potential new investor in 1987 said:

> Buyer acknowledges and represents that Buyer has been advised by representatives of Seller and understands that Seller *neither has any commitment, written or verbal, from Major League Baseball for a Major League Baseball franchise by expansion or otherwise nor any agreement, written or verbal*, for the purchase or relocation of any existing Major League Baseball franchise . . . .

R. 481 (emphasis added). In 1986, a TBBG representative wrote the owner of the Chicago White Sox that "we will not commence construction of our stadium *until we are assured of obtaining a Major League Baseball franchise*." R. 1245 (emphasis added). Also in 1986, Mr. Morsani himself told a sports columnist that TBBG would not build a baseball stadium "until that assurance [of a team] comes, *if it does*." R. 1244 (emphasis added). And in 1990, when Mr. Morsani applied for an expansion

team, he signed an express acknowledgement that no one associated with Major League Baseball had "any duty or obligation to anyone submitting an Expansion Questionnaire . . . ." R. 599, 596. The plaintiffs thus frankly and repeatedly admitted that they had not been promised a team.

The evidence is equally clear that the defendants did everything they could to make certain that the plaintiffs knew that no team had been promised them. In 1985, the Baseball Commissioner's Office wrote to TBBG's executive director: "As has been repeatedly stated over many months, no timetable has been set for Major League Baseball expansion nor have *any* commitments been made regarding possible locations." R. 472 (emphasis in original). When TBBG's executive director wrote a letter in April 1988 to ask for "a signal from Major League Baseball for the Tampa Bay Baseball Group to proceed" with construction of a stadium (R. 536), the Commissioner's Office responded:

> [D]espite the fact that Major League Baseball is continuing to move ahead in its serious consideration of expansion, we are certainly not in a position to establish any ultimate timetable for expansion or make any commitments with respect to the location of any future franchise. Under the circumstances, you and the Tampa group will need to be guided by your [own] judgment and instincts with respect to the construction of a stadium. *Any activity undertaken at this point toward that end will be done on your own and certainly without any commitment from Major League Baseball that Tampa would ultimately have a Major League Baseball tenant in the facility*.

R. 537 (emphasis added).

Significantly, the plaintiffs never contested *any* of the numerous statements by the defendants that no promise had been made of a future team; indeed, the very fact that the plaintiffs themselves asked for a "signal" from the Commissioner in 1988 proves that they themselves knew and understood that they had been given no promises of a future team. All of this evidence is undisputed.

Argument on the defendants' summary judgment motion extended over several days of hearings set by the trial court. In the course of those hearings, the trial court called the parties' attention to this Court's then-recent decision in *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn on other grounds*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999). The trial court asked the parties to address the impact of *Sullivan* on the plaintiffs' claims regarding the Twins.

The trial court subsequently granted summary judgment as to Count I as a matter of law.[1] The trial court found that Section 95.051, Florida Statutes, enumerates eight specific circumstances that constitute the only grounds that the

[1] The trial court denied summary judgment with respect to the plaintiffs' claims arising out of two later attempts to acquire a baseball team (Counts II and III). The plaintiffs also asserted a claim under the Florida Antitrust Act with regard to all three attempted transactions (Count IV); the trial court granted the defendants' motion for summary judgment as to that count. Count IV is not a subject of this appeal. Counts II and III, each for tortious interference with regard to transactions other than the Twins, are pending in the Circuit Court.

Legislature intended to be available to avoid the effect of the statute of limitations, as this Court construed the statute in *Sullivan*. Equitable estoppel is not included among the permissible grounds for avoiding the effect of the statute of limitations contained in section 95.051; the trial court therefore followed *Sullivan* and held that equitable estoppel could not save the plaintiffs' admittedly untimely claim.

The trial court had no occasion to address the powerful evidence—some of which is quoted above—that whatever promises of a future team the plaintiffs may claim to have received in May 1984, they admitted that they were disabused of those beliefs thereafter, considerably more than four years before they filed suit. R. 1282 n.1. Because the trial court regarded *Sullivan* as controlling as a matter of law, the court found it unnecessary to reach a conclusion about that undisputed record evidence. *Id*.

The plaintiffs appealed the trial court's ruling to the Court of Appeal for the Second District, which reversed the trial court. *Morsani v. Major League Baseball,* 739 So. 2d 610 (Fla. 2nd DCA 1999). The Second District observed that "it is undisputed that the plaintiffs filed the complaint outside the statute of limitations period." *Id.* at 613. The court then restated the trial court's logic, through application of section 95.051 and this Court's decision in *Sullivan*, that led to the conclusion that a claim of equitable estoppel could not revive an otherwise time-barred claim:

> The trial court found that section 95.051, Florida Statutes (1993), which enumerates the eight specific circumstances that toll the statute of limitations, constitutes a legislatively mandated exclusive catalogue of grounds that can avoid the application of the statute of limitations, as the statute was authoritatively construed by the Supreme Court in *Fulton County Administrator v. Sullivan,* 1997 Fla. LEXIS 1462, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997). Because equitable estoppel was not included among the permissible grounds for avoiding the effect of the statute of limitations set out in section 95.051, the trial court held that the plaintiffs' claims were barred by the statute of limitations.

Id. at 612.

The Second District resisted this logic, however, and reached a conclusion that made semantics paramount: it held that the statute of limitations did not preclude any defense that was couched in terms of "estoppel" rather than "tolling": "Because the concepts of tolling and estoppel are distinct and separate as defenses to the statute of limitations, *Sullivan* is distinguishable because it only applies to limit defenses that toll the statute of limitations." *Id.* at 614. As authority for this conclusion, the Second District relied principally on a federal case construing the federal Interstate Land Sales Full Disclosure Act that bore no resemblance to Florida's section 95.051. *Id.*

The Second District then noted that the First District had confronted an analogous issue in *Hearndon v. Graham*, 710 So. 2d 87 (Fla. 1st DCA), *jurisdiction accepted,* 23 Fla. L. Weekly S45 (Fla. Oct. 19, 1998), and that the First District had

held that section 95.051 precluded the doctrine of delayed discovery as a defense to the statute of limitations.

> In *Hearndon*, the court held that the defense of delayed discovery was precluded by section 95.051. . . . That court recognized that the defense of delayed discovery may be distinguishable from the defenses limited in *Sullivan* because it delays the accrual of the cause of action and does not serve to toll the statute of limitations. . . . However, the court affirmed the summary judgment in that case because it had determined that the concepts of "tolling" and "accrual" had become blurred and because *Sullivan* was so strongly worded.

Morsani, 739 So. 2d at 615 (citations omitted). The Second District noted that the First District had certified to this Court the issue of whether the doctrine of delayed discovery survives section 95.051 and *Sullivan* as "an exception to or a tolling of the statute of limitations[.]" *Id.*

The Second District then concluded that section 95.051 (as interpreted by *Sullivan*) "can be distinguished as applying only to those defenses that toll the statute of limitations." Having acknowledged several times in the course of its opinion, however, that section 95.051 might indeed bar any defense or exception to the statute of limitations not codified by the Legislature, including a claim of equitable estoppel, the Second District certified

> the following question to the supreme court as a matter of great public importance:
>
> 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?

Id. at 616.

The Second District then found a disputed issue of material fact, despite what it described as "the existence of [the defendants'] written denials of any promises to the plaintiffs," because of "the mere existence of the plaintiff's [sic] deposition testimony regarding the representations . . . ." *Id.* at 616. The Second District completely ignored, however, the uncontradicted evidence in the record not merely of "written denials" by the defendants, but also of *express admissions by the plaintiffs themselves* that they had been given no promises of a future baseball team—admissions including the previously quoted disclosure document for a potential investor advising that investor that no one had promised anything to the plaintiffs, or anyone associated with them.

On January 7, 2000, this Court issued an order deferring its decision on jurisdiction and directing the parties to file briefs on the merits.

III.
SUMMARY OF ARGUMENT

Florida's public policy, as enacted by the Legislature and confirmed by the decisions of this Court, favors enforcement of the statute of limitations and confines defenses to the statute of limitations strictly to those that the Legislature has adopted. Any other approach unfairly rewards those who sleep on their rights, unfairly

disadvantages defendants who are subjected to stale claims, spawns litigation by allowing old claims to be asserted, and generates even more litigation over the applicability of court-made exceptions to the statute of limitations. In section 95.051, the Legislature spelled out all of the exceptions to the statute of limitations that it chose to allow—including equitable exceptions—and expressly excluded any additional exceptions. The Second District, however, allowed an enormous (and purely semantic) exception to section 95.051 for any defense to the statute of limitations that a plaintiff can label "equitable estoppel."

The Second District also committed an error of law when it allowed the plaintiffs to avoid summary judgment by manufacturing a disputed issue of fact. A host of uncontradicted admissions by the plaintiffs themselves established that the plaintiffs were not promised a future baseball team—the foundation of their asserted estoppel claim—and that they knew it. Yet the Second District allowed the plaintiffs to defeat summary judgment in the face of that overwhelming record by simply disavowing their prior admissions with self-serving testimony prepared for purposes of this litigation. Summary judgment would be eviscerated as a meaningful procedural tool if a party could defeat it simply by denying his or her own prior express admissions.

IV.
ARGUMENT

A. Equitable Estoppel Is Not a Permitted Ground for Avoiding the Statute of Limitations.

1. Public Policy Favors Strict Enforcement of Statutes of Limitations.

As this Court has long held, statutes of limitations are vital to a fair and efficient system of justice. In *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976), this Court set out the fundamental public policies that statutes of limitation serve:

> As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. *In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are [of value] are not usually left to gather dust or remain dormant for long periods of time . . . .*

333 So. 2d at 36 (quoting *Wilkinson v. Harrington*, 243 A.2d 745, 752 (R.I. 1968)) (emphasis in original). "Such statutes protect defendants against claims asserted when all proper vouchers and evidence are lost, and after the facts have become obscure from the lapse of time, defective memory or death and removal of witnesses." *Allie v. Ionata*, 503 So. 2d 1237, 1240 (Fla. 1987).

As this Court recognized in *Nardone* and *Allie*, allowing statutes of limitations to be honeycombed with unpredictable exceptions is contrary to public policy in several respects:

- The likelihood of the judicial process reaching accurate conclusions declines when suit can be filed on old claims. Documents are often missing or cannot be adequately explained. Witnesses are frequently unlocatable, deceased, or unable to remember events. Under those circumstances, "the quest for truth might elude even the wisest court." *Nardone*, 333 So. 2d at 36.
- It is resolutely unfair" to allow plaintiffs "who [have] willfully or carelessly slept on [their] legal rights" to force defendants to litigate "at a grave disadvantage" against stale claims. *Id.* A plaintiff can plan suit on an old cause of action, and marshal both documentary and oral evidence to support a one-sided version of past events, while a defendant, understandably ignorant that litigation may yet ensue, will be unable to gather or preserve evidence necessary to mount an effective defense. "Limitation statutes are designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." *Allie*, 503 So. 2d at 1240. This policy concern is especially acute here, because the Second District's decision would compel the defendants to

meet claims at trial that would be based on facts surrounding the Twins transaction that were at least eight years old when this case was filed, and are 16 years old today.

- The courts, already overburdened with litigation, will have to cope with resource-intensive claims requiring the reconstruction of long-past events. The litigation explosion already has stretched judicial resources to the limit; allowing claims to evade the statute of limitations simply adds to the caseload. It is a "reasonable and fair presumption that valid claims which are [of value] are not usually left to gather dust or remain dormant for long periods of time . . . ." *Nardone*, 333 So. 2d at 36.

Moreover, for statutes of limitations to achieve their purposes, they must be applied with efficiency and certainty. If merely determining the applicability of a statute of limitations requires protracted litigation, that litigation itself defeats the goals of the statute, as this Court recently held in *Silvestrone v. Edell*, 721 So. 2d 1173, 1176 (Fla. 1998) (adopting a "bright-line rule [that] will provide certainty and reduce litigation over when the statute starts to run. Without such a rule, the courts would be required to make a factual determination on a case by case basis . . . .").

In this case, the Second District disregarded the direction of the Legislature in section 95.051 and opened an enormous gap that defeats the purpose of the statute. By recognizing an artificial distinction between "equitable estoppel" and "tolling,"

the Second District's decision encourages litigants to package time-barred claims in the language of estoppel and thus to avoid the strict rule of section 95.051. At worst, the Second District's decision will send many otherwise time-barred and stale claims to trial, and litigants will be forced to defend themselves "with nothing more than tattered and faded memories, misplaced or discarded records, and missing or dead witnesses." *Nardone*, 33 So. 2d at 36. At best, "the courts would be required to make a factual determination on a case-by-case basis " to determine whether an exception to the statute of limitations applies, the opposite of the "bright-line rule [that] will provide certainty and reduce litigation over when the statute starts to run" that this Court adopted in *Silvestrone*, 721 So. 2d at 1176. This is manifestly not what the Legislature intended in enacting section 95.051.

2. The Express Terms of the Statute Enumerate All of the Equitable Defenses That the Legislature Recognized and Exclude All Other Grounds.

The Legislature knows very well how to write an equitable exception to the statute of limitations. In Section 95.051, the Legislature listed eight specific grounds that a plaintiff may invoke to avoid the running of the statute of limitations; equitable estoppel is simply *not among them*. A number of those grounds are equitable in nature, i.e., they prevent the running of statutes of limitations in circumstances where the defendant's actions have inhibited the ability of a plaintiff to file suit on a timely basis. For example, section 95.051(1)(b) applies if the person to be sued has evaded

service of process by using a "false name," section 95.051(1)(c) applies if the person to be sued has concealed himself or herself within the state, and section 95.051(a) applies if that person has absented himself or herself from the state. Each of these exceptions is equitable; in each case, the defendant, by his or her own actions, has made it difficult or impossible for the plaintiff to file suit. The Legislature could easily have adopted a general or a specific exception that included the sort of equitable estoppel that the plaintiffs rely on here; the Legislature deliberately chose not to do so.[2]

One might stop there and simply rely on the venerable principle that when the Legislature enumerates a series of exceptions in the statute of limitations—or any statute, for that matter—all other exceptions are necessarily excluded:

> We have oft-times held that the rule "Expressio unius est exclusio alterius" is applicable in connection with statutory construction. This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and

[2] The Legislature has repeatedly demonstrated that it knows how to insert equitable exceptions into statutes of limitations when it wishes to do so. In the statute of limitations on medical malpractice actions, the Legislature provided for an extension of the limitations period in actions "in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury . . . ." Section 95.11(4)(b), Florida Statutes. The Legislature inserted no such generalized equitable exception into section 95.051; yet the Second District purported to create such an exception where the Legislature did not.

> unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.

Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952). *See also Carey v. Beyer*, 75 So. 2d 217, 217-18 (Fla. 1954) ("When the legislature refuses to write exceptions into the [statute of limitations], the courts have consistently refused to do so.").

Here, not content to rely only on this universal rule of statutory construction, the Legislature went further and added an express direction that the list of grounds in section 95.051(1) for avoiding the statute of limitations is to be exclusive: "No disability or other reason shall toll the running of any statute of limitations except those specified in this section . . . ." Section 95.051(2). Thus, the Legislature emphasized the exclusivity of the statutory grounds not once but twice: first, by spelling them out explicitly in the statute, and then by adding the unmistakable instruction that "[n]o disability or other reason" can be invoked. Taken together, these statutory elements compel a single conclusion: the statute of limitations may be avoided only by one of the legislatively authorized grounds contained in section 95.051.

The Second District's decision would make nonsense of section 95.051 by confining it only to those grounds that fit within the narrowest possible definition of

"tolling." Under this theory, any defense to the statute of limitations that might be labeled as something else, be it "equitable estoppel" or some other "equitable" doctrine, could be freely asserted without regard to section 95.051. The certainty and predictability that the Legislature sought for the statute of limitations would disappear; the statute's application would depend on the ingenuity of plaintiffs in fitting their theories under a label that sounded in equity. The Second District's decision simply elevates labels over substance and defeats the purpose of the statute.

3. In *Sullivan* and *Federal Insurance*, This Court Held that Section 95.051's Exclusivity Extends to Any Exception to the Statute of Limitations.

In *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn on other grounds*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999), this Court held that because section 95.051(1) does not include fraudulent concealment as an exception to the statute of limitations, the plaintiff in a wrongful death action could not rely on fraudulent concealment to avoid the statute of limitations where the defendant confessed to killing his wife after years of denying his involvement in the crime. 22 Fla. L. Weekly at S578. The Court invoked the same fundamental principle of statutory construction that has been the foundation of its interpretation of statutes of limitations for half a century:

> [T]he 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, Florida Statutes (1985). When interpreting a

> statute, legislative intent is the polestar by which we are guided. *See Parker v. State*, 406 So. 2d 1089 (Fla. 1981). This intent is gleaned primarily from the plain language of the statute. *See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315 (Fla. 1992). *When construing statutes of limitations, generally courts will not write in exceptions when the legislature has refused to do so*. *Carey v. Beyer*, 75 So. 2d 217 (Fla. 1954).

22 Fla. L. Weekly S579 (emphasis added).

Because section 95.051 enumerates *all* the circumstances that the Legislature specified to avoid the effect of the statute of limitations, and even contains an express prohibition on the creation of additional grounds that defeat the statute, the Court held that the equitable doctrine of fraudulent concealment, which does not appear in the statute, could not prevent the statute from barring a cause of action:

> The statute specifically precludes application of any tolling provision not specifically provided for by the legislature. In the face of such clear legislative direction, we are compelled to hold that fraudulent concealment of the identity of a tortfeasor . . . will not toll the statute of limitations. *See Carey*; *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) ("We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof."); *Swartzman v. Harlan*, 535 So. 2d 605 (Fla. 2d DCA 1988) (finding that under section 95.051(2), Florida Statutes (1987), the court was not able to create an exception to toll the statute of limitations not specifically enumerated by the legislature); *In re Southeast Banking Corp.*, 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1539 (1995) (same).

Sullivan, 22 Fla. L. Weekly at S579 (citations omitted).

On November 24, 1999, this Court withdrew its earlier opinion in *Sullivan* and decided the case on choice-of-law grounds, holding that Georgia rather than Florida law applied, and that because (in contrast to Florida) "a Georgia statute *expressly tolls* the statute of limitations for fraudulent concealment," 24 Fla. Law W. at S558 (emphasis added), the cause of action by the victim's estate against the murderer was not time-barred. Nothing in the subsequent *Sullivan* opinion casts doubt on this Court's approach to construing the Florida statute of limitations in the prior opinion; the second opinion simply states that because the Court had determined that Georgia rather than Florida law applies, "we decline to answer the certified question as to Florida law concerning statutes of limitations." *Id.* at S558.

Indeed, this Court has already unanimously reaffirmed the principle of the original *Sullivan* opinion—that a statute of limitations allows only the exceptions that the legislature adopts, regardless of whether those exceptions are denominated tolling, estoppel, or anything else. In *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119 (Fla. 1998)—a case the Second District did not discuss or even cite—this Court unanimously held that a discovery rule for latent construction defects could not be read into the applicable statute of limitations. The Court said:

> [S]ection 95.11(2)(b), Florida Statutes (1981), makes no reference to a discovery rule for latent defects. Using the principle of statutory construction expressio unius est exclusio alterius, we conclude that the

> absence of such express language in section 95.11(2)(b), Florida Statutes (1981), is clear evidence that the legislature did not intend to provide a discovery rule in section 95.11(2)(b), Florida Statutes (1981). *To conclude otherwise would require us to write into section 95.11(2)(b), Florida Statutes (1981), a discovery rule when the legislature has not.* As we stated in *Fulton County Administrator v. Sullivan*, *1997 Fla. LEXIS 1462*, 22 Fla. L. Weekly S578-79 (Fla. Sept. 25, 1997), *when construing statutes of limitations, courts generally will not write in exceptions when the legislature has not.*

707 So. 2d at 1122 (emphasis added).

By stating unequivocally that Florida courts should not "write in" exceptions to the statute of limitations "when the legislature has not," this Court in *Federal Insurance* disapproved court-made *exceptions*, not just those exceptions labeled as "tolling." The Second District's conclusion that equitable estoppel is distinguishable from "tolling"—dubious as that distinction is—ignores this Court's holding that the statute eliminates all "exceptions," not just exceptions denominated "tolling." In short, the Second District "wrote in" an exception to the statute of limitations in the face of this Court's command *not* to do exactly that.

The identical faulty syllogism embraced by the Second District here could have applied in *Federal Insurance*: section 95.051 applies only to "tolling;" the discovery rule is not "tolling;" therefore, the statute does not preclude the discovery rule. Yet this Court had no difficulty in *Federal Insurance* in reaching the conclusion that unless the Legislature expressly authorized such a discovery rule, courts cannot recognize it. The Court did not confine its ruling in *Federal Insurance* to "tolling,"

as the Second District did here. To the contrary, *Federal Insurance* expressly warns against judicial recognition of "*exceptions*" to the statute of limitations that have no legislative authorization. 707 So. 2d at 1122 (emphasis added). Equitable estoppel is the court-made "exception" that the Second District wrote into the statute of limitations here, and *Federal Insurance* forbids it. *See also Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan*, 629 So. 2d 113, 114 (Fla. 1993) (rejecting "blameless ignorance" rule for discovery of cause of action for defamation because statutory limitations period contained no exceptions; "We find the present case controlled by the plain language of applicable statutes.").

In this case, the Second District concluded that because section 95.051(1) uses the word "tolling" (and because in the original *Sullivan* opinion, this Court sometimes referred to the issue as one of "tolling"), section 95.051(1)'s preclusive effect is *limited* strictly to exceptions to the statute of limitations that are described as "tolling." But this distinction is irrational: the Second District held, in effect, that the Legislature carefully restricted the grounds on which a statute of limitations could be "tolled," but was entirely indifferent to any other ground that would have exactly the same effect of avoiding the statute—just so long as those grounds were labeled something other than "tolling." The Second District's approach both frustrates the statute's manifest intent and defeats its purpose: few lawyers lack the ingenuity to frame time-barred causes of action in terms of "equitable estoppel." The

Legislature's goals of reducing the number of stale claims that burden the courts and are unfair to defendants, and of making the application of the statute of limitations clear and predictable, would both be defeated.

Other recent decisions by the District Courts of Appeal take the opposite approach from the Second District's in this case. In *Hearndon v. Graham,* 710 So. 2d 87 (Fla. 1st DCA), *jurisdiction accepted,* 23 Fla. L. Weekly 45 (Fla. Oct. 19, 1998), the First District held that under section 95.051(1) and *Sullivan*, the statute of limitations could not be avoided on the basis of a plaintiff's argument that childhood sexual abuse by her stepfather, the defendant, produced traumatic amnesia that prevented her from discovering the abuse until she reached adulthood, after the statute of limitations had run. Heading its discussion "Equitable Exceptions to the Statute of Limitations" (710 So. 2d at 89), the First District held that delaying the date of accrual of a cause of action until it is discovered could not be distinguished from the concept of "tolling" found in *Sullivan*. The First District found that *Sullivan* must be interpreted broadly, and cannot be confined merely to those exceptions to the statute of limitations that are narrowly labeled as "tolling."

> *By the broad language used by the Sullivan court, we are led to conclude that Sullivan marks a return to a more strict judicial interpretation of the statutes of limitations for purposing [sic] of determining when the applicable statute should begin to run*. *Sullivan* appears to have receded, sub silentio, from the line of cases which held that the last element occurs for purposes of section 95.031 and the cause of action accrues when the plaintiff knew or through the exercise

> of reasonable diligence should have known of the invasion of his legal rights. . . . Thus, under *Sullivan*, unless the legislature has expressly adopted a provision tolling the running of the statute of limitations, delaying accrual of a cause of action, or otherwise recognizing an exception to the statute, the last element for purposes of section 95.031(1) is determined by looking at the common law elements for the respective causes of action. *We believe that our reading of Sullivan is consistent with the Sullivan court's declaration that all exceptions to the statute of limitations must be codified by the legislature. Id.*

710 So. 2d at 92 (citations and footnotes omitted; emphasis added).

In *Putnam Berkley Group, Inc. v. Dinin*, 734 So. 2d 532 (Fla. 4th DCA 1999), the Fourth District—like the First District in *Hearndon*—rejected the discovery rule as an exception to the statute of limitations. The plaintiff in *Putnam Berkley* sued for unauthorized use of her photograph, which was published in 1988 but which she did not discover until 1995. Relying on *Federal Insurance* (and *Sullivan*), the Fourth District held that the suit was time-barred because the Legislature did not adopt a discovery rule as an exception to the statute of limitations for unauthorized-use claims. The Fourth District found it unnecessary even to consider whether delayed discovery could be analogized to "tolling" under section 95.051. Rather, after surveying other statutes in addition to section 95.051 in which the Legislature expressly delayed accrual of a cause of action until that cause of action is discovered, the Fourth District simply held that because the Legislature had not enacted a discovery rule for unauthorized-use claims, the courts could not create one. "The legislature has provided only a few *exceptions* from this broad rule [that the statute

of limitation runs from the time the cause of action accrues]." 734 So. 2d at 534 (emphasis added).[3]

In short, the Second District here reached a result contrary to the decisions of this Court in *Federal Insurance* (and *Sullivan*), and contrary as well to the decisions of the First District in *Hearndon* and the Fourth District in *Putnam Berkley*. Each of those cases held that there can be no *exceptions* to the statute of limitations—and each uses the word *exception*—that the Legislature has not codified. Equitable estoppel is every bit as much an *exception* to the statute as the delayed discovery of a latent construction defect rejected in *Federal Insurance*, the delayed discovery by reason of childhood abuse rejected in *Hearndon*, and the delayed discovery of an unauthorized photograph rejected in *Putnam Berkley* (not to mention the fraudulent concealment rejected in the original *Sullivan* opinion). The Second District committed error when it recognized equitable estoppel as a defense to the statute of limitations without legislative authorization.[4]

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[3] Even if this Court were to conclude in *Hearndon* that accrual of the cause of action occurred at a later date, such a result would not affect this case; there is no dispute here that any cause of action accrued in 1984.

[4] The Second District also said that "a broad construction of *Sullivan* will also eliminate the well-established defense of waiver, which clearly does not toll the statute of limitations." 24 Fla. L. Weekly at D849. This is incorrect. Exceptions to the statute of limitation are a matter of *substantive* law and are limited by Section 95.051. Waiver is a *procedural* doctrine, governed by the Rules of Civil Procedure, in the context of the very cases relied on by the Second District. *See, e.g., Kissimmee*
(continued...)

4. Equitable Estoppel Is Closely Related to Other Equitable Defenses to the Statute of Limitations That the Courts Have Uniformly Rejected.

The simple, powerful principle of section 95.051, as interpreted by this Court in *Federal Insurance* and its predecessors, is all that is needed to decide the case: any exceptions to the statute of limitations must be adopted by the Legislature, regardless of what they may be called. Here, however, the Second District, grasping at a semantic distinction without a difference, held that equitable estoppel is different from "tolling," and section 95.051 speaks only of "tolling" ("No disability or other

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(...continued)
Util. Auth. v. Better Plastics, Inc., 526 So. 2d 46, 48 (Fla. 1988) ("[T]he statute of limitations is an affirmative defense that must be pleaded at trial. Fla. R. Civ. P. 1.110(d). . . . The [defendant] waived the statute of limitations defense by electing not to plead it . . . .").

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court . . . .

Benyard v. Wainright, 322 So. 2d 473, 475 (Fla. 1975). Requiring that a litigant comply with the Rules of Civil Procedure is thus not an ad hoc court-made "exception" to the statute of limitations prohibited by section 95.051. The Rules of Civil Procedure are promulgated by this Court under its constitutional and statutory authority. Those Rules expressly recognize the doctrine of waiver: like any litigant, a party invoking the statute of limitations must properly plead it, or the defense is waived. The Rules of Civil Procedure complement Section 95.051, pursuant to statutory authority. A properly narrow construction of the statute of limitations in no sense undermines the doctrine of waiver.

reason shall *toll* the running of any statute of limitations except those specified in this section . . . .") (emphasis added).

The basic flaw in the Second District's reasoning is that it construed the statutory term "tolling" unduly narrowly; this Court, however, construed it broadly in *Federal Insurance* (delayed discovery constitutes a form of "tolling"), as well as in the original *Sullivan* opinion (fraudulent concealment is also a form of "tolling"). That broad construction is necessary to give effect to the legislative intent embodied in section 95.051: defenses to the statute of limitations must be restricted to those adopted by the Legislature.

The Second District found itself hard-pressed to explain why "equitable estoppel" is *not* simply another form of "tolling" that is contrary to the statute. Relying principally on a case under the federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-17 (1994), the Second District embraced the view that "tolling" refers only to a "suspension" of the running of the statute of limitations, while equitable estoppel refers to situations in which "after the limitations period has run . . . a party will be estopped from asserting the statute of limitations as a defense . . . ." 739 So. 2d at 614, *quoting Bomba v. W.L. Belividere*, 579 F.2d 1067, 1070 (7th Cir. 1978).

This conclusion was not only contrary to this Court's precedents, but also to the Second District's own precedents. As the Second District itself previously

recognized in *Sheffield v. Davis*, 562 So. 2d 384, 386 (Fla. 2nd DCA 1990), "toll" has no rigid or precise definition in Florida law, and can encompass any circumstance that prevents resort to the statute of limitations, including both circumstances that suspend the running of the statute *and* circumstances that "take away" or "remove" the statute altogether:

> Although the terms "toll" or "tolled" often appear in the Florida Statutes, Florida Rules of Juvenile Procedure, Florida Rules of Appellate Procedure, and Rules Regulating the Bar, none of these sources contain a definition of "toll" or "tolled." Nor have we found any Florida cases which provide a meaning for these words. Black's Law Dictionary provides the following definitions of "toll":
>
> > *To bar, defeat, or take away*: thus, to toll the entry means to deny or take away the right of entry.
> >
> > To suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority.
>
> Black's Law Dictionary 1334 (5th ed. 1979). Webster's Third New International Dictionary Unabridged defines "toll" as
>
> > *To take away; make null; remove, as to remove the statute of limitations.*
>
> Webster's Third New Int'l Dictionary 2405 (1986).

Sheffield, 562 So. 2d at 386 (footnotes omitted; emphasis added). (Indeed, the Second District expressly cited section 95.051 as an example of a statute lacking a definition of "toll." Id. at 386 n.4.) Surely, equitable estoppel operates "to take away; make null; remove, as to remove the statute of limitations"—the very definition

of "toll" that the Second District quoted in *Sheffield*, above. Thus, the Second District's assertion that tolling and estoppel are "distinct and separate" is not supported even by its own precedents.[5]

In short, the Second District relied on an illusory distinction between technical "tolling" grounds, which (it held) are all that section 95.051 reaches, and court-created "equitable" doctrines such as estoppel, which are supposedly exempt from both the statute and this Court's decisions. That distinction is baseless: section

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[5] The federal Interstate Land Sales Full Disclosure Act statute of limitations provision applicable in *Bomba* differed significantly from Florida law as expressed in section 95.051. The federal statute simply provided that no action under the Act could be brought more than three years after a piece of property was sold or leased to the would-be plaintiff. That provision made no mention of any equitable defenses to the running of the limitations period. Here, the Florida Legislature has expressly enumerated those equitable defenses that can prevent the running of the statute—use of a false name, concealment within the state, or absence from it—and thus excluded any additional court-made exceptions. The Legislature then went even further, and mandated that "[n]o disability *or other reason* shall toll the running of any statute of limitations except those specified [in an applicable statute]." Section 95.051(2) (emphasis added). Indeed, the *Bomba* court recognized that equitable estoppel could apply only "absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel." 579 F.2d at 1070. That is precisely what the Legislature did in section 95.051.

The Second District also cited several Florida cases that recognized equitable estoppel as a defense to the statute of limitations after the enactment of section 95.051. 24 Fla. L. Weekly at D849. Yet none of those cases considered the effect of section 95.051 (or even mentioned it), with the lone exception of *City of Brooksville v. Hernando County*, 424 So. 2d 846, 848 (Fla. 5th DCA 1982), which was decided long before this Court's controlling contrary interpretation in *Federal Insurance*.

95.051 spells out *all* the exceptions to the statute of limitations, equitable or non-equitable in nature, that the Legislature has chosen to allow.

5. An "Equitable Estoppel" Exception Would Frustrate the Purpose of the Statute of Limitations.

Allowing a party to avoid the statute of limitations on the basis of "equitable estoppel" would create an exception that would frustrate the statute's purposes. Any litigant, merely by asserting he or she had been orally promised something by a defendant, could thereby automatically avoid summary judgment on a concededly time-barred claim. Assertions of oral promises are too easily feigned, as the Statute of Frauds recognizes in contract law by declaring unenforceable certain promises unless they are made in writing. Section 725.01, Fla. Stats. (1999). But the plaintiffs here are predicating their estoppel allegations entirely on an uncorroborated oral promise, precisely what the Statute of Frauds prevents. It is manifestly unfair to make a party defend itself against an assertion that an oral promise was made many years before. Indeed, in this case, the alleged promise occurred almost *16 years* ago.

Recognizing equitable estoppel as a means to avoid the statute of limitations would create an unbounded time period in which suit could be brought. So long as a party is willing to testify that he or she has continued to rely on a supposed promise of the defendant in deciding to forebear bringing suit, the courts could be entertaining claims that are decades old. The statute of limitations would be in danger of

becoming meaningless. At the very least, trial courts would have to conduct mini-trials on time-barred claims simply to determine whether the statute of limitations could be invoked. This is exactly what this Court sought to avoid in *Silvestrone*, 721 So. 2d at 1176, where it adopted a "bright-line rule [that] will provide certainty and reduce litigation over when the statute starts to run" and thereby avoids "a factual determination on a case by case basis" in the application of the statute of limitations. The Second District's decision here is squarely contrary to those laudable goals.

B. Summary Judgment Should Be Granted Against a Claim of Equitable Estoppel Based on a Promise Where There Are Contemporaneous Admissions That No Such Promise Existed.

1. Summary Judgment Is a Vital Tool for Resolving Litigation.

Summary judgment plays a vital procedural role, as this Court has long recognized. "The rule providing for summary judgment and summary final decrees have served a most salutory purpose in the administration of justice." *Rivaux v. Florida Power & Light Company*, 78 So. 2d 714, 717 (Fla. 1955). When there is no *genuine* issue of material fact, and the moving party is entitled to judgment as a matter of law, the claim should be resolved on summary judgment and not burden the courts with unnecessary trials. *Food Fair Stores of Florida, Inc. v. Patty*, 109 So. 2d 5, 7 (Fla. 1959) ("While we have consistently urged caution in the exercise of the power to grant summary judgments, we have also taken note of the propriety of exercising the authority in appropriate situations as a means of expediting the

disposition of baseless litigation."). Summary judgment is thus an important procedure to resolve claims without the expense and burden on parties and trial courts. When the uncontradicted, contemporaneous documentary record demonstrates no factual dispute, allowing a party to overcome a motion for summary judgment by raising a non-genuine issue defeats the public policy behind summary judgment.

2. The Plaintiffs' Admissions in Contemporaneous Documentary Evidence Proved That There Was No Promise Upon Which to Base Any Estoppel Claim.

Abundant and undisputed evidence obtained in discovery thoroughly undermined the plaintiffs' estoppel argument, exposing it as nothing but a "paper issue," inadequate as a matter of law to defeat summary judgment. *Johnson v. Gulf Life Ins. Co.*, 429 So. 2d 744, 746 (Fla. 3rd DCA 1983). Undisputed evidence presented to the trial court included the following:

- **1987**—TBBG prepared a stock purchase agreement and gave it to a potential investor that expressly admitted that "[TBBG] *neither has any commitment, written or verbal, from Major League Baseball for a Major League franchise by expansion or otherwise* nor any agreement, written or verbal, for the purchase or relocation of any existing Major League Baseball franchise[.]" R. 481. This statement constitutes an explicit, contemporaneous admission by the plaintiffs that baseball had *not* promised them a team.

- **April-May 1988**—TBBG's executive director asked baseball for a "signal" for the plaintiffs to proceed with construction of a stadium. R. 536. The Commissioner's Office responded: "Any activity undertaken at this point toward that end *will be done on your own and certainly without any commitment from Major League Baseball[.]*" R. 537 (emphasis added).

- **May 1984**—Following the very meeting with Commissioner Bowie Kuhn and both league presidents in which the plaintiffs claim that the promise of a future team was made to them, Mr. Morsani asked Commissioner Kuhn to advise the competing group in St. Petersburg that St. Petersburg had no assurances of getting a team. R. 436-37. Pursuant to Mr. Morsani's request, Commissioner Kuhn wrote to the St. Petersburg group (with a copy to Mr. Morsani) and advised that there were "no assurances . . . to St. Petersburg *or any other city*." R. 434 (emphasis added). The plaintiffs never disputed the fact that there were no assurances to *any* city—including Tampa.

- **October 1985**—The Commissioner's Office sent TBBG an explanation of expansion criteria developed by baseball's long-range planning committee, which expressly stated:

> As has been repeatedly stated over many months, no timetable has been set for Major League Baseball expansion nor have *any* commitments been made regarding possible locations.

R. 472 (emphasis in original).

- **July 1986**—Mr. Morsani told the Tampa *Tribune*: "We will proceed with our own project to build our multi-purpose stadium near Tampa Stadium with private capital if we win a major league franchise, *but not until that assurance comes, if it does*." R. 1244, 318 (emphasis added). This statement is yet another express, contemporaneous admission by Mr. Morsani that he did not think that defendants had promised him or TBBG a team.

- **October 1986**—A TBBG attorney and investor wrote to Chicago White Sox owner Jerry Reinsdorf noting TBBG's concern about the timing of "Major League Baseball's decision to expand" and stating that TBBG would not commence construction of a stadium *until* TBBG was "*assured of obtaining a Major League Baseball franchise*." R. 1245 (emphasis added)—another express admission that no such assurances existed.

- **August 1990**—In his application for an expansion team, Mr. Morsani certified that baseball had no "duty or obligation to anyone submitting an expansion questionnaire," and that action on expansion teams was in the "sole and absolute discretion of the National League . . . ." R. 599, 596. This is still another express admission that plaintiffs received no promises of a team, and were well aware of that fact.

The Second District dismissed this abundance of undisputed evidence as the defendants' mere "*written denials* of any promises to the plaintiffs . . . ." 739 So. 2d at 616 (emphasis added). This conclusion was manifestly wrong; the record is replete not merely with the defendants' denials but also with the plaintiffs' *admissions* that no one had promised them a future team. Time and time again, the plaintiffs themselves admitted the absence of any promises: when they gave a stock purchase agreement to a potential investor disclosing the absence of any promises, in statements they made to owners of other Major League Clubs, in statements to the press, in their request to the Commissioner for a "signal" to proceed with stadium construction, and in Mr. Morsani's 1990 application for an expansion team in which he reaffirmed the absence of any promises to him or his fellow investors.

Moreover, the Second District inaccurately minimized the defendants' actions by dismissing them as mere "written denials." The defendants told the plaintiffs directly, expressly, and in writing, that the plaintiffs had no promise of a future team. Indeed, in the face of the defendants' repeated warnings that no promises of a team had been given, the plaintiffs' very silence constituted a binding admission. "In Florida, it has long been the rule that if a person is silent when he should raise a denial, a presumption of acquiescence arises which may be treated as an admission allowable in evidence against him." 23 FLA. JUR. 2D, *Evidence and Witnesses* § 336 at 423 (1995). *See also Sullivan v. McMillan*, 8 So. 450, 461-62 (Fla. 1890); *Privett*

v. State, 417 So. 2d 805, 806 (Fla. 5th DCA 1982). This is all the more so when the statement to which a person fails to respond is a formal exchange of correspondence—the case here—and not merely a casual oral remark. 23 FLA. JUR. 2D, *Evidence and Witnesses* § 337 at 425; *McMillan*, 8 So. at 461-62.

Thus, when the plaintiffs wrote the Commissioner's Office in 1988 and asked for a "signal" to begin stadium construction, and when the Commissioner's Office replied in writing that "[a]ny activity undertaken at this point toward that end *will be done on your own and certainly without any commitment from Major League Baseball*," R. 537 (emphasis added), the plaintiffs' failure to respond to the letter or to contest it constituted a binding admission. The same was true when the defendants wrote to the plaintiffs in October 1985 and said that "no timetable has been set for Major League Baseball expansion, nor have *any* commitments been made regarding possible locations." R. 472 (emphasis in original), and when, in May 1984, the Commissioner copied the plaintiffs on a letter to the competing St. Petersburg group that stated that there were no assurances [of a team] . . . to St. Petersburg *or any other city*." R. 434 (emphasis added). The plaintiffs' failure to respond to or to contest any of this written correspondence admitted by their silence what they also admitted expressly over and over again long before the statute of limitations expired on their claim: no one had promised them a team. There is simply no basis in the record for the plaintiffs' assertion of equitable estoppel to avoid the statute of limitations.

3. A Party Opposing Summary Judgment Cannot Demonstrate a Genuine Issue of Material Fact as to Equitable Estoppel By Relying Solely on Self-Serving and Self-Contradictory Post-Litigation Testimony.

Where, as here, a party asserts an exception to the statute of limitations, this Court has articulated the applicable summary judgment standard:

> A movant for summary judgment has the initial burden of demonstrating the non-existence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue . . . . *Concomitantly, the party seeking to escape the statute of limitations must bear the burden of proving circumstances that would toll the statute.*

Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979) (emphasis added; citations omitted).

Here, the defendants plainly "tender[ed] competent evidence," *Landers*, 370 So. 2d at 370, supporting their motion for summary judgment. (Indeed, all that was required of the defendants was to "demonstrat[e] on the face of the pleadings that the cause of action was time barred," *id.*, which no one disputes.) The plaintiffs, however, failed to come forward with counter-evidence sufficient to reveal a genuine issue, particularly because the plaintiffs rely on the doctrine of equitable estoppel to pursue an otherwise time-barred and stale claim. As this Court has held, the evidence required to sustain a claim of equitable estoppel must meet a high standard.

> The burden of proving all the facts essential to the working of an estoppel rests on the party asserting it or on whose behalf it is applied. . . . Before an estoppel can be raised there must be certainty and the facts necessary to constitute it *cannot be taken by argument or inference, nor supplied by intendment. They must be clearly and satisfactorily proved.*

Jarrard v. Associates Discount Corp., 99 So. 2d 272, 277 (Fla. 1957) (emphasis added). As Justice Willis explained in his concurring opinion in *Crown Life Insurance Co. v. McBride*, 517 So. 2d 660, 664 (Fla. 1987):

> This is a significantly higher degree of proof than by the greater weight of the evidence. *Jarrard v. Associates Discount Corp.*, 99 So. 2d 272 (Fla. 1957); *Barber v. Hatch*, 380 So. 2d 536 (Fla. 5th DCA 1980).
>
> These standards, and the quantum of proof required, places the burden upon the trial court to ascertain that there is competent, substantial evidence adduced at the trial which would constitute clear and convincing proof of the existence of the factual elements necessary to establish an estoppel, *before submitting the issue to a jury*.

517 So. 2d at 664 (emphasis added). Indeed, in *Crown Life*, this Court found that the plaintiff had failed to meet his burden, because the sole evidence was the plaintiff's own self-serving testimony without the support of any "written policy, memoranda, witnesses, or other evidence to support this testimony." *Id*. at 662.

Here, far from meeting the demanding standard of proof required for a claim of equitable estoppel, the plaintiffs repeatedly admitted, orally and in writing, that they had no promise of a baseball team on which an estoppel could be based. Like the plaintiff in *Crown Life*, the only evidentiary support for their estoppel claim

comes from their own self-serving testimony, given after they had filed this lawsuit. Indeed, in their reply brief in the Second District, the plaintiffs admitted that they lack the quantum of proof necessary to sustain an equitable estoppel claim, which "cannot be taken by argument or inference" *Jarrard*, 99 So. 2d at 277. Before the Second District in this case, the plaintiffs said:

> [I]t is *a perfectly fair inference* from these facts that the plaintiffs were induced to forebear 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 frontrunner 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* . . . .

Reply Brief of Plaintiffs to Second District Court of Appeal at 13 (served Sept. 8, 1998) (emphases added). Rather than the "written policy, memoranda, witnesses, or other evidence to support this testimony" required by this Court in *Crown Life* to support such a claim, 517 So. 2d at 662, the plaintiffs admitted they had "no formal promise or formal commitment to a future franchise" but only alleged "informal assurances" giving rise to a mere "inference" of estoppel.[6] Even those informal

[6] Even in cases not involving the heightened standard of proof required for equitable estoppel, any inference must be "reasonably deducible" from the evidence to defeat summary judgment. *4444 Corp. v. City of Orlando*, 598 So. 2d 287, 288 (Fla. 5th DCA 1992). The so-called "perfectly fair inference" that the plaintiffs attempt to draw is simply not "reasonably deducible" from the evidence which indisputably shows that the plaintiffs had no promises of a future baseball team and that they very well knew it.

assurances are substantiated only by the plaintiffs' own self-serving claims made after this litigation began, and directly contradicted by their admissions made at the time of the events in question.

Indeed, in the trial court, the plaintiffs tried to contradict some of this contemporaneous evidence with self-serving affidavits and testimony given long after the fact and for the purposes of this litigation. Newly minted "evidence" of this kind is manifestly inadequate to create a genuine dispute of fact, because it is inconsistent with the plaintiffs' own statements made at the same time as the events at issue. *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So. 2d 292, 299 (Fla. 3rd DCA 1997) (plaintiff's "bare self-serving assertions . . . without more, are insufficient to defeat a summary judgment" when they were "conclusively refute[d]" by "record evidence," including the plaintiff's own admissions); *Inman v. Club on Sailboat Key, Inc.*, 342 So. 2d 1069, 1070 (Fla. 3rd DCA 1977) ("A party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment."); *Pinky Originals, Inc. v. Bank of India*, 1996 U.S. Dist. LEXIS 15575 (S.D.N.Y. Oct. 21, 1996) (plaintiffs could not establish equitable estoppel by contradicting their own prior admissions).

Indeed, it has long been the law that mere "paper issues" cannot defeat a properly supported motion for summary judgment. "It is not sufficient for the

opposing party merely to assert that an issue does exist, . . . or to raise paper issues." *Johnson v. Gulf Life Ins. Co.*, 429 So. 2d 744, 746 (Fla. 3rd DCA 1983) (citations omitted). *See also, e.g., Wolk v. Resolution Trust Corp.*, 608 So. 2d 859, 860 (Fla. 5th DCA 1992) ("[M]ere paper issues . . . cannot avoid a summary judgment."). Self-serving attempts by parties opposing summary judgment to contradict their own prior admissions and the undisputed documentary record, raise nothing more than just such illusory paper issues. *See, e.g., Polo v. Correa*, 645 So. 2d 144, 145 (Fla. 3rd DCA 1994) (summary judgment affirmed against obligor on promissory notes who "attempted by his self-serving affidavit to raise a 'paper issue.' However, his affidavit is insufficient to rebut the strong presumption created by the notes themselves."); *Freixas v. Buena Vista Lakes Condominium Ass'n*, 559 So. 2d 1184, 1185 (Fla. 3rd DCA 1990) (summary judgment affirmed when opposing party created mere "paper 'issue'" by "specifically contradict[ing] the sworn testimony that he gave in a prior related lawsuit").

These cases hold that a plaintiff, when faced with an overwhelming documentary record contradicting his claim (a record consisting in large part of his own admissions), cannot defeat summary judgment simply by offering his own post-litigation testimony to contradict his own prior undisputed admissions. Here, the plaintiffs could not possibly sue for breach of an alleged oral contract to award them a baseball team at some indeterminate future time, because the Statute of Frauds

precludes such a claim.[7] Yet they are relying on post-litigation alleged recollections of just such supposed oral promises to attempt to avoid the statute of limitations. Summary judgment would be rendered meaningless if a party could manufacture such an "issue" in the face of that party's own uncontradicted contemporaneous documentary admissions (and a wealth of other evidence) to the contrary.

In short, the undisputed contemporaneous record demonstrates overwhelmingly that the plaintiffs, experienced investors and attorneys all, knew and recognized long before the limitations period expired that they had no commitments from the defendants for a future team. The plaintiffs admitted over and over again, by their own affirmative statements and by their silence, that they had no promises of a future baseball team. The defendants tendered competent evidence to support summary judgment, and the plaintiffs came forward with nothing but litigation-crafted self-serving assertions that are inadequate as a matter of law to reveal a genuine issue of material fact as to their claim of equitable estoppel.

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[7] Indeed, the plaintiffs' entire case amounts to nothing but an attempt to recover for breach of an alleged oral contract—to award them a baseball team at some time in the indefinite future—that (even if it existed) would be unenforceable under the Statute of Frauds. By packaging their claims as tortious interference claims, the plaintiffs have tried to circumvent the Statute of Frauds, which they cannot do. *See Roberts Co. v. P.B.O., Ltd.*, 322 So. 2d 633, 633-34 (Fla. 3rd DCA 1975) (tortious interference action cannot be maintained to recover for breach of an alleged contract unenforceable under the Statute of Frauds).

4. The Second District's Decision Conflicts With Other Decisions Rejecting "Paper Issues" Created by a Party's Self-Contradiction.

The Second District's opinion in this case creates confusion about the proper legal standard for summary judgment. The Second District allowed the plaintiffs' litigation-crafted testimony to contradict a contemporaneous record of their own admissions. By doing so, the Second District created a conflict with the Third District's decisions in *People's Gas* and *Inman*, both of which held that a plaintiff's admissions in the record evidence cannot be overcome by self-serving admissions, as well as the Third District's decisions in *Polo* and *Freixas*, both of which held that such self-contradiction creates a mere "paper issue" that cannot stave off summary judgment.

This case exemplifies the appropriateness of summary judgment in the face of a belated attempt to create a "paper," rather than a genuine, issue of fact and therefore provides an appropriate vehicle to clarify the summary judgment standard in this important procedural area. This issue is one of broad applicability and great importance that independently merits accepting jurisdiction and reversing the Second District's decision.[8]

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[8] The judgment of the trial court may be affirmed on any theory or evidence presented to it, even if the trial court did not rely on that ground. *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) ("[A] conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it."); *DSA*

(continued...)

CONCLUSION

For the reasons stated in this brief, the decision of the Court of Appeal for the Second District should be reversed, and the trial court's summary judgment for the defendants/petitioners should be affirmed with regard to Count I of the plaintiffs/respondents' Third Amended Complaint.

Respectfully submitted,

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(...continued)
Group, Inc. v. Gonzalez, 555 So. 2d 1234, 1235 (Fla. 2d DCA 1989) (the "result in the trial court must be affirmed if right, even if right for [the] wrong reason").

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Petitioner's Brief does not exceed the font size of 10 characters per inch.

_____
John W. Foster, Sr.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner's Brief on the Merits was served this 31st day of January, 2000, by telecopier or facsimile and first-class mail, postage prepaid, on the following attorneys for Respondents and other parties:

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