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' REPLY BRIEF

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I.
CLAIMS OF EQUITABLE ESTOPPEL CANNOT EVADE THE LEGISLATURE'S EXPRESS LIMITS ON EXCEPTIONS TO THE STATUTE OF LIMITATIONS.

The plaintiffs' argument indeed consists (as they say) of a "simple" syllogism, but it is a syllogism founded on two faulty premises that necessarily produce the wrong conclusion: first, the plaintiffs' invalid assertion that §95.051, Fla. Stat., abolishes only "tolling" defenses; second, their equally invalid argument that equitable estoppel is not a "tolling" defense; and their inescapably false conclusion that § 95.051 therefore does not abolish equitable estoppel as a means of resuscitating an otherwise time-barred claim. Respondents' Brief on the Merits ("Resp. Br.") 7-8. We will demonstrate the syllogism's fallacy by disproving those premises in reverse order: first, the plaintiffs' minor premise that equitable estoppel is not a "tolling" defense, and second, their major premise that the Legislature limited § 95.051 to the narrowest possible characterization of "tolling."

A. Equitable estoppel is indistinguishable from "tolling."

The plaintiffs assert that "[t]he two concepts [of tolling and equitable estoppel] are entirely different." Resp. Br. 11. As principal authority, the plaintiffs rely on (and quote for more than a page of single-spaced type) the decision of the United States Court of Appeals for the Seventh Circuit in *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978). Resp. Br. 12-13. They persuaded the Second District to rely on *Bomba* in reaching that same conclusion. *Morsani v. Major League Baseball*, 739 So. 2d 610, 614 (Fla. 2nd DCA 1999).

The plaintiffs have not cited to this Court, however, the numerous more recent decisions of the Seventh Circuit holding that equitable estoppel is in fact a *tolling* doctrine. These decisions establish that if the Seventh Circuit ever considered equitable estoppel to belong to some species other than tolling, that distinction has long since been obliterated:

> Two *tolling doctrines* might be pertinent here . . . . One, a general equity principle not limited to the statute of limitations context, is *equitable estoppel*, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations. . . .
>
> The rule in the federal courts is that *both tolling doctrines—equitable estoppel* and equitable tolling—are, just like the discovery rule, grafted on to federal statutes of limitations.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990) (emphasis added), *cert. denied*, 501 U.S. 1261 (1991). *Accord Bohac v. West*, 85 F.3d 306, 312 n.8 (7th Cir. 1996) ("The *tolling doctrine* implicated by this argument is termed *equitable estoppel*."); *Blaney v. United States*, 34 F.3d 509, 513 n.4 (7th Cir. 1994) ("Both of these '*tolling doctrines* [equitable estoppel and equitable tolling] stop the statute of limitations from running even if the accrual date has passed.'") (quoting *Cada*, 920 F.2d at 450); *Smith v. City of Chicago Heights*, 951 F.2d 834, 841 (7th Cir. 1992) (equitable estoppel described as a "tolling doctrine") (emphases added).

Other federal appellate courts also classify equitable estoppel as a form of tolling. *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998) ("Both *equitable estoppel* and equitable tolling operate, in a practical sense, *to toll a limitations period*."); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998) (discussing when "*tolling on estoppel* grounds is proper"); *Kelly v. Marcantonio*, 187 F.3d 192, 203 (1st Cir. 1999) ("In their brief, plaintiff-appellants briefly mention a number of *other tolling theories, including equitable estoppel* . . . .") (emphases added). In short, the supposed distinction between equitable estoppel and tolling that the plaintiffs say is "well settled in the jurisprudence of this nation," Resp. Br. 12, and on which their argument rests, is not "well settled" at all; it is not even accurate.

The plaintiffs also take great pains to argue that there is a sharp distinction between equitable estoppel and fraudulent concealment, the exception to the statute of limitations that this Court found to be a form of tolling and therefore barred by § 95.051 in the Court's original opinion in *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S 578 (Fla. Sept. 25, 1997), *withdrawn on other grounds*, 24 Fla. L. Weekly S 557 (Fla. Nov. 24, 1999). Resp. Br. 18-23.

This distinction is equally illusory: the "jurisprudence of this nation," in the plaintiffs' own words, abounds with judicial recognition that fraudulent concealment and equitable estoppel are two facets of the same concept: they are both exceptions to statutes of limitations based on claims that a defendant's conduct prevented a plaintiff from filing suit before the statute of limitations expired. *Chapple v. National Starch & Chemical Co.*, 178 F.3d 501, 506 (7th Cir. 1999) ("the doctrine of equitable estoppel, sometimes referred to as fraudulent concealment"); *Hentosh v. Herman M. Finch Univ. of Health Sciences*, 167 F.3d 1170, 1174 (7th Cir. 1999) ("[e]quitable estoppel—sometimes referred to as fraudulent concealment"); *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 875-876 (7th Cir. 1997) ("[F]raudulent concealment, a doctrine that overlaps with equitable estoppel, tolls the period."); *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983) ("Fraudulent concealment is based upon the doctrine of equitable estoppel."); *Evans v. Conlee*, 741 S.W.2d 504,

506 (Tex. App. 1987) ("[f]raudulent concealment is a specie[s] of the doctrine of equitable estoppel"); *Russell v. Anchorage*, 743 P.2d 372, 375 n. 9 (Alaska 1987) (fraudulent concealment "argument in essence is one of equitable estoppel"); *Beeck v. Aquaslide 'N Dive Corp.*, 350 N.W.2d 149, 158 (Iowa 1984) ("An estoppel may be based on fraudulent concealment."). Indeed, the Second District itself, in the opinion that the plaintiffs defend in this Court, acknowledged that "[i]t is true that the doctrine of fraudulent concealment has been considered a species of equitable estoppel." *Morsani*, 739 So. 2d at 615.

In short, the plaintiffs have staked their argument on a semantic distinction: equitable estoppel is not "tolling," and therefore it cannot be barred by § 95.051. Numerous courts—including the Seventh Circuit, whose decision is the mainstay of the plaintiffs' argument—hold the precise opposite, and with good reason: the effect of invoking equitable estoppel is exactly the same as the effect of any other tolling doctrine. Without its semantic prop, the plaintiffs' syllogism collapses.

B. The Legislature cannot have intended to allow § 95.051§ to be evaded merely by the manipulation of labels.

The other premise of the plaintiffs' syllogism—that the Legislature intended § 95.051 to reach only exceptions to the statute of limitations labeled "tolling"—is equally false. The plaintiffs would have this Court elevate nomenclature over substance, and thus subscribe to what Justice Cardozo called "the tyranny of tags and tickets." Benjamin Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 688 (1931). The real question, however, is which construction of § 95.051 carries out the Legislature's intent and objectives, and which construction frustrates them.

Because the plaintiffs have relied so heavily on the Seventh Circuit opinion in *Bomba*, it should be noted what Chief Judge Posner of that court has said:

> Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. *They protect important social interests in certainty, accuracy, and repose.* . . . We should not trivialize the statute of limitations by promiscuous application of tolling doctrines.

Cada, 920 F.2d at 452-53 (emphasis added). Indeed, this Court has very recently again stressed "the purpose of a statute of limitations, which is 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Totura & Co., Inc. v. Williams*, 25 Fla. L. Weekly S 141, S 144 (Fla. Feb. 17, 2000),

quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

The Legislature's obvious intent in enacting § 95.051 was indeed to "protect important social interests in certainty, accuracy, and repose," *Cada*, 920 F.2d at 452, by preventing the litigation of old and stale claims, and by making application of the statute of limitations simple and certain. The means the Legislature chose was to sweep away *ad hoc* court-made exceptions to the statute of limitations by enumerating in the statute itself the only exceptions to the statute that courts are permitted to recognize. The Legislature accomplished this by declaring that "[n]o disability or other reason shall toll the running of any statute of limitations except those specified in this section . . . ." § 95.051(2).

The plaintiffs assert that the defendants "impugn[] the intelligence and integrity" of numerous courts (or alternatively, that we say that those courts must be "simply stupid"). Resp. Br. 28. We certainly did not use any of these ugly words. It is surely fair to ask, however, what view of the Legislature's "intelligence and integrity" is inherent in the plaintiffs' theory: that the Legislature enacted a careful and extensive list of grounds for avoiding the statute of limitations, expressly declared that the list was exclusive—and then expected clever litigants to circumvent the statute by packaging their superannuated claims in exceptions not authorized by

the Legislature simply by calling their proffered exception something other than "tolling."

The Legislature can exclude equitable estoppel as a defense to the statute of limitations if it chooses, and in fact it did; courts must honor that choice. For example: "While there may be circumscribed settings in which the doctrine of equitable estoppel might apply . . . we believe the more accurate analysis excludes the application of this doctrine when the consequence operates to trump a clear outer limit intended by Congress." *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420, 1436 (10th Cir.), *modified on other grounds*, 947 F.2d 897 (10th Cir. 1991). *See also Bomba*, 579 F.2d at 1070 (applying equitable estoppel "absent some affirmative indication that Congress expressly intended to exclude [it]"). That is precisely what the Legislature did here, and what it had to do, unless one seriously believes that the Legislature was indifferent to plaintiffs such as these making a mockery of what it was trying to achieve.

The plaintiffs argue over and over that this Court should not "abolish . . . the 150-year old defense of equitable estoppel," Resp. Br. 8; *see also id.* at 7, 27, 32, a defense (they say) "which arrived in Florida in 1829 with the state's *statutory* adoption of the English common law." *Id.* at 23 (emphasis added). In one sense, this argument is lawyers' hyperbole: the defendants have never argued that the "defense

of equitable estoppel" should be abolished, except insofar as the Legislature has limited it in one context: as an exception to the statute of limitations. As the Seventh Circuit said in *Cada*, equitable estoppel is "a general equity principle not limited to the statute of limitations context . . . ." 920 F.2d at 450.[1] In a more fundamental sense, the plaintiffs reveal the error of their position when they note that equitable estoppel arrived in Florida as part of the Legislature's "*statutory adoption*" of the common law. What the Legislature adopted, the Legislature can modify—and it has.[2]

The plaintiffs labor to argue that when the court in *Alachua County v. Cheshire*, 603 So. 2d 1334 (Fla. 1st DCA 1992), used the words "equitable tolling," what the court actually meant was "equitable estoppel." What the plaintiffs fail to

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[1] *See, e.g., Doe v. Allstate Ins. Co.*, 653 So. 2d 371 (Fla. 1995) (equitable estoppel can prevent forfeiture of insurance policy where insurer has taken steps to defend insured); *Dept. of Health and Rehabilitative Servs. v. Privette*, 617 So. 2d 305, 308 n.3 (Fla. 1993) ("parents can be equitably estopped from disputing paternity where they previously have acknowledged the legal father's paternity").

[2] The plaintiffs reel off a string of citations to cases in which courts have recognized an estoppel defense to various *other* statutes of limitations, not one of which contained the exclusive list of exceptions set out in § 95.051 or the Legislature's admonition in § 95.051 against creating additional *ad hoc* exceptions to that statute. Resp. Br. 14, *citing, inter alia*, *Barnett Bank v. Estate of Read*, 493 So. 2d 447 (Fla. 1986). All of these cases are beside the point; the potential availability of equitable estoppel as a defense to other, very different statutes of limitations says nothing about the construction of § 95.051, which the Legislature carefully drafted to achieve a different result.

recognize, however, is that their theory leads inescapably to the conclusion that by enacting § 95.051§, the Legislature abolished equitable *tolling* as a defense to the statute of limitations purely and simply because that defense contains the magic word "tolling," but that the Legislature did not intend to abolish its sibling, equitable estoppel, because the magic word is missing—even though both are equitable doctrines that have exactly the same effect in avoiding the statute of limitations. Indeed, in *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988), this Court described equitable *tolling* in terms every bit as applicable to equitable *estoppel*: "We find the doctrine of tolling applicable [because] petitioner was misled or lulled into inaction by his Employer . . . ." *Id.* at 1134.

In short, this premise of the plaintiffs' syllogism is equally false: the Legislature cannot have intended to prohibit only those defenses to the statute of limitations narrowly denominated "tolling," because such an interpretation of the statute would defeat the Legislature's purpose in enacting it. It was no slip of the pen when this Court reiterated in *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119, 1122 (Fla. 1998), the same principle that it stated in its original *Fulton County* opinion: "[W]hen construing statutes of limitations, courts generally will not write in exceptions when the legislature has not." Any other construction

frustrates the fundamental purpose of the statute.[3]

II.
THE PLAINTIFFS' ADMISSIONS SHOW THAT THEIR ESTOPPEL CLAIM CANNOT SURVIVE SUMMARY JUDGMENT.

A. Estoppel cannot be proven by inference, which the plaintiffs admit is all that they rely on.

In their brief, the plaintiffs reprint, word for word, the fatal admissions that they made to the Second District: that their claim of equitable estoppel is based on what the plaintiffs call "a *perfectly fair inference*" from their own new-minted and self-serving testimony, that they received no more from the defendants than what they themselves call "*informal assurances,*" and that "to be sure, *they had no formal promise or formal commitment* to a future franchise." Resp. Br. 37 (emphasis added). Contrast these admissions with the standard of proof for an estoppel claim as set out by this Court in *Jarrard v. Associates Discount Corp.*, 99 So. 2d 272, 277 (Fla. 1957) (emphasis added):

> 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.

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[3] Indeed, this Court recently cited *Federal Insurance* with evident approval in *State v. Van Hubbard*, 24 Fla. L. Weekly S 575, S 578 (Fla. Dec. 16, 1999), as "concluding that absence of express language establishing [a] discovery rule for latent defects is 'clear evidence that the legislature did not intend to provide a discovery rule' in [a] limitations statute."

In the starkest terms, the plaintiffs admit their estoppel argument rests on what they call "a perfectly fair inference" in the face of this Court's holding that an estoppel *cannot* be based on mere inference. That should be the end of the matter.[4]

[4] Even the plaintiffs' "perfectly fair inference" is based on claims that they were told such things as they were an "absolute front runner," or that "you're doing the right thing, your market's great, you are all great, and I'm confident you are going to be rewarded with a baseball team." Resp. Br. 36. These comforting generalities fall far short of the "written policy, memoranda, witnesses, or other evidence" needed to establish a claim of estoppel. *Crown Life Insurance Co. v. McBride*, 517 So. 2d 660, 662 (Fla. 1987).

B. Any possible basis for an estoppel claim was removed more than four years before the plaintiffs filed suit.

The plaintiffs' brief does not contest—indeed, it studiously ignores—the uncontradicted evidence of their own repeated admissions that they were never promised a baseball team, *e.g.*, their 1987 admission in a stock purchase agreement that "[TBBG] neither has any commitment, written or verbal, from Major League Baseball for a Major League franchise by expansion or otherwise . . . ." R. 481. Their brief is just as silent on the uncontradicted documentary evidence that the defendants told them, over and over again, that no one had promised them a team, *e.g.*, the May 1988 letter from the Commissioner's Office to TBBG's executive director telling the plaintiffs that "[a]ny activity undertaken at this point toward that end [construction of a stadium] will be done on your own and certainly without any commitment from Major League Baseball[.]" R. 537. There were numerous similar admissions by the plaintiffs and admonitions by the defendants; they are described in the defendants' opening brief at pp. 33-36. *All* of these undisputed admissions by the plaintiffs and warnings from the defendants occurred more than four years before this suit was filed. The timeline attached as Exhibit A illustrates the several points in time when the plaintiffs admitted they knew, or were indisputably told, that they had not been promised a team, thus terminating any conceivable claim of estoppel more than four years before they sued.

Even where estoppel or some other tolling doctrine is available to prevent a defendant from resorting to the statute of limitations, a plaintiff's cause of action is nevertheless time-barred when the tolling condition is removed *and the plaintiff still waits until after the statute of limitations runs its full duration before suing.*

> [Defendant's] conduct or rather nonconduct did not work an estoppel because it did not make it impossible for the [plaintiff] to sue in time. It is implicit in the doctrine that the conduct alleged as the basis for estoppel have been the cause of the plaintiff's not suing in time.

Flight Attendants Against UAL Offset v. Commissioner, 165 F.3d 572, 576-77 (7th Cir. 1999). *See also, e.g., NLRB v. Don Burgess Construction Co.*, 596 F.2d 378, 383 (9th Cir.) ("fraudulent concealment tolls a statute of limitations only for as long as the concealment endures"), *cert. denied*, 444 U.S. 940 (1979); *Hentosh*, 167 F.3d at 1175 ("tolling does not provide a plaintiff with an automatic extension of indefinite duration"). Presumably, not even the plaintiffs would argue that estoppel authorizes them to wait ten years, fifty years, or forever, to sue once they are indisputably told, or admit they know, that the condition giving rise to the claimed estoppel has ceased. Here, the plaintiffs were told, and admitted that they knew, about the absence of any promise of a future team. Yet, they waited more than four years *after that* before filing suit. As the timeline in Exhibit A demonstrates, the plaintiffs' action was time-barred as of May 1992, at the absolute latest. Indeed, the plaintiffs admittedly knew

at a number of earlier points that they had no promise of a team. No interpretation of the doctrine of equitable estoppel can possibly save such a lawsuit from the statutory bar.[5]

[5] The plaintiffs cite *Hankey v. Yarian*, 25 Fla. L. Weekly S 203 (Fla. March 16, 2000), as supplemental authority, but it does not support them. There, the Court held: "The 'tolling' language in section [95.051] has been routinely and consistently interpreted as suspending the running of the statute of limitations time clock *until the identified condition is settled*." *Id.* at S 204 (emphasis supplied). If equitable estoppel tolled the statute of limitations in § 95.051, it, too, would suspend the running of the statute only for a particular period—unless the plaintiffs seriously contend that a claim of estoppel confers on them a permanent exemption from the statute of limitations even after the "identified condition is settled." *Id.* This conclusion is consistent with the host of decisions cited in Part I of this brief that recognize equitable estoppel as simply another example of a tolling defense. In *Hankey*, moreover, the Court noted that its interpretation was *consistent* with the legislative purpose of the medical malpractice limitations scheme to allow sufficient time for the investigation and settlement of medical malpractice claims, and thereby to *reduce* the number of malpractice cases filed. *Id.* By contrast, the plaintiffs' position here would *defeat* the legislative purpose of confining exceptions to the general statute of limitations, and reducing the number of stale claims that must be litigated.

CONCLUSION

The decision of the Second District in this case should be reversed.

Respectfully submitted,

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Exhibit A
TIMELINE

May 1984 Plaintiffs assert they relinquished prospective minority interest in Minnesota Twins based on statement by Commissioner Kuhn that they would be "absolute front runner" for an expansion team. Resp. Br. 2 and Resp. Appendix 7.

May 1984 Commissioner Kuhn writes to competing St. Petersburg group (at plaintiffs' request, with copy to them) that there are "no assurances [of a team] . . . to St. Petersburg or any other city." R. 434. Plaintiffs do not contest this.

October 1985 Commissioner's Office writes plaintiff 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). Plaintiffs do not contest this.

July 1986 Mr. Morsani tells *Tampa Tribune* that plaintiffs will not build stadium in Tampa "until that assurance comes, if it does." R. 1244, 318.

October 1986 TBBG representative writes owner of White Sox that plaintiffs will not start stadium construction until plaintiffs are "assured of obtaining a Major League Baseball franchise." R. 1245.

1987 Plaintiffs send prospective investor a stock purchase agreement stating: "[TBBG] neither has any commitment, written or verbal, from Major League Baseball for a Major League franchise by expansion or otherwise . . . ." R. 481.

May 1988 Commissioner's Office writes plaintiffs' executive director (in response to his request for a "signal" to begin stadium construction) 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. Plaintiffs do not contest this.

November 1992 Plaintiffs file suit.18