IN THE SUPREME COURT OF FLORIDA

ELIZABETH L. DAVIS,	)	
	)	
Petitioner,	)	CASE NO. SC: SC01-1157
	)	
vs.	)	
	)	
HELEN K. MONAHAN,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S INITIAL BRIEF

_____

On Review from the District Court

of Appeal, Fourth District

State of Florida

No. 00-1982

_____

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PRELIMINARY STATEMENT

In this brief, petitioner, defendant below, Elizabeth L. Davis will be referred to as "Davis" or "Petitioner" and respondent, plaintiff below, Helen K. Monahan will be referred to as "Monahan" or "Respondent". Defendant below, Betty Kish will be referred to as "Kish" and Monahan's guardian, Barbara K. Sadler, will be referred to as "Sadler". Davis and Kish will be referred to collectively as "Defendants". Citations to the record on appeal will be made by the letter "R" and the appropriate page number. Parallel citations to the appendix of this brief will be made by the letters "App." and the appropriate page number of the appendix.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the Fourth District Court of Appeal's reversal of two orders, one dated April 18,2000 and the other dated May 31, 2000, the latter of which, by entry of partial summary final judgment, dismissed Davis from this action with prejudice on the basis of the statute of limitations. Monahan v. Davis, 781 So. 2d 436, 440 (Fla. 4th DCA 2001) (R. 1920; 1975)(App. 0001-0007). In this action, Monahan, pursuant to her Fifth Amended Complaint, sought monetary damages against Davis, Monahan's niece, and Kish, Monahan's sister, for the alleged wrongful taking of Monahan's cash, stocks, bonds, interest, dividends, and pension and social security payments. (R. 938-62)(App. 0008-0032). Monahan's theories of recovery

were breach of fiduciary duty against Davis; and civil theft, civil conspiracy, conversion, and unjust enrichment against Davis and Kish. (R. 938-62)(App. 0008-0032).

Defendants moved for summary final judgment on several grounds including statute of limitations since the alleged wrongdoings with regard to Monahan's personal property (initially raised by Monahan's Amended Complaint filed April 15, 1998) occurred as early as 1990. (R. 1052-55)(App. 0060-0063). Davis submitted affidavit testimony declaring, in summary, that Davis never retained any of Monahan's property for her own personal use and any expenses paid using Monahan's property were paid at Monahan's request, with her authority, knowledge and consent and were for expenses incurred by and/or for the benefit of Monahan. (R. 1030 ¶ 8)(App. 0090 ¶ 8). Any of Monahan's property which was in Davis' custody pursuant to Monahan's consent, but which was not spent at her request on her expenses, was returned to her custody, the post-expense remainder being deposited into an account of Monahan's choosing. (R. 1030 ¶ 8)(App. 0090 ¶ 8). Further, Davis' deposition testimony was that all Monahan funds deposited in Davis' personal account were used for Monahan. (R. 482-83, 493-94, 526)(App. 0146-0147, 0157-0158, 0190).

Monahan, to defeat the statute of limitations argument, took the position,

among other arguments, that she did not discover the alleged wrongdoing until 1995.[1] (R. 1979 at 15-18, 31, 32-33, 35)(App. 0471-0474). Davis argued that a discovery rule did not apply to Monahan's causes of action. (R. 1054)(App. 0062). At one of the four hearings on Defendants' Motion for Summary Final Judgment, it was clear that the court was seeking record proof that Monahan did not discover the alleged theft of her property until 1995. (R. 1979 at 15-18, 31, 32-33, 35)(App. 0471-0474, 0487, 0488-0489, 0491). Monahan did not and could not offer any record evidence to support her delayed discovery argument. (R. 1992 at 12-15; 1978 at 5-14; 1979 at 15-18, 31, 32-33, 35)(App. 0433-0436; 0445-0454; 0471-0474, 0487, 0488-0489, 0491).

However, the trial court found that Monahan knew or should have known of the alleged wrongdoing before 1995, relying on undisputed record evidence that showed that in 1993 Monahan was audited by the IRS for failing to report the income generated by the liquidation of the U.S. Savings Bonds in 1990 that allegedly were improperly taken, giving rise, in part, to this action. (R. 1979 at 47-48)(App. 0503-0504). The undisputed record evidence showed that the IRS sent the letter regarding the audit to Monahan and that Monahan gave the letter to Kish. (R. 1979 at 45,

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[1] Monahan did not plead delayed discovery as an avoidance defense. (R. 1016-17).

48)(App. 0501, 0504). Accordingly, the trial court ordered:

> The court finds that the statute of limitations bars recovery for any actions 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; 1979 at 51)(App. 0006; 0507).

Monahan appealed, arguing among other things, that the trial court erred in granting summary judgment since record evidence indicated that Monahan did not know of the alleged wrongdoing until 1995, when she allegedly had other family members inquire about the status of her assets. (Appellant's Reply Br. at 11; R. 1479 at 54-55; 1508 at 281)(App. 0316 at 54-55; 0374 at 281). Additionally, Monahan argued, contrary to Davis' assertions, that the delayed discovery doctrine relied on in Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000) applied to all causes of action to delay the accrual of Monahan's causes of action until the time she allegedly discovered the wrongdoing in 1995; although no apparent reason for her ignorance of her affairs during 1990 to 1995 was ever established through record evidence and the undisputed record evidence established that she had actual knowledge.

The Court of Appeal of Florida, Fourth District agreed with Monahan, reversing the entry of summary judgment in favor of the defendants. See Monahan, 781 So. 2d at 440. The District Court held that the delayed discovery doctrine can apply to delay the accrual of all causes of action except for cases of fraud and products

liability where the accrual is governed by § 95.031(2) of the Florida Statutes. Id. at 438.

Davis' Motion for Rehearing, Motion for Rehearing En Banc, Motion to Certify Conflict and to Certify Question of Great Public Importance was filed March 15, 2001. The motions were denied on April 20, 2001. Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on May 18, 2001. This Court accepted jurisdiction by Order dated October 22, 2001.

The facts giving rise to this action begin 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!

In or about 1990, to aid in Monahan's relocation to Florida, Monahan executed a Power of Attorney in favor of Davis and stayed for some time with Davis in Maryland. (R. 448; 1030)(App. 0112; 0090). With regard to the specific transactions which allegedly gave rise to Monahan's claims in this action, the Power of Attorney gave Davis authority to conduct Monahan's affairs including but not limited to redemption of U.S. Savings Bonds. (R. 967 ¶ 2)(App. 0037 ¶ 2). Davis,

pursuant to the Power of Attorney, redeemed Monahan's U.S. Savings Bonds at Citizens Bank in Maryland. (R. 513)(App. 0177). Davis then deposited the proceeds into an account which she had opened for Monahan at the same bank. (R. 513)(App. 0177).

Also about the same time, Davis helped Monahan close her New York accounts at Chase Manhattan Bank and Apple Bank. (R. 480-81; 486)(App. 0144-0145; 0150). The Apple Bank accounts were closed by Monahan signing her Certificates of Deposit and then, with her obvious consent, depositing them into Davis' account at Sovereign Bank in Maryland. (R. 481-82)(App. 0145-0146). The Chase Manhattan account was closed and Monahan herself uttered checks to Davis for deposit into Davis' account in Maryland. (R. 486)(App. 0150). The proceeds from Monahan's accounts were used, with Monahan's consent for Monahan's expenses. (R. 483)(App. 0147). Davis paid for Monahan's expenses for at least a year. (R. 485)(App. 0149).

Some of the proceeds, including any post-expense remainder, were transferred to an account in Florida at Barnett Bank; a joint account held by Kish and Monahan. (R. 1030 ¶ 8; 1042 ¶¶ 5-6)(App. 0090 ¶ 8; 0100 ¶¶ 5-6). Davis never retained any of Monahan's property for her own personal use and any expenses paid using Monahan's property were paid at Monahan's request, with her authority,

knowledge and consent and were for expenses incurred by and/or for Monahan. (R. 1030 ¶ 8)(App. 0090 ¶ 8). Any of Monahan's property which was in Davis' custody pursuant to Monahan's consent, but which was not spent at her request on her expenses, was returned to her custody, the post-expense remainder being deposited into an account of Monahan's choosing. (R. 1030 ¶ 8)(App. 0090 ¶ 8).

The Barnett Bank account was a joint account and Monahan was added to the account at Monahan's request. (R. 624-25; 1042 ¶ 5-6)(App. 0227-0228; 0100 ¶¶ 5-6). With Monahan's consent, in 1990, funds from the Barnett Bank account were used to open a joint A.G. Edwards brokerage account. (R. 649-50; 1042 ¶ 8)(App. 0252-0253; 0100 ¶8). Despite Monahan and Kish having joint custody and control over these accounts, Kish never retained any of Monahan's property for her own personal use. (R. 1042 ¶¶ 6-8)(App. 0100 ¶¶ 6-8). Any of Kish's expenses which were paid using either account were paid with Kish's money. (R. 1042 ¶¶ 7-8)(App. 0100 ¶¶ 7-8). If expenses were paid using Monahan's property, such expenses were paid at Monahan's request, with her authority, knowledge and consent and were for expenses incurred by and for Monahan. (R. 1042 ¶¶ 7-8)(App. 0100 ¶¶ 7-8).

In 1993 Monahan was audited by the IRS for failing to report the income generated by the liquidation of the U.S. Savings Bonds in 1990 that allegedly were

improperly taken, giving rise, in part, to this action. (R. 680; 1478 at 46, 47; 1485 at 98; 1979 at 45, 47-48)(App. 0283; 0314 at 46, 47; 0327 at 98; 0501, 0503-0504). There is no dispute that the IRS sent the letter regarding the audit to Monahan. (R. 1979 at 45, 48)(App. 0501, 0504). This resulted in additional tax paid by Monahan. (R. 1478 at 46)(App. 0314 at 46).

Monahan at the time of her deposition in December of 1998, could not recall any wrongdoing by either of the Defendants with regard to her funds. (R. 343, 362-63). Nor could Monahan recall Davis or Kish improperly spending any of Monahan's money. (R. 343).[2] Sadler did not have personal knowledge of any facts to contradict that Monahan authorized, consented to, ratified and approved of Davis and Kish's conduct with respect to Monahan's affairs. (R. 1522 at 392)(App. 0402 at 392). In fact, since Sadler was not present with Monahan from 1990 to 1994, Sadler did not know whether Davis or Kish acted contrary to Monahan's wishes with respect to her property. (R. 1493 at 166-67)(App. 0345 at 166-67).

After Monahan moved to Florida in early 1990, Monahan lived with her sister, Julia Evans ("Evans"). (R. 623; 1483 at 86)(App. 0226; 0324 at 86). Monahan

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[2] After Monahan's deposition was taken, guardianship proceedings were filed in January of 1999 on behalf of Monahan in Ohio without notice to Kish or Davis. (R. 1500 at 218-19; 2069-2109)(App. 0358 at 218-19). Sadler was appointed as Monahan's guardian in February of 1999. (R. 1503 at 242-43; 2108-09)(App. 0364 at 242-43).

lived with Evans until September of 1994 when Monahan went to Ohio to visit her brother, Alex Keselowsky ("Keselowsky") while Evans went out of town to visit other relatives. (R. 1475 at 19; 1487 at 119)(App. 0307 at 19; 0332 at 119). Although Evans returned from her visit, Monahan remained in Ohio to schedule and complete eye surgeries in November and December of 1994. (R. 1488 at 123, 126)(App. 0333 at 123, 126).

Although Sadler did not have personal knowledge of Monahan's sources of income, her total amount of her expenses, or her living conditions before September of 1994, during the time period from September of 1994 to December of 1994, Sadler saw her "pretty frequently" and based on her experiences with Monahan during that time period she felt her mental faculties and capabilities were "pretty good." (R. 1475-76 at 19 - 20, 22 - 26, 1484 at 90, 1488 at 126, 1493 at 166, 1572 at 398)(App. 0307-0309 at 19-20, 22-26, 0325 at 90, 0334 at 126, 0345 at 166, 0404 at 398). Accordingly, there has been no claim that Monahan was incompetent or suffering from any type of mental disability at that time or any time prior. (R. 1488 at 127)(App. 0334 at 127). After surgery on each eye had been completed, Sadler noticed a very noticeable difference in Monahan, "She became active." (R. 1488 at 127) (App. 0334 at 127). According to Sadler, Monahan could do what she "pretty well wanted to do" and Monahan understood what was going on in her daily life. (R.

1488 at 127)(App. 0334 at 127).

Monahan may have decided to remain in Ohio after Evans died in early March of 1995. (R. 1488 at 120)(App. 0332 at 120). According to Sadler, in Ohio, Monahan wanted to handle her own financial affairs and sought out the advice of attorney Richard Henkel ("Henkel"). (R. 1487 at 116)(App. 0331 at 116). She, along with Sadler, Sadler's Husband Bill ("Bill Sadler"), and Keselowsky met with Henkel in June of 1995. (R. 1487 at 115)(App. 0331 at 115). At that meeting Monahan executed a Power of Attorney in favor of Bill Sadler and a health care power of attorney in favor of Keselowsky. (R. 1487 at 117)(App. 0331 at 117). Following that meeting, Henkel sent a letter solely addressed to Kish, dated June 2, 1995, revoking any powers of attorney that may have been granted to Kish and requesting an accounting from Kish of all transactions involving Monahan's assets that Kish made on Monahan's behalf since 1990. (R. 2017-18). However, at no time did Monahan ever execute a Power of Attorney in favor of Kish. (R. 622-23)(App. 0225-0226).

On June 21, 1995, attorney Carl Schuster ("Schuster") responded to Henkel solely on behalf of Kish, communicating Kish's concerns regarding Monahan's apparent decision to relocate in Ohio. (R. 2022-24). At 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. (R.

1511-12 at 306-07; 2022; 2028-29)(App. 0380-0381 at 306-07). Nevertheless, by letter dated August 17, 1995, Schuster, on behalf of Kish, provided documents and other information regarding Monahan's accounts at that time. (R. 2030-31).

According to Sadler, it was at some time during the latter part of 1995 that Monahan decided to sell her Florida condominium. (R. 1501 at 144)(App. 0339 at 144). Also during this time, according to Sadler, Monahan, through Bill Sadler, contacted various financial institutions and obtained information regarding Monahan's accounts. (R. 1479 at 54-55; 1508 at 281)(App. 0316 at 54-55; 0374 at 281). According to Sadler, during the latter part of 1995 and early 1996, Monahan came to her with the records for Sadler's analysis. (R. 1479 at 50)(App. 0315 at 50). On February 2, 1996, Monahan revoked the Power of Attorney in favor of Davis. (R. 976)(App. 0046).

Based on her review of some of Monahan's records, Sadler could not ascertain how $200,000 had been spent by Davis. (R. 1478 at 46)(App. 0314 at 46). However, Sadler acknowledged that she had no personal knowledge that Defendants converted any of Monahan's property or used her property for their own personal use. (R. 1518-19 at 364-68; 1520 at 382-83)(App. 0394 at 364-68; 0400 at 382-83). According to Sadler, Monahan lost $587,267 as a result of the Defendants' breach of fiduciary duty, civil theft, fraud and conversion even though she could not prove that

the Defendants retained or otherwise converted a single dollar belonging to Monahan. (R. 1520 at 381-83)(App. 0400 at 381-83).

Also at the end of 1995, Monahan created a trust, initially naming Keselowsky as trustee and also as beneficiary. (R. 1503 at 240-42)(App. 0363 at 240-42). Sadler, Bill Sadler, and one of Evans' sons were successor beneficiaries under the trust. (R. 1503 at 241)(App. 0363 at 241). Around the time Sadler was appointed as Monahan's guardian in February of 1999, she also became trustee of the trust, although Sadler attested at the time she applied for appointment of guardian that she was not an administrator, executor, or other fiduciary of the estate of Monahan. (R. 1503 at 242-43; 2077-79; 2108-09)(App. 0364 at 242-43). Despite the apparent conflict of interest in having an interest in Monahan's estate and representing her as her guardian, Sadler allegedly authorized the November 2, 1999 filing of the Fifth Amended Complaint on behalf of Monahan. (R. 938)(App. 0052).

SUMMARY OF THE ARGUMENT

The District Court below reversed the entry of summary judgment in favor of Davis based on the statute of limitations, holding in part, that the delayed discovery doctrine applied, based on Monahan's assertions, to delay the accrual of the causes of action plead in this case. This decision conflicts with the application of the doctrine by other Florida courts interpreting the scope of the discovery rule. In

analyzing the history of the delayed discovery doctrine through the decisions of this Court and others, and the development of the statutory limitations scheme by the legislature, the apparent conflict between the common law delayed discovery doctrine and the legislature's enactment of a general rule governing accrual and its enactment of express discovery rules for specific causes of action, can be harmonized only if Hearndon is limited to its unique facts. Otherwise, the legislature's express mandate regarding accrual of causes of action is meaningless and the decisions of this Court and others limiting the application of a discovery rule become irreconcilable with a common law delayed discovery rule that applies to all causes of action.

As set forth below, causes of action solely seeking to recover economic damages should be governed by the statutory scheme where a discovery rule is provided in actions for fraud. Absent fraud or some other statutorily enumerated provision, a cause of action seeking economic damages accrues when the facts giving rise to the cause of action occur. This rule gives meaning to the legislature's specific enactments while providing the courts the ability to apply the delayed discovery doctrine to actions not already governed by a statutory discovery rule involving physical injury arising from latent facts and consistent with the policies supporting Hearndon. Applying the statutory limitations scheme to the causes of action asserted in the instant case, there is no delay in accrual because Monahan has not and cannot

prove that Davis fraudulently concealed or misrepresented any of the facts regarding the transactions in which Davis allegedly misappropriated Monahan's money.

Even if a discovery rule applied to all or some of Monahan's claims, the undisputed record evidence demonstrates that Monahan knew and consented to all the transactions giving rise to the allegations of theft as they occurred beginning in 1990. Additionally, the undisputed record evidence, upon which the trial court relied, indicated that in 1993, the IRS audited Monahan for failing to declare interest from the allegedly improper redemption of the U.S. Savings Bonds. The IRS sent Monahan a letter describing the source of the interest from the redeemed bonds. Accordingly, Monahan should have known of these alleged claims in 1993 when she was audited.

Monahan cannot create issues of fact to support her claim that she did not discover the alleged misappropriations until 1995 based on statements by Monahan to Sadler regarding Monahan's requests that Sadler assist Monahan to account for her assets in 1995. Monahan's requests for information regarding her assets cannot support the improper inferential leap that Monahan never knew of the disposition of her assets before 1995. Additionally, any statements made by Monahan to Sadler in 1995 are hearsay and inadmissible to prove that Monahan did not know of the status of her assets before 1995.

ARGUMENT

I. THE DELAYED DISCOVERY DOCTRINE DOES NOT APPLY TO THE CLAIMS ALLEGED IN THE INSTANT CASE.

This Court should reverse the decision entered by the District Court because the delayed discovery doctrine does not apply to delay the accrual of the causes of action in this case.[3] Additionally or alternatively, Hearndon should be limited to its unique facts and the accrual of the causes of action in this case should be determined by the applicable Florida statutory limitations scheme. The application of the statute of limitations by the trial court and the subsequent interpretation of the delayed discovery doctrine are questions of law to be reviewed de novo. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001) ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo."); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000) ("[T]he standard of review for a pure question of law is de novo."), cert. denied, 121 S. Ct. 1487 (2001).

Under Florida law, time limitations on legal actions are governed by the provisions of Chapter 95 of the Florida Statutes. Morsani, 790 So. 2d at 1075. Under

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[3] Pursuant to the Fifth Amended Complaint, Monahan attempted to plead against Davis actions for breach of fiduciary duty, conversion, civil theft, civil conspiracy, and unjust enrichment. (R. 938-62)(App. 0008-0032).

Florida's statutory limitations scheme, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues. § 95.031, Fla. Stat. (1997). A cause of action accrues when the last element constituting the cause of action occurs. Id. (1).

In the instant case, Monahan advanced five (5) theories against Davis: Count I, breach of fiduciary duty; Count II, civil theft; Count V, civil conspiracy; Count VI, conversion; and Count VII, unjust enrichment. (R. 938-962)(App. 0008-0032). The applicable limitations period for an action for breach of fiduciary duty is four years. § 95.11(3)(o), Fla. Stat. (1997); Halkey-Roberts Corp. v. Mackal, 641 So. 2d 445, 447 (Fla. 2d DCA 1994). An action for civil conspiracy is also governed by a four year statute of limitations, Timmins v. Firestone, 283 So. 2d 63, 65 (Fla. 4th DCA 1973); Armbrister v. Roland Int'l Corp., 667 F.Supp. 802, 809 (M.D. Fla. 1987), as is an action for conversion. Bove v. PBW Stock Exchange, Inc., 382 So. 2d 450, 452 (Fla. 2d DCA 1980); Small Bus. Admin. v. Echevarria, 864 F.Supp. 1254, 1260 (S.D. Fla. 1994). An action for unjust enrichment is governed as an action on a contract not founded on a written obligation and must be commenced within four years after accrual. §95.11(3)(k), Fla. Stat. (1997); Venditti-Siravo, Inc. v. City of Hollywood, Florida, 418 So. 2d 1251, 1253 (Fla. 4th DCA 1982); Fowler v. Towse, 900 F.Supp. 454, 459 (S.D. Fla. 1995). Finally, § 772.17 requires a civil theft claim

to be commenced within five (5) years after the conduct in alleged violation, terminates or the cause of action accrues. § 772.17, Fla. Stat. (1997).

The discovery rule provided by § 95.031 of the Florida Statutes only applies to actions for products liability and fraud. § 95.031(2), Fla. Stat. (1997). It does not apply to intentional torts beyond fraud such as breach of fiduciary duty and civil conspiracy. See Halkey-Roberts, 641 So. 2d at 447 (holding discovery rule does not apply to action for breach of fiduciary duty); Armbrister, 667 F.Supp. at 809 (ruling limitation period for conspiracy cause of action begins to run on accrual not discovery). Likewise, an action for unjust enrichment is barred after four years from accrual as opposed to discovery by the plaintiff. See Fowler, 900 F.Supp. at 460. Finally, the discovery rule does not apply to an action for civil theft or conversion. See § 772.17, Fla. Stat. (1997); Armbrister, 667 F.Supp. at 822; Bove, 382 So. 2d at 452; but see, Senfeld v. Bank of Nova Scotia Trust Co., 450 So. 2d 1157, 1164 n.10 (Fla. 3d DCA 1984).

As this Court noted in Morsani, there are several ways a party may "deflect" the applicability of a statute of limitations. Morsani, 790 So. 2d at 1074-77. Legal theories that may avoid the effect of the statute of limitations include accrual, tolling, equitable tolling, waiver, and equitable estoppel. Id. at 1076-77.

It is important to note that here Monahan did not plead any of these

theories in her reply as an avoidance to the affirmative defense of statute of limitations. (R. 1016-17). However, in the Fifth Amended Complaint, Monahan alleged the following:

> This action is not barred by the Statute of Limitations even though the events described began to occur in 1990, because the events were concealed by Defendants from Plaintiff and were not discovered by Plaintiff until October, 1995, with this action being filed shortly following the discovery of the events herein described.

(R. 939 ¶ 4)(App. 0009 ¶ 4). Davis raised the Statute of Limitations defense to the action. (R. 1007-08 ¶ 82). Monahan did not allege an avoidance to the defense. (R. 1016-17).[4] Nor did Monahan argue at the various hearings on summary judgment that the "delayed discovery doctrine" applied. At the first two hearings on March 29, 2000 and April 6, 2000, Monahan argued concealment, not that Monahan's causes of

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[4] Davis argued below that the lack of pleading an avoidance to the statute of limitations alone was a proper basis for affirming the trial court. According to the Florida Rules of Civil Procedure, if an answer contains an affirmative defense and the opposing party seeks to avoid that defense, that party must file a reply containing the avoidance. Fla.R.Civ.P. 1.100(a); see also, Morsani, 790 So. 2d at 1081 (Wells, C.J., concurring). If no reply is served, all the allegations contained in the affirmative defense that could have been avoided are admitted. Id.; 1.110 (d), (e); see also Goldberger v. Regency Highland Condominium Ass'n, 452 So. 2d 583, 585 (Fla. 4th DCA 1984) (holding failure to plead an affirmative defense waives that defense, and an appellate court will not consider a waived defense when reviewing a summary judgment); Hertz Commercial Leasing Corp. v. Seebeck,399 So. 2d 1110, 1111 (Fla. 5th DCA 1981)(holding a reply alleges affirmative defenses to affirmative defenses). However, this argument was not addressed by the District Court.

action "accrued" in 1995. (R. 1992 at 13-15; 1978 at 5, 11; 1448)(App. 0434-0436; 0445, 0451). At the April 18, 2000 hearing, Monahan did argue that the statue of limitations begins to run from the date the alleged wrongful activities were discovered but did not argue upon what theory of law that position was based. (R. 1979 at 15)(App. 0471). Again the trial court did not reach whether that was the correct rule because Monahan could not and did not show any record evidence to contradict that Monahan knew of the transactions in question and consented to them as they occurred. (R. 1979 at 18)(App. 0474). There was no pleading nor argument that the doctrine of "delayed discovery" applied.

Nevertheless, on appeal to the District Court, Monahan successfully argued that the delayed discovery doctrine applies to all causes of action, including those advanced in the instant case. Monahan v. Davis, 781 So. 2d 436, 437-38 (Fla. 4th DCA 2001). The holding in Monahan not only puts into question every case that preceded Hearndon which held that a discovery rule did not govern accrual of specific causes of action, but also seems to extend Hearndon beyond its unique factual situation and the question presented therein.

In Hearndon, a personal injury action, the plaintiff filed suit against her stepfather claiming that she had been sexually abused as a child and that the abuse had caused her to suppress or lose memory of the events for several years until she later

recalled the abuse and filed suit. Hearndon v. Graham, 767 So. 2d 1179, 1182 (Fla. 2000). The alleged intentional sexual abuse allegedly caused the traumatic amnesia resulting in plaintiff's delayed discovery. Id. at 1181. The trial court granted defendant's motion to dismiss based on the statute of limitations rejecting the application of the delayed discovery doctrine. Id. The appellate court affirmed holding that the delayed discovery doctrine was not an enumerated basis to toll the statute of limitations but certified as a question of great public importance, essentially, whether the delayed discovery doctrine provides an exception to the statute of limitations in cases of childhood sexual abuse which causes repressed memory. Id. at 1181-82. This Court reversed the appellate court and specifically held that the delayed discovery doctrine should apply to causes of action alleging subsequent recollection of childhood sexual abuse. Id. at 1182.

A clear reading of Hearndon suggests that the delayed discovery doctrine does not apply to all causes of action, but rather only those in which the injured party is unable to readily discover an essential fact to support the cause of action caused by the alleged wrongdoing. Hearndon v. Graham, 767 So. 2d at 1184. The Hearndon court referred to this as "blameless ignorance" on the part of the injured party which delays accrual of the cause of action until the party reasonably discovers, or should have discovered, the act constituting an invasion of his or her legal rights and the

resulting injury. Id. at 1184, 1185 n.3.

As the Hearndon court noted, the delayed discovery doctrine, referred to as the "discovery rule" or the "blameless ignorance doctrine" in prior Florida state cases, derives from the adoption of the rule established in Urie v. Thompson, 337 U.S. 163, 170 (1949), a case in which the plaintiff was exposed to hazardous materials during employment and later developed silicosis, an injury that developed after the proscribed limitations period had run. Hearndon, 767 So. 2d at 1184; Urie, 337 U.S. at 165, 170; see also, Franklin Life Ins. Co. v. Tharpe, 131 Fla. 213, 214, 179 So. 406, 407 (1938) (holding statute of limitations was tolled where beneficiary of life insurance policy did not know of policy's existence until found). In holding that the plaintiff was not barred by the statute of limitations, the Urie court stated:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Urie, 337 U.S. at 170.

This Court adopted the blameless ignorance doctrine in City of Miami v. Brooks, a medical malpractice case where the plaintiff developed an injury five years after overexposure to x-rays which caused the latent injury; holding; "the statue [of limitations] attaches when there has been notice of an invasion of the legal right

of the plaintiff or he [or she] has been put on notice of his [or her] right to a cause of action." 70 So. 2d 306, 308 (Fla. 1954).

A year later this Court applied the rule to an action to recover for an employment related skin disease that developed in 1947 but was not diagnosed as specifically related to his employment until the statute of limitations would have otherwise run; holding that accrual begins when the plaintiff knows or should know that the disease was occupational in origin. Seaboard Air Line R.R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956). In Miami Beach First Nat'l Bank, this Court held that in an action by a depositor against his or her bank for the wrongful payment of a check upon a forged endorsement, the statute of limitations begins to run from the discovery of the forgery by the depositor. Miami Beach First Nat'l Bank v. Edgerly, 121 So. 2d 417, 418 (Fla. 1960).

In Creviston v. General Motors Corp., an action for implied breach of warranty for personal injury arising from a defective refrigerator door, this Court held that the statute of limitations begins to run from the date the plaintiff knew or should have known of the defect constituting the breach of warranty. 225 So. 2d 331, 333 (Fla. 1969). In analyzing past precedent regarding the "blameless ignorance doctrine" the Creviston court stated:

> [Prior holdings] appear to crystalize 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 [or her] legal rights.

Id. at 334. However, Creviston, by its own terms was not intended have broad application, "Our holding is limited solely to the matter of the commencement of the running of the three years statute of limitations in the factual posture of this case and is not otherwise extended." Creviston, 225 So. 2d 334.[5]

Of course, the holdings in these cases have been largely codified into Chapter 95 of the Florida Statutes. See, e.g., § 95.031(2), Fla. Stat. (1999) (governing accrual of actions for products liability and fraud); § 95.11(4)(b), Fla. Stat. (1999) (governing accrual of action for medical malpractice); see also, § 95.11(3)(b) (governing accrual of an action relating to the determination of paternity); § 95.11(3)(c) (governing accrual of an action founded on the design, planning, or construction of an improvement to real property); § 95.11(4)(a) (governing accrual of an action for professional malpractice other than medical malpractice); § 95.11(4)(e) (governing accrual for securities violations); § 95.11(4)(f) (governing accrual of an

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[5] This Court would later note Creviston's limiting language in Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer v. Flanagan, 629 So. 2d 113, 114 (Fla. 1993), holding that the discovery rule did not apply to actions for defamation.

action for personal injury relating to herbicide exposure while serving in the armed forces from 1962 through 1975); § 95.11(7) (governing accrual of intentional torts based on abuse).

In 1974, chapter 95 of the Florida Statutes underwent substantial revision and the Florida legislature enacted Florida's accrual statute, § 95.031 to make more precise the dates upon which various causes of action accrued. Moorey v. Eytchison & Hoppes, Inc., 338 So. 2d 558, 559 (Fla. 2d DCA 1976). Until Hearndon, this Court strictly construed the revisions to Chapter 95 to preclude the application of a discovery rule to actions for defamation and breach of contract. See Wagner, Nugent, 629 So. 2d at 115 (holding defamation accrues from time of publication and not discovery); Federal Ins. Co. v. Southwest Fla. Ret. Ctr., Inc., 707 So. 2d 1119, 1122 (Fla. 1998) (holding discovery rule did not apply to actions for breach of contract).

In Federal Ins., this Court, in construing § 95.11(2)(b), which governs limitations on actions on a contract, obligation, or liability founded on a written instrument, noted that the statutory section did not provide for a discovery rule and applied the doctrine expressio unius est exclusio alterius, concluding that the absence of such express language was clear evidence that the legislature did not intend to provide a discovery rule in § 95.11(2)(b), "To conclude otherwise would require us to write into section 95.11(2)(b), Florida Statutes (1981), a discovery rule when the

legislature has not." Federal Ins., 707 So. 2d at 1122.

Since the 1974 revisions to chapter 95, however, Florida district courts have been split in applying a discovery rule to the accrual of causes of action not expressly containing an accrual provision under chapter 95. See, e.g., Lund v. Cook, 354 So. 2d 940, 942 (Fla. 1st DCA 1978) (holding 1974 revisions did not change discovery rule although they did provide overall limitations on its application as to certain specific types of cases, reversing summary judgment grounded upon statute of limitations in action for negligent preparation of survey and plat); Bove, 382 So. 2d at 452-53 (holding cause of action for conversion accrues at the time of the conversion unless fraudulently concealed); Senfeld, 450 So. 2d at 1163 (holding discovery rule applies to action for conversion); Branford State Bank v. Hackney Tractor Co., Inc., 455 So. 2d 541, 542 (Fla. 1st DCA 1984) (holding discovery rule applied to accrual of plaintiff bank's action for conversion of property subject to its security interest); Hawkins v. Washington Shores Sav. Bank, 509 So. 2d 1314, 1315-16 (Fla. 5th DCA 1987) (reversing motion to dismiss where plaintiff depositor alleged causes of action against depository bank, bank directors, and employee for breach of contract, conversion, fraud, negligent hiring and retention, and negligence arising out of theft of funds from account since discovery rule applied to delay accrual regardless of the underlying nature of the cause of action); Halkey-Roberts, 641 So. 2d at 447

(holding discovery rule does not apply to action for breach of fiduciary duty and implicitly reasoning that § 95.031 provided that in all actions other than for fraud and products liability, a cause of action accrues when the last element constituting the cause of action occurs); Abbot Labs., Inc. v. General Elec. Capital, 765 So. 2d 737, 739-740 (Fla. 5th DCA 2000)(holding discovery rule does not apply to delay accrual of statute of limitations for breach of contract, following Federal Ins.); In re Receivership of Armor Ins. Co., 775 So. 2d 367, 368 (Fla. 2d DCA 2000) (same); Monahan, 781 So. 2d at 438 (holding delayed discovery doctrine applies to causes of action for breach of fiduciary duty, conversion, civil theft, conspiracy, and unjust enrichment); Yusuf Mohamad Excavation, Inc. v. Ringhaver Equip. Co., 26 Fla. L. Weekly D2189, D2189-90 (Fla. 5th DCA Sept. 7, 2001) (holding delayed discovery doctrine does not apply to actions for tortious interference with business relationships, defamation or unfair and deceptive trade practices and held that the Hearndon decision was intended to be limited to its unique facts, following Federal Ins.).

Although Federal Ins. seemed to indicate a strict construction of the 1974 revisions in favor of limiting the delayed discovery doctrine, Hearndon suggests that the delayed discovery doctrine continues to apply despite Florida's statutory limitations scheme. If the delayed discovery doctrine is applied to all causes of action as suggested by the Monahan court, § 95.031(1) defining when a cause of action

accrues, is meaningless and unneeded. Clearly, the Florida legislature could not have intended such a result nor would such revision by this Court seem proper in light of the separation of powers set forth in the Florida Constitution. Art. II, § 3, Fla. Const. (1968).

On the other hand, Hearndon represents a policy consideration that protects an injured party who cannot readily detect all the facts to support their cause of action such as in the case of repressed memory caused by sexual abuse or in cases of latent exposure to harmful agents. These policy concerns are particularly important in allowing the courts to develop legal theories for particular types of problems when not impeding on the role of the legislature in order to join modern trends in American jurisprudence. Of course, much of the policy considerations involving causes of action as they existed prior to 1974 have been balanced by the legislature in implementing rules of accrual for specific causes of action.

Accordingly, this Court's decisions can be harmonized. The delayed discovery doctrine should continue to apply to causes of action where the plaintiff has suffered physical injury and either through repressed memory or some other latent fact, does not readily discover all of the essential facts to support his or her cause of action. See Hearndon, 767 So. 2d at 1184, 1185 n.3. In cases merely alleging economic harm (not damages arising from physical injury), the Florida legislature has

already provided a statutory scheme which protects injured parties in cases involving fraud. § 95.031(2), Fla. Stat. (1997). The Florida legislature did not add discovery rules to delay the accrual of other causes of action seeking to recover economic damages that do not involve fraud. Cf. Federal Ins., 707 So. 2d at 1122. In short, Hearndon should be limited to its facts and case law applying a discovery rule to delay the accrual of causes of action seeking compensation for solely economic damages should be overruled to the extent that they allow delay in accrual which does not arise from the tortfeasor's fraudulent conduct. Future cases extending the delayed discovery doctrine should only do so in cases involving physical injury and which are otherwise consistent with the policy considerations supporting Hearndon.

Applying this standard to the instant case, the District Court decision should be reversed. The delayed discovery doctrine should not apply to this case. This is not a case in which the plaintiff has allegedly suffered a latent physical injury or suffered from repressed memory caused by the Defendants' alleged wrongful conduct. Here, Monahan has not produced any record evidence for the alleged delay in discovery. Although Monahan contends to be currently suffering from dementia, she contends that she was not suffering from dementia prior to this action. (R. 1979 at 38; 1510 at 202)(App. 0494; 0354 at 202). Sadler testified that Monahan was competent in June of 1998. (R. 1510 at 202)(App. 0354 at 202). It was not until

December of 1998 or January of 1999 that Sadler became concerned regarding Monahan's competency and felt that guardianship was necessary. (R. 1510 at 202-04)(App. 0354 at 202-04). Additionally, Monahan's lack of memory is in no way caused by the actions of Davis or anyone else. This case does not possess the special considerations which made the delayed discovery doctrine applicable in Hearndon.

Accordingly, Florida's statutory limitations scheme should apply. In her Fifth Amended Complaint, Monahan has pled against Davis actions for breach of fiduciary duty, civil conspiracy, conversion, civil theft, and unjust enrichment. (R. 938-62)(App. 0008-0032). The statute of limitations for breach of fiduciary duty is governed by § 95.11(3)(o). § 95.11(3)(o), Fla. Stat. (1997); Halkey-Roberts, 641 So. 2d at 447. The intentional tort of civil conspiracy is also governed by this provision. Armbrister, 667 F.Supp. at 809. Section 95.11 provides in pertinent part, "Actions other than for recovery of real property shall be commenced as follows . . . (3) WITHIN FOUR YEARS . . . (o) An action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, except as provided in sections (4), (5), and (7)." § 95.11(3)(o), Fla. Stat. (1997) (emphasis added).

The legislature did not provide a discovery rule for actions for breach of fiduciary duty or civil conspiracy. The legislature did provide a discovery rule for

other intentional torts such as fraud, securities fraud, or based on abuse. § 95.031(2); §95.11(4)(e); § 95.11(7). The legislature could have included a discovery rule for breach of fiduciary duty or civil conspiracy as it did for other intentional torts such as fraud. See Federal Ins., 707 So. 2d at 1122.

Likewise, the legislature did not provide a discovery rule for actions for conversion or civil theft. An action for taking personal property is governed by a four (4) year statute of limitations. § 95.11(3)(h), Fla. Stat. (1997). The legislature could have provided a specific discovery rule but did not. For civil theft, the legislature provided its own statute of limitations in § 772.17 which requires a civil theft claim to be commenced within five (5) years after the conduct in alleged violation, terminates or the cause of action accrues. § 772.17, Fla. Stat. (1997). Enacted in 1986, the legislature could have set forth a discovery rule within the statutory section but did not. Accordingly the general provision of § 95.031(1) governing accrual applies. The same can be said of § 95.11(3)(k) which governs actions for unjust enrichment and other actions founded on implied or unwritten contracts. §95.11(3)(k), Fla. Stat. (1997); Venditti-Siravo, 418 So. 2d at 1253; Fowler, 900 F.Supp. at 459; see also, Federal Ins., 707 So. 2d at 1122 (interpreting § 95.11(2)(b) governing actions upon written contracts).

In summary, based on the statutory limitations scheme, absent fraud,

there is no basis statutory basis to delay accrual for an action arising out of misappropriation of personal property. In the instant case, Monahan has not plead nor proven fraud. (R. 938-962)(App. 0008-0032). Monahan attempted to allege a cause of action for fraud in the Amended Complaint and the Second Amended Complaint relating to the alleged theft of Monahan's personal property. (R. 49; 730). Both times Defendants moved to dismiss arguing, inter alia, that Monahan failed to state a cause of action for fraud. (R. 146; 767). The Amended Complaint was dismissed pursuant to the Order on Case Management Conference entered July 7, 1999 and at the August 13, 1999 Case Management Conference the trial court granted Monahan's ore tenus motion to amend the Second Amended Complaint. (R. 728; 782). Monahan subsequently abandoned attempting to allege a cause of action for fraud. (R. 783-805; 849-74; 938-62)(App. 0008-0032). See Dee v. Southern Brewing, Inc., 146 Fla. 588, 590, 1 So. 2d 562, 562-63 (1941) (holding the filing of an amended pleading abandons the original and it no longer serves any purpose in the record); Arthur v. Hillsborough County Bd. of Criminal Justice, 588 So. 2d 236, 237 (Fla. 2d DCA 1991) (holding claims which were not reasserted in subsequent amendments were abandoned and could not be resurrected on appeal and affirming summary judgment).

Additionally, the record evidence does not contain any evidence of fraud. The record evidence only shows that Monahan knew or should have known of the

alleged transactions giving rise to her claims since she had knowledge of them and they were completed with her consent. (R. 478-79; 482-83; 484; 487; 514; 1030)(App. 0142-0143; 0146-0147; 0148; 0151; 0178; 0090). At the first two hearings on March 29, 2000 and April 6, 2000 on the motion for summary final judgment, Monahan argued concealment but she did not and could not set forth record evidence to support any fraud or concealment by Defendants. (R. 1992 at 13-15; 1978 at 5, 11; 1448)(App. 0434-0436; 0445, 0451). Accordingly, the District Court's determination that the delayed discovery doctrine applies to this case should be quashed and the trial court's ruling should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THERE WAS NO REBUTTAL OF RECORD EVIDENCE THAT MONAHAN KNEW OF THE TRANSACTIONS AS THEY TOOK PLACE.

Even if a discovery rule applied to any of Monahan's claims, the record evidence only showed that Monahan knew of the transactions as they took place. The District Court disagreed, holding that the record evidence supported an inference that Monahan did not know of the alleged misappropriation until 1995 based on her comments to Sadler regarding her assets. Monahan, 781 So. 2d at 439. However, this determination was incorrect. This Court, having acquired discretionary jurisdiction to review the decision below, has authority to review the District Court's decision for any error even though it may not be the issue that initially served to establish appellate

jurisdiction. See Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 912 (Fla. 1995) ("Having accepted jurisdiction, we may review the district court's decision for any error."). The standard of review is de novo. Morsani, 790 So. 2d at 1074 ("The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo."); Armstrong, 773 So. 2d at 11 ("[T]he standard of review for a pure question of law is de novo.").

A. The Record Evidence Only Shows Monahan Had Knowledge and Consented to the Transactions Performed by Davis.

At the hearings on the motion for summary final judgment, Monahan was not able to controvert the undisputed record evidence that Monahan had knowledge of and consented to the transactions allegedly performed by Davis. (R. 478-79; 482-83; 484; 487; 514; 1030)(App. 0142-0143; 0146-0147; 0148; 0151; 0178; 0090). Davis did not misrepresent to Monahan nor conceal from her any of the transactions which were completed pursuant to the Power of Attorney. (R. 1031 ¶ 14)(App. 0091 ¶ 14). Sadler confirmed that she could not dispute this. Sadler did not have personal knowledge of any facts to contradict that Monahan authorized, consented to, ratified and approved of Davis and Kish's conduct with respect to Monahan's affairs. (R. 1522 at 392)(App. 0402 at 392).

In fact, since Sadler was not present with Monahan from 1990 to 1994, Sadler did not know whether Davis or Kish acted contrary to Monahan's wishes with

respect to her property. (R. 1493 at 166-67)(App. 0345 at 166-67). Sadler acknowledged that she had no personal knowledge that Defendants converted any of Monahan's property or used her property for their own personal use. (R. 1518-19 at 364-68; 1520 at 382-83)(App. 0394-0395 at 364-68; 0400 at 382-83). Sadler could not testify that the Defendants retained or otherwise converted a single dollar belonging to Monahan. (R. 1520 at 381-83)(App. 0400 at 381-83).

This District Court overlooked the fact, as urged by Davis at oral argument, that the undisputed record evidence shows that in 1993 Monahan was audited by the IRS for failing to report the liquidation of the U.S. Savings Bonds that allegedly give rise, in part, to this action. (R. 1979 at 47-48)(App. 0503-0504). The undisputed record evidence shows that the IRS sent the letter regarding the audit to Monahan. (R. 1979 at 45, 48)(App. 0501, 0504).

Accordingly, even if the record evidence could create an inference that Monahan was not aware of the alleged misappropriation of her property in 1995 since she allegedly was inquiring about her financial affairs, the record evidence shows that in 1993 she should have been aware of it. See, e.g., Sands v. Diliberto, 546 So. 2d 455, 455 (Fla. 3d DCA 1989) (affirming summary judgment based on statute of limitations since plaintiff should have discovered discrepancies which gave rise to his claim when records showing discrepancy were sent to him and not when records were

actually examined). The trial court came to the same conclusion and granted the motion for summary judgment. (R. 1979 at 47-48)(App. 0503-0504).

B. Monahan Cannot Stack Inferences To Assert Late Discovery.

Additionally, in reaching its decision, the District Court apparently overlooked that the alleged inference based on Sadler's testimony that Monahan was not aware of the alleged misappropriation in 1995, cannot be used to create the inference that Monahan did not know of the alleged transactions giving rise to her claims as they occurred. As argued by Davis at oral argument, Monahan cannot improperly stack inferences to rebut the record evidence that Monahan knew and consented to the transaction giving rise to her claims. Monahan's alleged lack of knowledge in 1995 is irrelevant. The relevant time period begins in 1990.

An inference is a logical deduction of fact that the trier of fact draws from the existence of another fact or group of facts. Whiteaker v. Gilreath, 734 So. 2d 1105, 1107 (Fla. 2d DCA 1999). Whether the inferred fact is found to exist will be decided by the trier of fact. Id. However, an ultimate fact may be proved by piling inferences on top of inferences only if the initial inference is established to the exclusion of any other reasonable theory. Barcello v. Rubin, 578 So. 2d 58, 59 (Fla. 4th DCA 1991), overruled on other grounds, Bulldog Leasing Co. v. Curtis, 630 So. 2d 1060, 1065 (Fla. 1994).

In the instant case, Monahan has attempted to create a genuine issue of material fact that Sadler's testimony supports an inference that Monahan was unaware of the alleged misappropriation of her property until 1995. However, Sadler's testimony can only support an inference that Monahan was unaware of the alleged misconduct in 1995. (R. 1479 at 54-55; 1487 at 115-17; 1493 at 166-67; 1508 at 281; 1522 at 392; 2017-18)(App. 0316 at 54-55; 0331 at 115-17; 0345 at 166-67; 0374 at 281; 0402 at 392).

Monahan's lack of awareness in 1995 does not support the inference that she did not know of the transactions as they occurred to the exclusion of all other theories arising from the same facts. Surely, Monahan could have been aware of the transactions as they occurred and then subsequently become unaware (i.e., forgot) in 1995 after the statue of limitations ran.

In short, Monahan will have to improperly stack inferences to create an issue of fact that she was not aware of the alleged wrongdoing as they occurred contrary to the record testimony provided by Davis and Kish. Accordingly, Monahan will not be able to prevail on her claims based on the statute of limitations as a matter of law.

C. Monahan Cannot Rely on Hearsay to Prevail.

In attempting to prove that Monahan did not discover the alleged

wrongdoing until 1995, Monahan relied on alleged statements made by Monahan to family members to inquire about the status of her assets. (Appellant's Reply Br. at 11; R. 1479 at 54-55; 1508 at 281)(App. 0316 at 54-55; 0374 at 281). The District Court, contrary to Davis' assertions at oral argument, held that Monahan's statements made to Sadler in 1995 were admissible as non-hearsay to show Monahan's state of mind inconsistent with notice or knowledge. Monahan, 781 So. 2d at 439. However, Monahan's alleged statements are hearsay and no exception is applicable.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (1999). Except as provided by statute, hearsay evidence is inadmissible. § 90.802, Fla. Stat. (1999). Inadmissable hearsay cannot be utilized in opposition to summary judgment. Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264, 268 (Fla. 4th DCA 1971).

The District Court, held below that the alleged statements made by Monahan to Sadler in 1995 were admissible as non-hearsay to show Monahan's state of mind inconsistent with notice or knowledge or as an exception to the hearsay rule under §90.803(3) of the Florida Statutes. Monahan, 781 So. 2d at 439. Respectfully, Monahan's statements are not non-hearsay.

The District Court in holding that Monahan's statements were non-

hearsay relied on pages 632-33 of the 1999 edition of Florida Evidence by Charles W. Ehrhardt. Id. However, the rule described in Ehrhardt in that section does not support the District Court's holding. See Charles W. Ehrhardt, Florida Evidence § 801.6, 632 (1999 ed.) (App. 0522-0523).[6] "When evidence of an out-of-court statement is offered to prove the state of mind of a person who heard the statement, the statement is not hearsay because it is not being offered to prove the truth of the statement's contents." Id. (emphasis added). The section of Ehrhardt, entitled "Statements Offered to Show the State of Mind of the Hearer" and the cases cited therein allow statements that are otherwise hearsay to become admissible as non-hearsay to prove the state of mind of the hearer. Id. at 632-33.

In the instant case, the District Court held that the statements were non-hearsay to prove Monahan's (the declarant's) state of mind at the time she allegedly made the statements to Sadler. Monahan, 781 So. 2d at 439. However, the non-hearsay rule cited is limited to proving the hearer's state of mind. Sadler's state of mind is irrelevant. Accordingly, the statements made by Monahan to prove Monahan's state of mind are hearsay not non-hearsay.

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[6] Although the District Court may have intended to cite to a different provision, no other section of Florida Evidence describing non-hearsay seems applicable to allow the admissibility of Monahan's statements to Sadler to prove Monahan's state of mind.

The District Court also held that the state of mind exception contained in § 90.803(3) of the Florida Statutes applies to allow Monahan's statements into evidence. Section 90.803 provides in pertinent part:

> The provision of s. 90.802 to the contrary, notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness: . . .
>
> (3) Then-existing mental, emotional, or physical condition.--
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical, sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at the time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:
>
> 1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement related to the execution, revocation, identification, or terms of the declarant's will.
>
> 2. A statement made under circumstances that indicate its lack of trustworthiness.

§ 90.803(3), Fla. Stat. (1999) (emphasis added). This exception to the hearsay rule makes admissible evidence of extrajudicial statements made by a declarant of his or

her bodily condition or mental state as they then exist. See 6C Fla. Stat. Ann. 347 (1999) (§ 90.803, cmt.3).

> A statement of declarant's then existing state of mind is relevant to show the declarant's state of mind. Generally, the statement of then existing state of mind is admissible to show that the declarant did certain acts which he [or she] intended to do. However, under this exception a statement of memory or belief is not admissible to prove that the event occurred.

Id.; see also, Reed v. State, 438 So. 2d 169, 171 (Fla. 1st DCA 1983) (Ervin, C.J., specially concurring) (declarant's statements after crime committed to prove his knowledge of events of crime were hearsay since statement depended for its value upon the veracity of events remembered and was properly barred pursuant to § 90.803(3) which generally excludes from evidence after-the fact statements of memory when offered to prove the facts remembered); cf. Cotton v. State, 763 So. 2d 437, 441-42 (Fla. 4th DCA 2000) (en banc) (affirming conviction of defendant for trafficking in cocaine and holding trial court correctly excluded statement by defendant to police after his arrest that he did not know contents of package handed to him, since statement was hearsay and § 90.803(03) state of mind exception did not apply, "[A]ppellant sought to introduce his own post-arrest statement to the police, wherein he explained his prior state of mind and conduct surrounding possession of the cocaine. His denial of guilty knowledge of the cocaine cannot be construed as a statement of then-existing state of mind offered for the reasons contemplated by

section 90.803(3).").

In the instant case, Monahan's alleged statements to Sadler in 1995 do not come within the state of mind exception because Monahan's alleged statements made to Sadler in 1995 are based upon Monahan's alleged memory of past events to prove that she did not have knowledge of the alleged misappropriations. Monahan, 781 So. 2d at 439-40. The alleged statements are of Monahan's memory in 1995 offered to prove the facts that she remembered. In summary, Sadler's testimony is essentially, Monahan told me, "I don't know what happened to my assets." (R. 1483 at 85; 1484 at 90-91)(App. 0323 at 85; 0325 at 90-91). Those types of statements cannot be used to prove that Monahan did not know what happened to her assets. In other words that she was not allegedly aware that her assets were taken. Such statements are hearsay and are not admissible.

CONCLUSION

Based on the foregoing, petitioner, Elizabeth L. Davis, respectfully requests this Court to quash the District Court's decision in this case, and affirm the trial court's rulings dismissing petitioner from this action with prejudice, and granting to Davis such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Amy D. Shield, Esq.**, 20245 Back Nine Drive, Boca Raton, Florida 33498 and **Barry A. Eisenson, Esq.**, 4953 Coconut Creek Parkway, Coconut Creek, Florida 33063, attorneys for Respondent, Helen K. Monahan, by U.S. Mail this ____ day of November, 2001.

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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 Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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