IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-1157

ELIZABETH L. DAVIS,

Petitioner,

vs.
HELEN K. MONAHAN

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO.: 4D00-1982

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES

OTHER AUTHORITIES

PREFACE

In this brief, Respondent, Helen K. Monahan, the Plaintiff below, will use the same references to the parties, the same citations to the record on appeal and the same parallel citations to Petitioner's Appendix as set forth in Petitioner's Preliminary Statement. Parallel citations to the Appendix of Respondent's Brief will be designated by the letter "A" and the appropriate page number of the Appendix. All emphasis is supplied by counsel for Monahan unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Some cases do not lend themselves to summary judgment. This is one such case. The Fourth District Court of Appeal succinctly set forth the basic facts of this case, which the court determined raised issues of fact making the entry of a partial summary judgment inappropriate. Yet, when comparing the facts presented in the Petitioner's brief with the fact pattern in the opinion of the Fourth District Court of Appeal, one would think that these were two entirely different cases! The Petitioner has omitted any adverse facts. The Respondent will therefore include her own statement of the case and facts which points out disagreements and discrepancies in Respondent's brief.

On page five of her brief, Davis begins setting forth the facts as follows:

> The facts giving rise to this action began in 1990. In or about that year, Monahan lived in New York, and after her husband passed away she

> moved to Florida with the help of her niece, Davis. (R.456;623;1030)(App.0120;0226;0090). At the time of her husband's death, Monahan seemed distraught, malnourished and helpless. (R.461) (App.0125). Davis, her niece wanted to help her. (R.461)(App.0125). No good deed goes unpunished!

There were no good deeds done! Davis testified that after Monahan's husband died on January 20, 1990, the 76 old woman was terrified and depending on anybody who would help her. (R:456,461,2066). But instead of helping her aunt, Davis and her mother, Kish, preyed on this very distraught, malnourished, elderly lady by helping themselves to over $587,000 of Monahan's assets. (R:460-461, 981, 1092-1096;A:1).

Davis is in error when stating on page 5 of her brief that Monahan stayed for some time with her in Maryland. Davis swears in her affidavit that Monahan "came to Maryland to briefly stay with me." (R:1030). This fact becomes important when one ponders how Monahan could have been present with Davis to assist in the banking transactions occurring sometime between March and September of 1990 when the majority of Monahan's assets were taken by Davis, since Monahan was already living in Florida with her other sister, Julia Evans. (R:455-456, 964-965,1483 at 86, 1507 at 187, 1978 at 10). Monahan had purchased a condominium with Evans which they owned as joint tenants with rights of survivorship. (R:964-965).

Monahan executed a power of attorney on March 9, 1990, while in Florida, naming Davis as her attorney in fact and giving Davis broad powers over Monahan's

assets. (R:967-973,2067; A:2). Davis was living in Maryland at the time, twelve hundred miles away from Monahan. (R:455-456). Davis explained that she obtained the power of attorney because she was taking care of Monahan's affairs. (R:456).

Monahan complained that she was not asked what she wanted to do; she was told what to do. (R:1502-1503 at 153-154). Evans would take her to Kish's office where she was asked to sign documents but Monahan could not read them because of her cataracts. (R:1488 at 128,1503 at 155-156). She also could not hear what people said; she would turn off her hearing aids because they constantly whistled. (R:1488 at 126). Monahan signed all kinds of documents without having any idea of what she was signing. (R: 1488 at 128).

Davis states on page 6 of her brief that she redeemed Monahan's U.S. Savings Bonds at Citizens Bank and then *deposited the proceeds into an account which she opened for Monahan* at the same bank. This statement is disputed. Actually, Davis went to Citizen's Bank in April, 1990 with her housekeeper, Lois Majette, and had Majette introduce Davis as being Monahan. (R:1477-1478 at 41-43; 1529 at 278). While impersonating Monahan, Davis endorsed $74,893.20 of the bonds using Monahan's name.[1] (R: 1094; 1529 at 278). When Monahan later wrote to Citizens

[1] The signature on the back of the bonds bearing Monahan's name did not even closely resemble her signature. (R:1477 at 41). Davis admitted cashing these bonds. (R:512-513).

bank in 1995 about the account Davis had supposedly opened in Monahan's name with the funds from these bonds, Citizens Bank responded that *they have no record of any account in her name or under her Social Security number where these funds had been deposited*. (R:1477 at 41).

Davis discusses various other financial transactions done with Monahan's "obvious consent." These self serving statements of approval were expressly negated by Monahan in her June 12, 1998 affidavit, where Monahan affirmed the allegations of the First Amended Complaint as "true and correct." (R:141).[2] Those allegations, restated in the Fifth Amended Complaint, clearly confirm that Monahan did *not* authorize the various financial transactions Davis alleges were done with Monahan's consent and that funds were expended for both Davis' and Kish's personal use. (R:52-59, 943-954; A:9; App.4). Monahan's affidavit demonstrates that she did not authorize Davis, verbally or by written instrument, to exercise her power of attorney to redeem any of the US Government Savings Bonds. (R:53,141). It was also disputed that Monahan even signed all the Certificates of Deposit, since the signature on the back of five of the seven CDS, cashed in May and June of 1990, did not appear to be

[2] The First Amended Complaint referred to in the Affidavit is a misnomer. Monahan is actually referring to the Amended Complaint.

hers. (R:1477 at 40). [3]

In addition to the $74,893 in bonds that Davis took and contended was put in a Citizens' bank account for Monahan, for which the bank has *no record*, Davis deposited in an account in *her own name* at Sovereign Bank in Maryland, $106,314 from Monahan's accounts that Davis closed at Apple Bank and Chase Manhattan Bank. (R:482,486-487,490-492,1093; A:1). This was *not* a jointly held account with Monahan. (R:513, 1093; A:1).

Davis also had Monahan's pension checks of $358 monthly mailed to Davis in Maryland while Monahan was residing in Florida. (R493,1093 1531 at 293; A:1). Davis then fraudulently endorsed Monahan's name on each of the pension checks prior to depositing them into Davis' own account. (R:1093-1094; A:1). During the four year period of time that Davis collected Monahan's pension, the checks amounted to $21,480. (R:493, 1093-1094; A:1). These pension funds were never reported on Monahan's tax returns. (1531 at 293). Monahan's assets retained solely by Davis totaled **$202,687**.

Davis maintained that she paid for Monahan's expenses for at least one year.

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[3] The financial records also revealed transactions by Davis and Kish relating to A.G. Edwards and Raymond James brokerage accounts which were contrary to the express wishes and written notices of Monahan. (R:1504 at 162-165; 1505 at 172,1948,1951,2028-2029; A:3,4,7).

(R:485). What did Davis do with the remainder of the $202,687? Davis admitted in her deposition that she used the account for her own living expenses! (R:482, 492).

Davis also transferred $76,673 in cashed bonds and a check for $40,000 from the Chase Manhattan account to Kish. (R:1094-1095; A:1). Kish, who had opened an account at Barnett Bank in March, 1990, titled in both Kish's and Monahan's names, deposited the $116,673 in the account in April, 1990. (R:626, 716, 1094-1095; A:1). Kish testified during her deposition that *she considered the funds in the Barnett Bank account to be hers even though the account was titled in both Kish's and Monahan's name*. (R:624-625; 644,1094-1095; A:1). Kish also testified that it was her funds alone that were used to replenish the joint account. (R:624-625;1094-1095; A:1). Kish additionally received Monahan's social security payments of $1,350 from April 1990 through June 1995, totaling more than $81,000, which were deposited in this account. (R:624-624,639,1095). Kish acknowledged a deposit into the Barnett account in July, 1999 in the sum of $122,993 which was established as representing the net closing proceeds from the sale of Monahan's New York apartment. (R:718, 1095, 2030).

Kish denied having any knowledge of an annuity Monahan had acquired prior to the death of her husband. (R:673). However, the liquidation of this annuity in the amount of $51,722, made payable to Monahan, was *sent to Kish's business address*

in Margate, Florida. (R:1095; A:1). Kish thus received a total of approximately **$372,388** in Monahan's assets.

Kish acknowledged routinely co-mingling her own funds with funds of Monahan by transferring funds from the Monahan/Kish Barnett account to accounts titled Betty Kish and Elizabeth L. Davis, joint tenants with right of survivorship. (R:1095;A:1). Funds were also transferred from the Monahan/Kish account into an account titled the Betty Kish Revocable Trust. (R:1095; A:1).

Davis supported Monahan for the first year after her husband had died. (R:485). Monahan complained that she was given only $300 monthly in living expenses for such things as food, clothes, church, and the movies and although she needed more money but it was never increased. (R:693, 1483 at 85, 1484 at 90-91, 1555 at 399). Kish subsequently gave Monahan only $300 monthly. (R:1482-1483 at 81-82, 85, 2023;A:5). Davis and Kish, who were in control of Monahan's funds, routinely told her funds were limited and they were only able to supplement her income by paying her the sum of $300 monthly. (R:59, 2066;A:2,9). Some months, no payments were made. (R:1502 at 147). Monahan had to clean Kish's home to earn spending money! (R:1503 at 157).

As a basis for the argument that Monahan knew of the transactions by Davis and Kish prior to 1995, Davis repeatedly points out in her brief that the "undisputed

record evidence" is that Monahan was audited by the IRS in 1993 for failing to report the income generated by the liquidation of the U.S. Savings Bonds in 1990. She also states that the IRS sent her a letter regarding the audit to Monahan. The "undisputed record evidence" that Davis cites to is argument of counsel during a hearing on the motion for summary judgment. (R:1979 at 44-49). Argument of counsel is not "undisputed record evidence." The alleged letter was never put into evidence. Moreover, the allegation that the IRS sent Monahan a letter saying that she would be audited would be insufficient by itself to put her on notice that there were misappropriations of funds by Davis and Kish. Many citizens get audited routinely by the IRS without there being a misappropriation of property.

There *is* record evidence to dispute that Monahan would have been aware of wrongdoing by Davis and Kish, even when receiving the letter from the IRS in 1993 since she would have been unable to read it. In 1993, Monahan could not read, nor could she hear. (R:1488 at 126, 128). Monahan admitted that she had physical problems and had allowed herself to become heavily dependent on Kish and others after her husband died. (R:2025; A6). Kish told Sadler that she took care of all of Monahan's financial and tax matters. (R:1482 at 81).

In Monahan's affidavit, she swore that all allegations in the First Amended Complaint were true. (R:2066; A:2). This complaint included allegations that Davis

and Kish prepared Monahan's IRS returns for the years 1990 through 1994 and improperly reported income on Monahan's tax returns resulting in a tax audit. (R:58;A:9). Kish and her accountant, Scott M. Freeman of Ahern Jasco and Company, responded to the IRS audit and negotiated the payment of additional tax in the amount of $12,457 which was paid out of the A.G. Edwards brokerage account with a check signed by Kish. (R:59, 683;A:9).

At the summary judgment hearing counsel made specific reference to another letter dated January 12, 1993 which was written by the accounting firm of Ahern Jasco and Company to the IRS stating that in 1990 Monahan never handled her finances and was relying on her heirs living twelve hundred miles away. (R:1979 at 44-45,49). Counsel also stated that Kish rather than Monahan was being copied with the accountant's letters. (R:1979 at 44,46).

In September, 1994 Monahan came to Cincinnati, Ohio to visit her brother, Alex Keselowsky, and never left. (R:1475 at 19). She moved into her brother's apartment and shares living expenses with him. (R:1510 at 211).

While in Cincinnati, with the help of her brother, Monahan had successful cataract and glaucoma surgery and purchased state of the art hearing aids. (R:1488 at 126-128; 2025;A:7). Subsequently, there was a very noticeable difference in her. (R:1488 at 127). She became active and played golf, could communicate with others

and was independent in her daily activities. (R:1488 at 127; 2026;A:7).

In June, 1995 Kish called Sadler, Keselowsky's daughter, who also lived in Cincinnati. (R:1473 at 4, 1474 at 15, 1482 at 81). Kish commented that she took care of all of Monahan's financial and tax matters, that Monahan did not have much income, and could not cover all of her expenses. (R:1482-1483 at 81-82). Kish explained that she was supporting Monahan and so would send $300 a month to Keselowsky to help support Monahan. (R:1482-1483 at 81-82).

Julia Evans, Monahan's sister, died on March 3, 1995 and Monahan acquired title to the property as a joint tenant with rights of survivorship. (R:966, 2043). On May 25, 1995, Davis misused the durable power of attorney to execute a Warranty Deed, conveying one-half interest in the condominium to May Jo Miles, Patricia Taylor, and Teresa McCullough, who were Evan's daughters. (R:49-51, 99-100).

Monahan had sought the advice of an attorney for estate planning and other legal matters of concern, including having the attorney prepare a durable power of attorney for Monahan in favor of William Sadler, Barbara Sadler's Husband, and a health care power of attorney in favor of Keselowsky. (R:1478 at 117, 2017-2021). On June 2, 1995, her lawyer, Richard Henkel, wrote to Kish requesting an accounting and putting Kish on notice that any power of attorney granted to her by Monahan was revoked. (R:1948-1949;A:3). A written revocation was executed on June 5, 1995.

(R:94).

Davis *misleads this Court* with the statements on page 10 of her brief that "Henkel sent a letter solely addressed to Kish" and that "[a]t no time did Monahan, Henkel, or anyone else on Monahan's behalf contact Davis, or a representative retained on Davis' behalf, requesting an accounting from Davis." *The June 13, 1995 certified letter, addressed to Davis from Henkel, requested an accounting*, and informed Davis that any power of attorney she had was revoked, is included in the Appendix. (R:1951-1952;A:4).

Carl Schuster had been the attorney for both Davis and Kish and testified that Davis had been his client for some thirty years. (R:1985 at 16-17). On June 21, 1995, Schuster responded to Henkel's letter and advised Henkel that Monahan's assets were minimal:

> Just in case there is a feeling that Ms. Monahan has a significant estate, you are advised that her assets are a one-half interest in a small condominium apartment here in Florida, and liquid assets of approximately $41,000. She is living on her social security which enables her to pay for maintaining her apartment (monthly maintenance, periodic assessments, real estate taxes, utilities, repairs, etc.). She takes $300 a month for her living expenses. When her income does not cover her expenses, Ms. Kish loans her account the necessary funds.[4]

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[4]In an August 17, 1995 letter to Henkel, Schuster wrote that Kish was "calculating the balance of the funds which are due her and Ms. Davis from the loans which they made to Ms. Monahan..." Kish's claim of ownership of the proceeds in the joint account was also confirmed in writing by Schuster in the

(R:2023;A:5).

As of July 14, 1995, Monahan was unaware of Davis' fraudulent conveyance of the title to Monahan's condominium, as evidenced by the letter written by Monahan's attorney Henkel to Schuster concerning Monahan's full ownership of the property as a result of the death of her sister Julie Evens. (R:2026;A:6). Henkel again requested a full accounting of Monahan's assets in this letter. (R:2025-2027;A:6).

By August 2, 1995, the tone of Henkel's letters to Schuster had changed as a result of the improper raiding of the A.G. Edwards brokerage account to transfer out Monahan's assets into another account in the names of Davis and Kish shortly after they received the June, 1995 letters from Henkel. (R:2028-2029;A:7). This was directly contrary to Monahan's express wishes and prior written notices in June, 1995. (R:2028-2029; A:7).

The scant financial information provided by Schuster's August 17, 1995 letter regarding one joint bank account opened at Barnett Bank in July, 1994, and one A.G. Edwards & Sons account could hardly be considered an accounting of Monahan's assets. (R:2030-2031;A:8). Schuster failed to address the other banking institutions and brokerage houses that had Monahan's assets, and any earlier bank accounts opened, as well as failing to address what happened to Monahan's pension, social

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August 17, 1995 letter. (R:2030-2031;A:8).

security checks, annuity, savings bonds and certificates of deposit.(R:2030-2031;A8).

In the latter part of 1995, Monahan decided to sell her Florida condominium because she was not going back to Florida. (R:1501 at 144). Monahan requested the real estate tax bill and found out she was not the sole owner of that property. (R:1501 at 144). Therefore, Monahan could not sell her condominium. (R:1501 at 144). She executed a revocation of Davis' durable power of attorney on February 2, 1996 (R:976). On October 23, 1997, the 83 year old Monahan also filed suit to quiet title, for fraud and constructive trust against Davis and Mary Jo Miles, Patricia Taylor and Teresa McCullough, the daughters of Julia Evans. (R:1-24,141;A:2).

On April 28, 1998, summary judgment was entered against Miles, Taylor and McCullough, directing that the Warranty Deed be given no force and effect and vesting title solely in Monahan. (R:99-100). On April 15, 1998, prior to the entry of the summary judgment, Monahan filed an Amended Complaint. (R:48-95). This complaint was subsequently amended and the Plaintiff traveled on the Fifth Amended Complaint. (R:729-762,783-824,849-892,938-981).

The basis for the allegations in the amended complaints came from the financial documents supplied by the various financial institutions which were contacted by Henkle and Monahan with Mr. Sadler's assistance when no accounting was forthcoming from Davis and Kish. (R:1479 at 54-55, 1529 at 281;A:7). Monahan

also asked Barbara Sadler to help her analyze the financial documents and show her what was there. (R:1479 at 50).

Sadler is a Certified Public Accountant with forty years experience in the accounting profession. (R:1473 at 6). She was a CPA in the regional office of the IRS for many years. (R:2026;A:6). Sadler has had extensive experience in the auditing of books and records of individuals and corporations as well as in the financial analysis of various financial statements, bank statements and bank records. (R:1473 at 6).

Sadler reviewed the financial data and could not ascertain where $200,000 of Monahan's money was spent by Davis for Monahan's benefit. (R:1478 at 46). Sadler's determined that a total of $587,267 was lost as a result of the Defendants' wrongful conduct. (R:981,1553 at 381; 1092-1097;A:1).

Davis is in error by stating on page 11 of her brief, that Sadler said "she could not prove the Defendants retained or otherwise converted a single dollar belonging to Monahan." What Sadler actually confirmed was that she had "no personal knowledge" of the actions of Davis or Kish. (R:1520 at 381-383). However, Sadler represented that her information was based upon the financial records that she had obtained. (R:1480 at 63). These records contradicted the deposition testimony of both Davis and Kish. (R:1092-1096;A:1). Moreover, Monahan's complaints that she was only receiving about $300 a month in living expenses while residing in Florida and

having to clean Kish's home to earn spending money, coupled with Kish's conversation with Sadler regarding her support of Monahan and sending Monahan $300 a month while Monahan lived in Ohio, clearly raised genuine issues of material fact regarding where all of Monahan's money went; especially in light of the fact that attorney Schuster informed Monahan's counsel in June, 1995, that Monahan was being sent $300 a month for her living expenses and there was a scant $41,000 in assets left. (R:1482-1483 at 81-82, 85, 1484 at 90-91,1503 at 157; 2023).

On page eight of her brief, Davis discusses Monahan's deposition testimony taken on December 2, 1998, in relating that Monahan could not recall any wrongdoing or improper spending by Davis or Kish. At the time Monahan's deposition was taken, she was suffering from dementia and at first did not even know who Kish was or could recognize Davis! (R:265, 318-319, 325). She did not recognize other relatives and was confused about who was her attorney. (R:265, 321, 330, 347, 1538 at 354). Monahan testified to flying to Florida with her daughter although she has no children. (R:265,348). During the deposition, counsel for the Defendants offered Monahan $5,000 to settle the lawsuit:

> Q. Let me ask you this. If Betty Kish said, Helen, I want to pay you $5,000 for this lawsuit to go away because I don't like the fact that I am being sued and Betty Lynn is being sued, I don't think anybody did anything wrong but I'm willing to give you $5,000 today, a check today, would that satisfy you, ma'am?
> A. Well, I'll say yes.

> Q. Okay.
> A. I'll say yes because we are a family and if it means that much to not return money to me, keep it. Keep it. I'll get another job or some darn thing and I'll manage to live somehow till the twentieth century. I have a yen to live till the twentieth century so that I can see all the things that is [sic] going to happen. Mercury, Venus, Mars, Jupiter, Saturn, Uranus and Neptune, if those people who live on all those planets, are they like us? Are they people, you know, like we are humans or are they different? They can be different and it will be nice to see that before you die. (R:339).

The trial judge refused to consider Monahan's deposition testimony because she was incompetent. (R: 1992 at 4). Upon Monahan's return to Cincinnati, she was examined by her primary care physician (R:1556 at 401-402). He determined that Monahan had dementia. (R:2071-2074). Guardianship proceedings were instituted and Sadler was appointed Monahan's guardian, with Monahan's agreement, on February 2, 1999. (R:2078-2079, 2099, 2101, 2109). Thereafter, Monahan, through Sadler, filed the Fifth Amended Complaint against Davis and Kish. (R:938-981).

Davis' statements concerning Sadler's "conflicts of interest" with the guardianship and the trust need clarification. When Sadler began guardianship proceedings over the person only rather than the person and/or estate of Monahan, Sadler's father was the trustee of Monahan's trust. (R:1513-1514 at 241-242; 2078, 2101). Therefore, Sadler could properly attest that at the time she applied for appointment of guardian of the person, she was not an administrator, executor or other fiduciary of Monahan's estate. Davis maintains that guardianship proceedings were

filed without notice to Kish or Davis. The portion to the record cited actually states that Sadler testified it was her understanding that the attorney would, under whatever the procedures were, notify people, although those living outside of Ohio were not required to be notified. (R:1511 at 218). Sadler further testified that she did not know if the attorney ever sent notice to Kish or Davis. (R:1511 at 218-219). Sadler never received any renumeration as Monahan's guardian. (R:1513 at 235). Davis strains in attempting to find some sort of conflict of interest. That Sadler is a successor beneficiary under Monahan's trust does not create a conflict of interest because Sadler is attempting to get back Monahan's assets for Monahan.

Davis and Kish filed a joint motion for summary judgment arguing that there were no genuine issues of material fact relating to Monahan's claims of breach of fiduciary duty, civil theft and conversion, civil conspiracy and unjust enrichment. (R:1044-1080). They claimed that Monahan "had knowledge of and consented to authorize and was aware of all disbursements" by the Defendants, as reflected in her deposition testimony. (R:1992 at 3-4). However, the lower court determined that there was an issue of fact regarding Monahan's competency when her deposition was taken. (R:1992 at 4, 16).

Counsel for Monahan pointed out that the Defendants had earlier taken the opposite position regarding Monahan's mental competency. (R:1992 at 12). Monahan

showed the court a letter dated June 21, 1995 from Carl Schuster, which was written to Monahan's attorney, stating that they believed Monahan required twenty-four hour care for reasons of "mental disability."[5] (R:1992 at 12;A:5).

The Defendants also argued that even disregarding Monahan's testimony, the affidavits of the two Defendants were uncontroverted regarding Monahan's knowledge and consent of their actions. (R:1992 at 4-5; R:1029-1041). The trial court orally denied the motion for summary judgment on these claims because it determined that the issues of consent raised a jury question. (R:1992 at 15-16).

> THE COURT: I have read this file, through all of this last night. I don't see how we can give summary judgment on either side for this. I think it has to go to trial. I don't even know jury or nonjury, but whoever is the tryer [sic] of fact has to go through the various checks from the various bank accounts, see what went in and what went out. (R:1992 at 3).

The court did, however, reserve ruling with respect to the statute of limitation issue raised by Davis and Kish. (R:1992 at 15). At subsequent hearings on the Statute of Limitations issue, Monahan explained that she did not do anything when the transactions were being undertaken by Davis in 1990 because Monahan was relying

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[5] The June 21, 1995, letter stated in part: "She requires twenty-four hour care, not for reasons of physical disability, but for reasons of mental disability. She is incapable of making any decision that could not be made by a young child. She has no conception of reality and particularly has deteriorated significantly over the last two years." (R:2022;A:5).

on the fact that Davis was acting pursuant to a power of attorney for her benefit. (R: 1978 at 8-9). Monahan argued that in a principal-agency relationship there is no duty whatsoever on the principal to make inquiry. (R:1979 at 13-14,29, 34-35). Monahan also argued that the statute of limitations began to run in 1995 when she discovered the wrongful activities by the Defendants. (R:1979 at 14-15). Monahan maintained that she asked for an accounting. (R:1978 at 9). However, the trial court was not satisfied that there was evidence from Monahan regarding when she discovered the loss of her assets. (R:1979 at 31).

The Defendants argued that the initial complaint filed was an action to quiet title. (R:1978 at 12). The first time allegations of fraud, conversion, breach of fiduciary duty, civil conspiracy and civil theft were raised was on April 15, 1998 when the Amended Complaint was filed, so Monahan would not get the benefit of a relation back to the original filing. (R:1978 at 12). All the causes of action were subject to a four year statute of limitations except the civil theft, which was five years. (R:1978 at 12-13).

On April 18, 2000, trial court entered its order granting a partial summary judgment which stated in pertinent part:

> ORDERED AND ADJUDGED that said Motion be, and the same is hereby granted in part. The court finds that the statute of limitations bars recovery for any action taken by defendants prior to 4/15/94 in that there is no record evidence of concealment and that there is no rebuttal of

> record evidence that Monahan knew of the transactions as they took place. (R:1920).

Another order was also entered on May 31, 2000, dismissing Davis from the action with prejudice on the basis of the statute of limitations. (R:1975). Monahan appealed these orders to the Fourth District Court of Appeal. On page 4 of her brief, Davis totally mischaracterizes Monahan's arguments to the appellate court. Monahan did not argue that *Hearndon v. Graham*, 767 So. 2d 1179 (Fla. 2000) applied to all causes of action to delay accrual until discovery of the wrongdoing. Monahan instead pointed out the unique factual situation involving a power of attorney in this case so that the statute of limitations would not commence running until there was an accounting or a demand for an accounting was refused, or until the agency between Monahan and Davis was terminated. Monahan also argued various reasons for her ignorance during 1990 to 1995 which was established by the evidence or inferences from the evidence so that the delayed discovery doctrine, revisited and clarified in *Hearndon*, applied in this case. These reasons were restated in the appellate court opinion.

The appellate court agreed that this case raised issues of fact as to whether the delayed discovery doctrine applies to make Monahan's claims timely under the statute of limitations. Since both orders involved the same legal issue, the court reversed both the April 18 and the May 30, 2000 orders.

SUMMARY OF THE ARGUMENT

The District Court reversed the partial summary judgment and order dismissing Davis from the action with prejudice because it determined that this case raises issues of fact as to whether the delayed discovery doctrine applies to make Monahan's claims timely under the statute of limitations. The Petitioner seeks to harmonize the the conflicting Florida decisions concerning the delayed discovery doctrine in a way that would relieve her from her own wrongdoing --- her systematic looting of the assets of a helpless family member who placed her trust in Davis and Kish. The Respondent suggests that this Honorable Court look to the California courts' solution which is a fair, workable policy that takes into consideration the necessity of set limitations for business expediency, yet protects those unknowingly injured or in a fiduciary relationship.

Alternatively, Monahan argues that this case should travel on its unique set of facts. Monahan gave Davis a power of attorney to act as attorney in fact for this elderly woman. This created an agency relationship which, under the case law, commenced the running of the statute of limitations when the agency was terminated, an accounting was had or a demand for an accounting was made and refused, or knowledge of such facts as would indicate that the agent was holding the principal's property for his or her own use. Under these circumstances, Monahan would be well

within the applicable statute of limitations.

The Petitioner argues that the "undisputed record evidence" demonstrates that Monahan knew and consented to all the transactions giving rise to her causes of action as they occurred beginning in 1990. Obviously, both Monahan and the District Court disagree with this contention. In this section of the answer brief, Monahan details the disputes and inconsistencies both from the record evidence and inferences from the record which demonstrate a genuine issue of material fact as to whether Monahan knew and consented to these fraudulent transactions beginning in 1990.

Even though the District Court misrelied on Section 90.803(3) Fla. Stat. (2000), the courts ruling must be upheld if there is any theory or principle of law in the record which would support the ruling. Monahan can rely on hearsay to prevail under the hearsay exception for the statement of an elderly person or disabled adult found in Section 90.803(24) Fla. Stat. (2000).

ARGUMENT

I. THE DELAYED DISCOVERY DOCTRINE APPLIES TO THE CLAIMS ALLEGED IN THIS CASE

Underlying Policy Considerations

When courts strictly apply a hard rule of law regardless of consideration of the circumstances involved, the temptation becomes irresistible to some to use that strict law to improper advantage; to cheat and lie about it; to wound and conceal it; and

when caught, cry "oh, he comes too late." The brainless application of strict law breeds injustice to its progeny.

In commerce, the duty of the person later claiming "cheat" is clear. The contract signer must read and understand the contract because it will be enforced. Rights are bargained for, consideration is exchanged, and the contract should memorialize the deal in its entirety. Commerce runs smoothly because most transactions are made and concluded by parties who function with fair disclosure and fair dealing. "Arm's length" and "caveat emptor" doctrines carry heavy weight.

Limitations in commerce require the cheated to carry a heavy burden. Fraudulent inducement, fraud in performance and other tort claims are permitted to the cheated. Even in these situations, the law is clear and limitations are easy to apply. A businessman is expected to take care of business and cannot sleep on his rights.

Outside commerce, limitations are harder to apply. In tort law, it is established that limitations commence when a person discovers or should have discovered the wrong. Limitations do not run from the occurrence of the wrong, i.e. --- leaving a sponge in the stomach, because the patient is unconscious and incapacitated during surgery and has no actual or implied knowledge of what was done. Ignorance is excused and the statute does not run until the patient knows or should have known.

In corruption within the family, wrongs which cause traumatic amnesia in the

child delay limitations until the child knows or should have known. Traumatic amnesia does not result alone from the physical act of sex, but from the related occurrence such as guilt, shame, or the murder of the victim's mother. Limitation does not run from the date of the physical invasion, but from the time when the child understands all the harm done by that physical invasion and recovers memories. The "physical impact" rule is subject to restrictions, and those restrictions almost all occur in the context of breach of trust.

The law of delayed discovery in the context of family relations is different from commerce. We expect a businessman to measure the size of the lumber delivered to his construction site, and take action if it falls short. If the receiver of nonconforming goods needs to sue, he is welcome in the courts. Families run on trust, not on negotiations and exchanges of consideration. Do judges want it to be any other way?

Children are taught to trust each other, to trust their parents. To not lie. To not cheat or steal. To take care of each other. Family, including family by marriage, is the last and only great protection against that terrible loneliness of isolation and abandonment. We love those in our families. We trust them. We have no choice.

Someone passes over a paper and says, "sign this. I will take care of you." In business, the signer is expected to bargain, investigate, inform himself and strike a deal. We require him to do so. But in a family, we do not expect abandonment of

ideals of trust and faith. In family, if one of us needs help, we trust the other who offers. We trust that we will not be cheated or abused, because this is the ethic we learn in childhood.

At what point is a woman required to be so suspicious of her sister that she calls a lawyer and says, "protect me from those I love and trust." At what point will judges say the sister should not have loved and believed a sister? Within the family, when does one sister have a duty to check up on the other sister who is supposed to be taking care of her, whom she loves and trusts?

Rules of commercial vigilance do not apply to families, and should not be applied. Judges should not interfere with family love. But, when family trust and love become the weapons used to defraud and swindle, the judges should take notice. Judges should act. They should not apply the rules of commerce, even though the documents may superficially appear the same, because the element of trust in families is different and should be different than the commercial arena of distrust, of caveat emptor.

This case is not about bargains and contracts. This is a case about family and naked need. Monahan was old and terrified, depending upon anyone who would help her. Family came forth and said "I'll take care of you. Sign this." And later, "sign this," and still later "sign this."

Now, shall the Honorable Justices of this Court say "you trusted your sister. How foolish. Shame on you." Or, shall the Honorable Justices say "Your sister cheated and deceived you. Shame on her."

Standard of Review

There is a de novo standard of review for rulings on a motion for summary judgment which concern pure questions of law. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001). In this case, the Petitioner raises the legal question of whether the delayed discovery doctrine applies to delay the accrual of Monahan's causes of action. The Respondent had presented an agency argument in both the trial and appellate courts which would obviate the need for a foray into this conflicted area of the law.

For review of whether there were genuine issues of material fact which precluded the entry of the partial summary judgment, this appellate court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Corbitt v. Kuruvilla,* 745 So. 2d 545 (Fla. 4th DCA 1999). If the record reflects the existence of genuine issues of fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the party moving for summary judgment. *Quest Air South, Inc. v. Memphis Group, Inc.,* 733 So. 2d 1109 (Fla. 4th DCA 1999); *Besco USA International*

Corp. v. Home Savings of America FSB, 675 So. 2d 687 (Fla. 5th DCA 1996).

Power of Attorney as an Agency Relationship - Accrual Applies

Davis totally ignores what is central to a determination of this case --- that she was given a power of attorney to act as attorney in fact for Monahan. Right after the death of her husband, Monahan was a 76 year old malnourished and terrified woman, depending upon anybody who would help her. Davis had Monahan sign a power of attorney that was extraordinarily broad. This eight page document gave Davis power over everything that Monahan owned and allowed her to do just about anything she pleased with Monahan's assets. However, the document did require Davis to use the power of attorney "for me and in my name, place and stead and on my behalf, and for my use and benefit." (R:82;A:9). Thus, Davis controlled the tree but Monahan was to receive its fruit!

The language of an agreement creating a power of attorney must be construed in such a manner so as to carry out the intent of the principal. *Johnson v. Fraccacreta*, 348 So. 2d 570 (Fla.4th DA 1977). It was obvious that the purpose of this power of attorney was to take care of Monahan. Davis stated she obtained the power attorney was so that she could handle her aunt's affairs at that time. (R:456). A power of attorney is a written instrument by which one person, as principal, appoints another

as agent and confers upon the agent the authority to perform certain specified acts or kinds of acts on behalf of the principal. 2 Fla. Jur. 2d *Agency and Employment* §27 (1998). There is no duty imposed upon a principal to make inquiry as to whether her agent has carried out her responsibilities. *Bach v. Florida State Board of Dentistry,* 378 So. 2d 34 (Fla. 1st DCA 1979). "The principal has a right to presume that his agent has followed instructions, and has not exceeded his authority." *Id.* at 37. Moreover, the power of attorney confers no authority to transfer the principal's property to the agent himself. *Kotsch v. Kotsch*, 608 So. 2d 879 (Fla. 2d DCA 1992).

Consequently, it would have been natural for a vulnerable elderly woman like Monahan to have given a power of attorney to her relative who was to use that power to take care of her. A clear fiduciary relationship, a relationship of trust was established and there was no duty imposed by law upon Monahan to make inquiry as to whether Davis was taking care of her funds or using them for an improper purpose. Monahan would have had every reason to presume that Davis was using the power of attorney for Monahan's benefit and the Plaintiff relied upon this belief. (R:51, 141).

Other jurisdictions, in considering when the statute of limitations commences, have determined that where there is a general or continuing agency, such as with a power of attorney, "a statute of limitations does not commence to run until the agency

is terminated, so that unless the death of one of the parties occurs, the termination of a continuing agency cannot be effective so as to set the statute in motion until an accounting is had or a demand for an accounting is made and refused, or there is an express repudiation of agency communicated to the principal." *Central States Resources, Corp. v. First National Bank in Morrill, Nebraska,* 243 Neb. 538, 501 N.W.2d 271, 545, 276 (Neb. 1993); *Grindey v. Smith,* 237 Iowa 227, 21 N.W.2d 465 (Iowa 1946).

In *Grindey, supra,* Walrath collected the rentals on farm land owned by two other relatives. One of the two other relative claimed entitlement to all of the rentals, and on the advice of his attorney, Walrath told them that he would hold the rent and not give it to either of them until a settlement was made regarding whom should be paid the rents received from the farm property. The rent was collected and retained from 1932 until 1944 when Walrath died. His estate raised the bar of the statute of limitations, and the trial court agreed, allowing the plaintiff's claim for a portion of the rentals for the years 1939 through 1943, but denied any recovery for any rental collected during any prior years.

On appeal, the plaintiff argued entitlement to the rentals collected by Walrath from 1932 through 1938. The appellate court agreed with the plaintiff, finding that if there is a general or continuing agency the statute of limitations will not commence

to run until the agency is in some way terminated. This could be accomplished by having an accounting or making a demand for an accounting which is refused, or an express repudiation of the agency. *Accord, Palombi v. Dutcher,* 31 Misc.2d 907, 221 N.Y.S.2d 347 (N.Y.Sup.Ct. 1961); *cf. Margolis v. Andromides,* 732 So. 2d 507 (Fla. 4th DCA 1999).[6]

Monahan first asked for an accounting through her attorney in June, 1995. (R:2017-2018). The actual revocation of Davis' Power of Attorney was on February 2, 1996. (R:976-977). Therefore, the filing of the Amended Complaint on April 15, 1998 requesting damages against Davis and Kish from 1990 would not be barred by the Statute of Limitations. The filing of the Amended Complaint was well within the four year statute of limitations.

In *Estate of Allen,* 30 Misc.2d 874, 220 N.Y.S.2d 296 (N.Y. Surr. Ct. 1961), the decedent father was the agent of the petitioner children, who was given the power of attorney by each of his children when they reached majority, in order to continue to manage investments and to receive and hold securities. Insofar as the record before the court showed, the decedent never gave them any notice whatever of his intent to

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[6] In *Margolis,* the lessee sued the supposed agent of the lessors for breach of implied warranty of authority. The appellate court held that the lessee's cause of action accrued at the moment when the lessors repudiated the supposed agent's authority to extend the term of the lease.

deprive them of their property. The court cited to earlier precedent in stating that "[w]here an agent is to receive and hold property for the benefit of his principal, a demand by the principal is necessary in order to start the statute [of limitations] running or, at least, knowledge of such facts as would indicate that the agent was thereafter holding the property for his own use." *Id.* at 879, 301.

In *Russell v. Furman,* 629 So. 2d 297 (Fla. 4th DCA 1994), the Fourth District Court of Appeals determined that the statute of limitations for an action against an insurance agent for negligence in creating a gap in insurance coverage began to run when the plaintiff first had reason to know that there was a gap in the coverage (rather than when the negligent action took place or when there was a court determination that there was a gap in the insurance).

There being no statutes directly concerning actions against those given a power of attorney [7] an appropriate analogy is a trustee of a trust. Both have a fiduciary relationship; the trustee with the beneficiary of the trust and the attorney in fact with the person for whom he or she holds a power of attorney. In the most recent Florida case counsel could find on the accrual of a cause of action against a trustee for breach

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[7]Chapter 709 on "powers of attorney and similar instruments" did not provide for a statute governing actions either in 1990 or currently. However, §709.08(8) Fla. Stat. (2000) discusses the standard of care of an attorney in fact under a durable power of attorney as a fiduciary who must observe the standards of care applicable to trustees.

of fiduciary duty, the Second District Court of Appeal, in *First Union National Bank v. Turney*, 26 Fla. L. Weekly D2776f (Fla. 2d DCA Nov. 26, 2001) said in dicta that the "[beneficiary of a trust's] causes of action did not accrue until she became aware of facts that would have put a reasonable person on notice." *Id* at *15. Quoting from *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000) the court stated that "[A] cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action." See *Nayee v. Nayee*, 705 So. 2d 961 (Fla. 5th DCA 1998).

Because of the power of attorney given to Davis, either under caselaw providing for accrual of a cause of action once an accounting is requested and refused or cases determining that a cause of action accrues once Monahan has knowledge of the tortious acts by Davis, the Respondent would be within the statute of limitations. Then it becomes a factual question of when the discovery occurred, which should not be determined on summary judgment. As instructed by the Court in *Green v. Bartel,* 365 So. 2d 785, 788 (Fla. 3d DCA 1978):

> Whether the plaintiff discovered, or by due diligence should have discovered the existence of the cause of action...prior to the date of the filing of her complaint, was a question of fact and it has been held that genuine issues relating to such questions of fact are to be determined by the trier of facts, and are not to be resolved on summary judgment.

Jurisdiction Improvidently Granted

Obviously, a decision based upon reliance of a power of attorney would not be in conflict with *Halkey-Roberts Corporation v. Mackal*, 641 So. 2d 445 (Fla. 2d DCA 1994) or *Yusuf Mohamad Excavation, Inc. v Ringhaver Equipment*, Co., 793 So. 2d 1127 (Fla. 5th DCA 2001) because they are so factually dissimilar to the instant case. Both of those cases arose out of a commercial setting and neither was concerned with a power of attorney. Thus, this Honorable Court may consider that jurisdiction was improvidently granted.

Delayed Discovery Doctrine

The Petitioner's brief analyzes the history of the delayed discovery doctrine through the various decisions of the Florida courts. Davis then makes a suggestion of how she would harmonize these decisions in a way which would relieve her from her own wrongdoing --- from Davis' systematic looting of the assets of a helpless family member who placed her trust in her niece and sister.

When looking for guidance, the Court often turns to other jurisdictions to examine their legal analysis. California, a state that is in the forefront of jurisprudence, has contemplated and concluded how to harmonize the application of the delayed discovery doctrine so that the policy considerations supporting the doctrine are fair and workable. In reiterating California decisions on this subject the court in *Prudential Home Mortgage Company, Inc. v. Superior Court*, 66 Cal.App.4th

1236, 78 Cal.Rptr.2d 566 (1998) stated:

> The application of the delayed discovery rule rests on considerations of policy. "Two common themes run through the cases applying the discovery rule of accrual. First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries. In some instances, the cause or injuries are actually hidden.... Even when the breach and damage are not physically hidden, they may be beyond what the plaintiff could reasonably be expected to comprehend. An action for professional malpractice, for example, typically involves the professional's failure to apply his or her specialized skills and knowledge.... The same rationale has been adopted where defendant held itself out or was required by law to be specially qualified in a trade. [Citations.] [¶] Second, courts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. **The rule is generally applicable to confidential or fiduciary relationships.**" (*Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1614-1615, 265 Cal.Rptr. 605; see *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1526, 37 Cal.Rptr.2d 810).
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> In *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 195 Cal.Rptr. 421, the court applied the delayed discovery rule to a breach of contract action where the breach was committed "in secret" and the harm was not reasonably discoverable by plaintiffs at the time. The court reviewed the application of the rule in California and other states and concluded, "A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance. (Id. at p. 831, 195 Cal.Rptr. 421.)

April Enterprises, Inc. v. KTTV, *supra*, further explained why the delayed discovery rule is applicable to a fiduciary relationship as well as explaining its procedural safeguards:

> Thus, the date-of-discovery rule is applied to a fiduciary when strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to mislead their fiduciary to delay bringing suit. *It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interests*.
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> * * * * *
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> Applying the discovery rule to certain, rather unusual breach of contract actions poses no more burden for the courts than the date-of-injury accrual rule in most instances. The discovery rule itself contains procedural safeguards protecting against lengthy litigation on the issue of accrual. It presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified. And when the case is tried on the merits the plaintiff bears the burden of proof on the discovery issue. April Enterprises, Inc. v. KTTV, 147 Cal.App.3d 805, 827, 832; 195 Cal.Rptr. 421,433,437 (1983).

By adopting these policy considerations as its own, this Honorable Court's decisions in *Federal Insurance Company v. Southwest Florida Retirement Center*, 707 So. 2d 1119 (Fla.1998) and *Hearndon v. Graham*, 767 So. 2d 1179 (Fla. 2000) are harmonized. The holdings of the various Florida cases cited on pages 21-26 of the Petitioner's brief now generally appear to flow in a recognizable pattern because the Florida courts have inherently followed California policy when coming to a decision of whether the delayed discovery doctrine should be applicable, based upon the facts of the particular case before the courts. It makes for a fair, workable policy that takes

into consideration the necessity of set limitations for business expediency where arms length transactions and caveat emptor are the creed, yet protects those unknowingly injured or in a fiduciary relationship. The underlying policy considerations raised earlier in the Respondent's brief have been met by the California courts. It is respectfully submitted that this Honorable Court do the same.

The proposed judicial construction will not conflict with the statutory scheme. As aptly discussed in *Hearndon v. Graham*, there is a distinct difference between accrual of a cause of action which then triggers the running of a statute of limitations, and tolling which comes into effect after the statute of limitations has already begun to run. Section 95.051 Fla. Stat. (2000) deals with tolling, not accrual of a cause of action. The causes of action in Section 95.11 Fla. Stat. (2000) providing for delayed discovery are actually statutes of repose, setting forth outer limits for bringing a cause of action.

Pleadings in the Trial Court

Davis maintains that the delayed discovery doctrine does not apply because it was not properly pled. Yet, Davis has noted that Monahan's Fifth Amended Complaint specifically alleges that the action was not barred by the statute of limitations even though the events began to occur in 1990 because they *were not discovered* in 1995 as a result of the concealment by the Defendants.

(R:939;App.0009). Monahan then proceeds to set forth the underlying facts constituting the concealment by the allegations of her Fifth Amended Complaint.

Davis raised the statute of limitations as an affirmative defense. (R:1007-1008). Monahan replied to the affirmative defense by denying it. (R:1016-1017). No responsive pleading was actually required, since Monahan had already set forth reasons constituting an avoidance in her Fifth Amended Complaint. Moreover, "the limitations defense asserted in a defendant's answer requires no responsive pleading by the plaintiff, since any fact that would tend to defeat the defense is available to the plaintiff at trial." 35 Fla. Jur 2d *Limitations and Laches* §7.

Davis mistakenly states that Monahan abandoned her cause of action for fraud that was contained in the Second Amended Complaint. Count I of the Second Amended Complaint was entitled "Fraud and Breach of Fiduciary Duty by Defendant Elizabeth L. Davis." (R:730). Count III of the Second Amended Complaint was entitled "Fraud and Breach of Fiduciary Duty by Defendant Betty Kish." (R:737). When Davis amended her complaints, the underlying allegations for fraud remained; just the heading of the count was changed.

Thus, the underlying allegations of Count I for "Breach of Fiduciary Duty by Defendant Elizabeth L. Davis" in the Fifth Amended Complaint are virtually identical to its counterpart in the Second Amended Complaint. (R:730-736,939-946). Likewise

the underlying allegations of Count III for "Breach of Fiduciary Duty by Defendant Betty Kish" in the Fifth Amended Complaint are virtually identical to its counterpart in the Second Amended Complaint. (R:737-743, 947-953). See *Ambrose v. Catholic Social Services, Inc.,* 736 So. 2d 146 (Fla. 5th DCA 1999) where the theories advanced were found to be for fraudulent conduct despite their apparent headings of fraudulent misrepresentation/concealment; negligent misrepresentation/ failure to disclose; breach of fiduciary duty; and intentional infliction of emotional distress. Likewise, in the instant case, although the heading of the counts were styled "Breach of Fiduciary Duty" they also stated a cause of action for fraud.

In summary, this case can be decided on its unique facts which permits Monahan to rely upon the power of attorney given to Davis, thereby coming within the Statute of Limitations. Should this Honorable Court use this case as a vehicle to harmonize the law on the delayed discovery doctrine, the California courts have already shown how to reconcile the various types of factual situations and causes of action in a fair and workable manner. As this Honorable Court stated in *Creviston v. General Motors*, 225 So. 2d 331,334 (Fla. 1969):

> From the standpoint of legal principals, the holdings in the cases above discussed appear to crystallize in favor of application of the blameless ignorance doctrine in those instances where the injured plaintiff was unaware or had no reason to know that an invasion of his legal rights has occurred. In reality, such a doctrine is merely a recognition of the fundamental principle that regardless of the underlying nature of a cause

> of action, the accrual of the same must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights.

Because of the unique facts of this case, this Honorable Court should find no conflict and dismiss because review was improvidently granted. Alternatively, the decision of the Fourth District Court of Appeal should be affirmed.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT

A. **Monahan's Lack of Knowledge and Inferences**

Monahan has been caught in a "Catch 22." Davis has steadfastly refused to comply with discovery requests for bank statements, copies of checks and federal income tax returns, which would have easily provided Monahan with the direct evidence of Davis spending Monahan's money improperly and her concealment of these actions. (R:381-396). The trial court's entry of the partial summary judgment, has prevented Monahan from making any further inquiry into these transactions, even for impeachment purposes at trial. (R:1936-1937). Consequently, the inferences from the record are critical to overcome Davis' position that Monahan actually knew and consented to the financial transactions by Davis, and the issue of when Monahan discovered these transactions. These inferences are not stacked. They are coupled with direct record evidence which enables Monahan to raise material issues of fact of

whether there was concealment so that Monahan was unaware of the transactions as they took place.

Although the trial court based its decision upon the arguments made and evidence presented at the hearings, a reviewing court cannot disregard the depositions, affidavits and exhibits on file in determining the correctness of the summary judgment. *Napelbaum v. Lawyer's Title Services, Inc., of Broward County*, 133 So. 2d 112 (Fla. 2d DCA 1961). A review of the record provides ample evidence that Monahan did not know of the transactions as they took place.

On page 33 of her brief, Davis maintains that Davis did not conceal any of the transactions which were completed pursuant to the power of attorney. Yet, there was sworn testimony that Davis impersonated Monahan when cashing Monahan's bonds at Citizens Bank by endorsing her name to the back of U.S. Savings Bonds worth $74,893.20. (R:1477-1478 at 41-42; 1529 at 278; 1094). Citizens Bank has no record of any account opened in Monahan's name with the funds from these bonds, as alleged by Davis. (R:1477 at 41; 513). Why would Davis impersonate Monahan and forge her signature if not to conceal Davis' actions? If Monahan were aware of the transaction, there would have been no need for this subterfuge.

Davis also maintains that Monahan had knowledge of and consented to the transactions allegedly performed by Davis. The most obvious record evidence

disputing this contention is the improper raiding of the A.G. Edwards account by the defendants which transferred Monahan's assets from that brokerage account into another account titled in Kish and Davis' names. This occurred within days after they received written notification of Monahan's revocation of the power of attorney and the express instructions that "no transactions entered into by you on her behalf with other parties will be effective." (A:3,4,7).

There is record evidence of the affidavit that Monahan executed which affirmed under oath, as true and correct, the allegations of the Second Amended Complaint. (R:141;A:2). The same pertinent allegations of this pleading were also stated in the Fifth Amended Complaint. Monahan confirmed that she relied on the fact that Davis would use the power of attorney properly and in such a way so as to conserve and protect the Respondent's assets. (R:51, 941). Monahan did not authorize Davis to exercise her power of attorney to redeem any of the U.S. Savings Bonds nor did she gift them to Davis. (R:53, 943). Monahan confirmed that Davis used the funds for her own personal use. (R:53, 482, 492, 943). Monahan additionally confirmed the allegations that Davis improperly withdrew the Respondent's money from the Chase Manhattan Bank, N.A. and from the Apple Savings Bank in New York in March, April and May, 1990 and used the funds for her personal use. (R:54-55, 944-945). This was admitted by Davis during her deposition. (R:492). These statements directly

contradict Davis' affidavit that she never used Monahan's property for her own use. (R:1031). They also contradict the self-serving statements in Davis' Affidavit, such as that all the transactions were "completed with my aunt's knowledge and consent." (R:1030).

Moreover, if Monahan was aware of the extent of her assets, or how they were being used by Davis and Kish, why was she cleaning Kish's apartment to earn spending money? Why was she permitting them to give her only $300 a month for living expenses? If Monahan was informed of what was being done with her money, why did she have to contact the various financial institutions in order to ascertain what became of her assets?

Monahan's actions in attempting to find out what happened to her assets belie the self-serving affidavits of Davis and Kish that she was informed of and consented to all of the transactions involving her assets. The depositions of Davis and Kish are replete with evasive answers or "I don't remember" to questions about their suspect transactions. (R:467-469, 485-486, 497-499,501-506, 509-510, 522-525, 530-533, 627, 630-632, 636, 639, 646-648, 650-651, 653-654, 659-660, 664-668, 671-673, 675-676, 680-681, 684-685).

Davis is in error when again contending on page 34 of her brief that Sadler said "she could not testify that the Defendants retained or otherwise converted a single

dollar belonging to Monahan." What Sadler actually confirmed was that she had "no personal knowledge" of the actions of Davis or Kish. (R:1520 at 381-383). However, Sadler represented that her information was based upon the financial records that she had obtained. (R:1480 at 63). These records contradicted the deposition testimony of both Davis and Kish. (R:1092-1096;A:1).

Davis inaccurately maintains that the District Court overlooked the argument, raised five times in her brief to this Court, that there was "undisputed record evidence" that Monahan was audited by the IRS for failing to report the liquidation of the U.S. savings bonds and "undisputed record evidence" regarding an IRS letter sent to her. It first must be clarified that the District Court did not overlook this argument because it was never raised either in Davis' Answer Brief or at oral argument. The first time this point was discussed was in Petitioner's Motion for Rehearing of the appellate court's decision.

Secondly, there was no "record evidence" of a letter, just argument of counsel at one of the hearings on the motion for summary judgment. The audit came as a result of the IRS finding a discrepancy from the unreported income taken by the Defendants which had resulted from the sale of Monahan's U.S. Savings Bonds, not reporting the pension income that Davis had taken and the omission of interest and dividend income from Plaintiff's accounts. (R:952,741-742,1092-1096;A:1).

Kish and her accountant responded to the audit and negotiated the additional tax payment of $12,457 which was paid by Kish on January 26, 1993 out of the A.G. Edwards account. (R:59,683;A:9). Since Monahan could not read or hear at that time, was heavily dependent on Kish, signed papers for Kish without knowing what she was signing, and Kish had stated that she took care of all Monahan's financial and tax matters, genuine issues of material fact were certainly raised regarding Monahan's knowledge of the Defendants' misappropriations by the receipt of a letter from the IRS in 1993. (R:1482 at 81, 1483 at 85, 1488 at 126, 128, 2025; A:6). These facts certainly distinguish this case from *Sands v. Diliberto*, 546 So. 2d 455 (Fla. 3d DCA 1985).

In summary, the record and proper inferences from the record amply show that there are genuine issues of material fact regarding whether Monahan was aware of the alleged wrongdoing by the Defendants as it occurred. The record and proper inferences from the record also raise genuine issues of material fact that Monahan did not discover the alleged wrongdoing by the Defendants until 1995. Thus, the District Court's proper reversal of the partial summary judgment should be affirmed by this Honorable Court.

B. **Monahan Can Rely on Hearsay to Prevail**

The District Court's misreliance on Ehrhardt and Section 90.803(3) Fla. Stat.

(2000) is not fatal to the admissibility of Monahan's statements in this case because of the axiom that even though a court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. *JTM, Inc. v. Totalbank*, 795 So. 2d 161 (Fla. 3d DCA 2001). Consequently, if the court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record. *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 2d DCA 1999); *Triana v. Fi-Shock, Inc.*, 763 So. 2d 454 (Fla. 3d DCA 2000).

Section 90.803(24) Florida Statutes (2000) is the hearsay exception which applies. It states in pertinent part as follows:

Hearsay exception; statement of elderly or disabled adult

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s.825.101, describing any act of abuse or neglect, any act of exploitation...not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
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> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and
>
> 2. The elderly person or disabled adult either:
>
> a. Testifies; or

b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

The definitions of "disabled adult" and "elderly person" are defined in Section 825.101(4) and (5) as follows:

(4) "Disabled adult" means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

(5) "Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

Monahan statements to Sadler certainly come within the hearsay exception of a statement of an elderly person or disabled adult. This exception is applicable in civil cases and "was created to balance the need for reliable out-of-court statements of elderly or disabled adult abuse victims against the rights of the defendant." Charles W. Ehrhardt, *Florida Evidence* §803.24 (2001 ed.).

It will therefore be up to the trial court, pursuant to Section 90.803(a)(1) to conduct a hearing to determine whether the source of the information or the method

or circumstances by which the statement is reported indicates its trustworthiness. It is the trial court which will find whether the time, content and circumstances of the statements provide sufficient safeguards of reliability.

CONCLUSION

Based on the record, the citations of authorities and arguments made, Respondent Helen K. Monahan respectfully requests that this Honorable Court affirm the District Court's decision in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix was sent by U.S. Mail/Hand Delivery this 11th day of December, 2001, to: **Gregg W. McClosky, Esq**., and **David J. Pascuzzi, Esq**., Mattlin & McClosky, 2300 Glades Road, Suite 400, East Tower, Boca Raton, Florida 33431.

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CERTIFICATE OF COMPLIANCE

I certify that this brief, in Times New Roman 14 point font, complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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