IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC03-933

Lower Tribunal Case Nos. 4D00-4656
4D01-2389

JOHN J. RYAN, IV, ET AL.,

Petitioners,

v.

LEONOR LOBO DE GONZALEZ and
JORGE GONZALEZ,

Respondents.

ANSWER BRIEF

GEORGE H. MOSS, II
CASEY WALKER
Moss, Henderson, Blanton, Lanier,
Kretschmer & Murphy, P.A.
817 Beachland Boulevard
Vero Beach, FL 32963

Attorneys for Appellees

Table of Contents

Table of Contents i

Table of Authorities iii

Statement of the Case and Facts 1

1. Facts 1

a. Maria Luisa and the children 2

b. Julio Lobo and his Estate 7

2. Brief Procedural History 15

Summary of the Argument 18

Argument 20

1. The trial court and the District Court of Appeal correctly determined that the children could not establish equitable estoppel by claiming Maria Luisa did not know of her cause of action 21

2. The children fail to show that the "last act" of their causes of action occurred in 1996 30

3. Summary judgment as to the children was correct on the alternative basis that Maria Luisa is charged with knowledge of documents showing the Moorings owned the Chiriqui bearer shares since 1968 33

4. Summary judgment against the Estate was proper because the Estate fails to establish that its cause of action accrued in 1996 37

A. The Estate's claims are time-barred because Julio Lobo's causes of action accrued not later than 1972 37

B. Even assuming the Estate's causes of action did not accrue until 1996, its claims are nevertheless time-barred 45

5. The District Court of Appeal correctly found that the trial court abused its discretion in denying attorney's fees 47

Conclusion 50

Certificate of Service 51

Certificate of Compliance 51

Table of Authorities

CASES PAGE

Aldrich v. McCulloch Properties, Inc.,
627 F.2d 1036 (10th Cir. 1980) 23, 24

Alachua County v. Cheshire,
603 So. 2d 1334 (Fla. 1st DCA 1992) 25

Cange v. Stotler and Co.,
913 F.2d 1204 (7th Cir. 1990) 24

City of Brooksville v. Hernando County,
424 So. 2d 846 (Fla. 5th DCA 1983) 25

Cook v. Deltona Corporation,
753 F.2d 1552, 1563 (11th Cir. 1985) 23

Darms v. McCulloch Oil Corp.,
720 F.2d 420 (8th Cir. 1983) 24

Davis v. Monahan,
832 So. 2d 708 (Fla. 2002) 28, 49, 47

Florida Dept. of Health and Rehabilitation Services v. S.A.P.,
835 So. 2d 1091 (Fla. 2002) 19, 21-29, 47, 48

Fox v. McCaw Cellular Communications of Florida, Inc.,
745 So. 2d 330 (Fla. 4th DCA 1998) 48

Glantzis v. State Automobile Mutual Insurance Company,
573 So. 2d 1049 (Fla. 4th DCA 1991) 25

Head v. Lane, 495 So. 2d 821
(Fla. 4th DCA 1986) 22

Hearndon v. Graham,
767 So. 2d 1179 . . . . . 27, 28, 48

Jaszay v. H.B. Corp.,
598 So.2d 112 (Fla. 4th DCA 1992) 25

Kozich v. Shahady,
702 So. 2d 1289 (Fla. 4th DCA 1997) 45

Lewis v. South Broward Hospital District,
353 So. 2d 562 (Fla. 4th DCA 1977). 45

Lindsey v. H.H. Raulerson, Jr. Memorial Hospital,
505 So. 2d 577 (Fla. 4th DCA 1987 45

Moorey v. Eytchison & Hoppes, Inc.,
338 So. 2d 558 (Fla. 2nd DCA 1976) 28

Major League Baseball v. Morsani,
790 So. 2d 1071 (Fla. 2001) 23, 25

New York Central and Hudson River Railroad Co. v. Kinney,
260 U.S. 340 (1922) 25

Pasco County v. Tampa Development Corp.,
364 So. 2d 850 (Fla. 2nd DCA 1978*)* 22

Ryan v. Lobo de Gonzalez,
841 So. 2d 510 (4th DCA 2003) 1, 18, 21, 22, 25, 29

School Board of Broward County v. Surette,
394 So. 2d 147 (Fla. 4th DCA 1981) 46

Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.,
725 So. 2d 451 (Fla. 4th DCA 1999) 45

Travelers Insurance Co. v. Spencer,
397 So. 2d 358 (Fla. 1st DCA 1981) 22

Troso v. FIGA, 538 So. 2d 103 (Fla. 4th DCA 1989) 45

West Volusia Hospital Authority v. Jones,
668 So. 2d 635 (Fla. 5th DCA 1996) 46, 47

Whigham v. Muehl, 500 So. 2d 1374 (Fla. 1st DCA 1987) 34, 36

STATUTES AND REGULATIONS

Fla. Stat. §90.408 49

Fla.Stat. §95.031 . . . . . 28, 29

Fla. Stat. §768.79(7)(b) 49

Statement of the Case and of the Facts

1. Facts.

Respondents adopt the facts of this case as rendered by the Fourth District Court of Appeal's decision in *Ryan v. Lobo de Gonzalez*, 841 So. 2d 510 (4th DCA 2003), and supply the following additional facts bearing on what Maria Luisa and Julio each knew and believed about the whereabouts, worth and ownership of the Chiriqui bearer shares at all material times leading up to Maria Luisa's 1980 redemption of her shares in the Moorings.

After the default of the Chiriqui note in the 1960s, the Moorings tried to take a tax loss in the amount of $3,000,000.00 due to that bad debt. (Avery 4/20/99 depo, Def. Ex. 11). That deduction was disallowed by the IRS. *Id.*

The IRS disallowed the tax loss because it considered the Chiriqui bearer shares as worthless collateral insufficient to secure the Moorings' assumption of the City Bank obligation. *Id.* The assumption was therefore considered a gift to Julio Lobo, in light of the worthlessness of the Chiriqui bearer shares and therefore the Chiriqui note. *Id.* The results of the disallowance were seven-figure tax penalties which dogged the Moorings for years, as did the 3.7 million in assumed debt itself. (Jorge 6/16/99 depo, p. 71, 117). Whatever the resulting injury to the Moorings and his daughters, the transaction suited Julio's purposes at least

temporarily, which were to hide the Chiriqui bearer shares from creditors. (R. 727-31).

a. Maria Luisa and the children.

Before she died in 1998, Maria Luisa admitted that she knew about it when the Chiriqui bearer shares were pledged to the Moorings as the collateral for the Moorings' assumption of Julio's City Bank debt. (Maria Luisa 10/4/96 depo., p. 26-27). She also knew about it when Julio handed the shares over to the Moorings pursuant to that pledge. *Id.*

Maria Luisa also knew that ever since Julio handed them over, the Moorings held and had custody of the Chiriqui bearer shares. *Id.* at 38. Despite Maria Luisa's claim that she didn't know the Moorings claimed ownership of the Chiriqui bearer shares, it is undisputed that by 1968 she and Leonor had seized control of the Moorings from Julio. (R. 1006). After this "palace revolution," the Moorings unambiguously manifested ownership and control of the Chiriqui bearer shares when in 1968 it sold off property belonging to Chiriqui, namely, the Hershey trademark. (Avery 4/20/99 depo., Def. Ex. 7).

Documents reflect the Moorings' assertion of its ownership and control of the Chiriqui bearer shares. Documents also reflect that this ownership and control was achieved with Maria Luisa's knowledge and approval.

The first such document is a March 28, 1968 letter to Maria Luisa by the Moorings' attorney, Martin Avery, regarding the Hershey trademark sale. *Id.* at Ex. 2). In that March 28, 1968 letter, Avery provided Maria Luisa an update on negotiations, and the latest purchase offer from Hershey:

> . . . [Hershey's offer was] predicated on the buying of the stock of Hershey Sugar Corporation with Moorings being allowed to retain, for whatever they are worth, the rights to the Cuban lands which were the basis of Hershey's Cuban tax loss.

Id.

The next such document is correspondence to Maria Luisa from H. Milton Link, the president of the Moorings, sent on May 18, 1968, four months before the sale. (Maria Luisa 10/4/96 depo., Ex. G-3). This letter provided that:

> [as] the principal stockholders [of the Moorings], it will be necessary for you and Leonora to actually sign and become a party to the authorization for the sale of the Hershey Corporation. In this connection, you will be glad to know that our arrangements provide for our retaining of all rights, title and interest whatsoever it might be to your Hershey property in Cuba.

Id. Only months after the Avery and Link Letters, the Moorings sold the Hershey trademark in September 1968, as the true owner of the Chiriqui bearer shares. *Id.*

As the children state, Julio received only part of the proceeds of the sale. Julio in fact was vehemently opposed the sale, but was powerless to stop it in light

of the fact that the Moorings owned the Chiriqui bearer shares. (Avery 4/21/99 depo. at Pls. Ex. 21).

Maria Luisa herself believed that by selling off the Hershey trademark in 1968, the Moorings had depleted Chiriqui of its only remaining valuable asset and that the Chiriqui bearer shares were worthless afterwards. (Maria Luisa 10/4/96 depo., pp. 27-28). As she stated,

> . . . the Chiriqui stock was always worthless, always worthless. It had nothing. It had nothing here in the United States except the brand name [of Hershey] . . . [a]nd the Hershey stock as such was worthless.

Id. Her belief was consistent with that of Jorge Gonzalez, who testified that the value of the Chiriqui bearer shares decreased as Fidel Castro remained in power, reaching bottom in the 1960s, when no more money was coming from the sale of Cuban shares. (Jorge 6/16/99 depo., p. 47).

The next documents are two letters dated twelve years after the Hershey sale, during the period leading up to Maria Luisa's 1980 redemption of her interest in the Moorings. The first of these is the February 20, 1980 "Groh Report," a letter to the IRS from the Moorings' accountant recounting the Chiriqui saga. (Avery depo., p. 38, Defs' Ex. 11); (Maria Luisa depo., Ex. G-7). The Groh Report was dated ten (10) months before Maria Luisa's sale of her interest in the Moorings. *Id.*

It confirmed that after the Moorings' seizure of the Chiriqui bearer shares:

> [t]he Florida companies and Moorings of Canada [predecessors to the Moorings] retained all of the rights, benefits and proceeds attaching to or resulting from the Chiriqui Pledge Agreement, the Chiriqui collateral and the Hershey Guaranty (effectively all of the assets in Cuba purchased for $24,500,000 on December 31, 1957).

Id.

By 1996, however, after the passage of Helms-Burton had renewed interest in confiscated Cuban properties, Maria Luisa claimed not to remember the Groh Report or any other document indicating that the Moorings owned Chiriqui. *Id.* at 11-13. She denied ever seeing the Link letter, and even denied memory of board minutes admittedly signed and initialed by her which documented the Moorings' sale of the Hershey trademark. *Id.* It is undisputed, however, that she was a shareholder and director at all times from 1968 to 1980. *Id.* at 38, 46.

Despite Maria Luisa's claim to have been unaware of the Groh Report, she was in fact sent a copy by the Moorings' attorney. (Avery 4/20/99 depo., p. 39). Moreover, it is undisputed that four months before her 1980 sale, the Groh Report was requested by and sent to Maria Luisa's representative in the sale and hand-picked Moorings director, Panama attorney Gilberto Arias. *Id.* at 39; Ex. 12, pp. 1-3).

The next document is a letter written by Maria Luisa's representative, Mr. Arias, acknowledging receipt of the Groh Report on August 21, 1980. *Id.* In that letter, Mr Arias thanked Jorge Gonzalez "for the 23-page letter-report by the Moorings auditor, John H. Groh, to the I.R.S. on February 20, 1980." *Id.*

Maria Luisa knew that after Julio's pledge of the Chiriqui bearer shares, after his surrender of the Chiriqui bearer shares to the Moorings, and after the 1968 Hershey trademark sale, the Moorings never gave the Chiriqui bearer shares back to Julio Lobo. (Maria Luisa 10/4/96 depo., p. 71). As she said, Julio Lobo "would complain and badger, why wasn't he getting his Chiriqui collateral back." *Id.* at 7. She said that "until the bitter end" in 1983 when he died, Julio Lobo was always "clamoring, whimpering, always asking for his stock back, always." *Id.* at 72.

Despite knowing that the Moorings had held Chiriqui since before 1968, and despite knowing that Julio's demands and requests for its return had never been honored up to the time of his death in 1983 or even after that, Maria Luisa still failed to bring suit until 18 years after her 1980 sale. In fact, she passed away ten months before this suit was brought. (R.1).

Contrary to Plaintiffs' allegations suggesting that she was incapacitated by alcohol at the time of the sale, Maria Luisa was in fact very aggressive in retaining counsel in that transaction, including not only Gilberto Arias but also attorney

Taylor Bigbie. As she testified, "I am not dumb. You can drink and not be dumb." (Maria Luisa 10/4/96 depo., p. 32).

Maria Luisa was also vigilant in protecting her interests after the 1980 sale. In 1984, for example, she retained Fowler White and John Stickroot to represent her in the matter of the "Gibraltar Trust," a trust set up by Julio Lobo in favor of Maria Luisa and Leonor. *Id.* at 49, Ex. G-13. By May of 1988, Maria Luisa threw the matter into litigation which would last fifteen years, in a failed bid to obtain more than her one-half share of the Gibraltar trust assets split 50/50 between Julio's daughters. *Id.* at 54.

Plaintiffs complain that neither the Moorings nor Leonor took steps to "perfect" or "formalize" their claim as the Chiriqui bearer shares. They do not dispute, however, that at all times Chiriqui was represented by bearer shares, and that as set forth above, the Moorings and/or Leonor had possession of those bearer shares for well over 30 years before any suit was filed by anybody.

b. Julio Lobo and his Estate.

The Estate's statement of facts obscures several facts regarding its claim, specifically its claim that Julio Lobo did not have a cause of action for the return of the Chiriqui bearer shares until 1996. (Initial Brief, p. 38). Most of these facts come by way of admissions from Julio Lobo that are now thirty years old.

Julio Lobo's own letters to his lawyers at Shutts & Bowen's Miami office show that in January 1971, three years after the "palace revolution," Julio Lobo believed he had a cause of action against Leonor and Maria Luisa for the return of the Chiriqui bearer shares:

> January 1971:
>
> . . . The Moorings are totally and completely mine and I have ample documents to prove it when the time comes. The properties were placed in their name for the above [aforementioned] reasons as my two daughters were my rightful legal heirs, only they elected to inherit me in life and not in death, and pulled the rug out from under me just at the time, when I needed the most the backing of the properties. They have kept my Hershey properties which were put into The Moorings for safekeeping; they kept the proceeds of the sale of the Hershey brand $235,000.00 which was mine, and absolutely mine . . . .

(R.719).

Additional excerpts of Julio's correspondence reflect his belief in 1971 that his daughters would not return the Chiriqui shares unless they were forced to. One example is his instruction to his Shutts & Bowen attorneys that "you are to proceed accordingly [against Leonor and Maria Luisa] with the utmost alacrity, celerity and energy." (R.719-20). Julio Lobo remarked in January of 1971 that:

> It is a sad state of affairs when a father has to sue his two daughters. They have stolen the only property I have left, which I need to get back on my feet. They will inherit me

> when I go but certainly not now. I have no other recourse and they leave me no other alternative.

(R.720). In handwritten notes on this same correspondence, Julio Lobo states that:

> I intend to hit back & to hit hard. The time has come now to act.

(R.720).

It is beyond doubt that Julio Lobo believed he had a cause of action against the Moorings, Leonor, and Maria Luisa for years afterward. His numerous letters to his lawyers and others regarding the Chiriqui properties specifically demonstrate this belief:

January 26, 1971	We must conduct a concentrated offensive against the - Moorings and its pseudo-owners, against Link, and against Avery. I need now very badly these properties and will do everything within my reach by hook or crook to recuperate them and to put Link in jail for malversation of funds (Moorings and mine), and Berryhill for incompetency and drunken habits while handling my cases. I MUST GET MY MONEY BACK OUT OF THE MOORINGS.
January 28, 1971	I have finally decided to go after The Moorings and try to recuperate my properties and my note from the City Bank. Recuperate the Hershey properties which at all time were

	mine and were injected into The Moorings to prevent a possible seizure, and . . . recuperate the possession and stock of The Moorings which I can prove is completely and totally mine . . . .
January 30, 1971	My two daughters have left for Florida together with the Arab. I want the Hershey stock out of their hands and into mine.
February 3, 1971	I want to recuperate my Hershey properties which were injected into The Mooring[s] for safekeeping.
February 11, 1971	To me it is immaterial whether The Moorings go[es] bankrupt or not. [T]o hell with my daughters and with the Arab. Nothing would please me more than to see them there or rather to know that they are there. Give no quarter and have no mercy on Link, Berryhill, Avery, daughters, the Arab. I am sick and tired of being the anvil, I want to be the hammer now.
May 10, 1971	I told you in no uncertain terms and also Tom Wolfe what four points I wanted to have settled to wit . . . return of my Hershey shares which I unduly put into The Moorings. Should they, the ex-daughters, refuse all of the above alternatives I shall then be forced to take the case to court here in Spain where I am a resident.
May 19, 1971	I am telling you - and this is privileged correspondence - that I intend to su[e] here against both ex-daughters . . .
February 9, 1972	I want you to tell me frankly whether some lawyer in your firm can handle the matter against my daughters . . .

February 15, 1972

You know full well of course, what has happened with regards to The Moorings and the dastardly way in which they have behaved towards me.

August 1, 1972

I want to warn you that under no circumstances and no matter how important this information may be I refuse to see my daughters or Jorge Gonzalez. They are thieves of the worst nature because any daughter that steals from her father ought to be ostracized from society to say the least.

September 5, 1972

Confidentially, I do not intend to do anything with regards to The Moorings, for the time being at least. Let's get out of this first and give them the works later. I can prove with all sorts of documents that those properties were in my name until 1963, when, for reasons well known to you, they had to placed in their name. I have all the canceled checks and vouchers in my possession, proving all of the foregoing.

As you know, an agreement was reached with the ex-daughters by Enrique Leon in my name, roughly two years ago. That agreement has never been fulfilled in any way shape or form and I am getting tired.

November 17, 1972

Since you and your firm are acting as my lawyers when you get through with your IRS suit, then my instructions will be to fire away against my daughters and that crook called Gonzalez (I would have thrown him out of your office).

I am sick and tired of being pushed around. That fellow Gonzalez has a fancy salary, the daughters also have a salary doing nothing, and the father, the originator of all this windfall, he gets nothing.

June 16, 1973

Let's get ready for a really good fight, because I do not want to die without letting the world know the crooks that my daughters and sons-in-law have turned out to be. We

should begin to plan all this.

January 17, 1974 — The Arab is a crook of the first war to begin with when I had millions of dollars he married without a penny.

Now I wish he would steady the case; me against my two daughters for having stolen the property . . . I think you should declare the war against them.

(R.720-724).

Plaintiffs state as "fact" that Julio Lobo did not take action against his daughters "because they reached an agreement in 1972 that Chiriqui shares would be returned to him 'at the appropriate time.'" (Initial Brief, p. 7). Julio's own words in September 1972 were, however, that:

> As you know, an agreement was reached with the ex-daughters by Enrique Leon in my name, roughly two years ago. That agreement has never been fulfilled in any way shape or form and I am getting tired.

(R.723). (Emphasis added). These words were written nine full months after the January 1972 Leon memorandum that the Estate says was the reason Julio waited twenty-six (26) more years to sue, fifteen (15) years following his death in 1983.

In point of fact, the direct evidence of Julio Lobo's reasons for never filing suit is found in his own admissions that he abandoned his claim to Chiriqui after a severe fall in 1973 that seriously injured him. This fall, and its aftermath, led to a thaw in the relations between Julio Lobo and his daughters:

April 20, 1974	I think this is the opportunity to settle all matters once and for all with The Moorings, now that friendly contact, thank God!, has been rest[o]red with my daughters. Now that we are reaching a final conclusion with the Internal Revenue, I think that we simultaneously have to reach an agreement with The Moorings for their benefit and mine, and all of those concern[ed].
May 2, 1974	I want to clear my standing with my two daughters with regards to my position within The Moorings. I have already waived my rights on those properties.
May 14, 1974	Upon your recommendation, I gave up my formal rightful claim on The Moorings.

(R.724-25).

By August 30, 1974, Julio Lobo had decided to give up any claim he may have had to the Chiriqui bearer shares. As he told his lawyers then:

> It is a pity that the two daughters, after taken away from me the properties, they fight amongst themselves for the management of sai[d] properties. I do not know what the "present current economic dilemma" of The Moorings is; in fact they do not give me any information whatsoever about the properties and their situation. I do not know why they have taken this position because they know well **no matter what my rights are, I am not going to claim my ownership** because, as you know, and not for other reasons, the tax people are after me . . .. Would I succeed in my claim, my daughters would simply be working for the Treasury Department. However, I made on various

> times, commitment with them to return to me, at the proper date, one third of the stock or its equivalent thereof and the **Hershey properties** which I injected into The Moorings in order to save them from rapacity on the part of NCB Bank.
>
> The relations between Cuba and the United States seem to be getting closer and some day that Hershey stock, for which I paid $25 millions, should be worth something today. Another reason is that I realized that fights between my daughters and I would be a long drawn out process and by the time it is solved, I do not think I should be here amongst the living. So, **I decided, long ago to let them inherit said properties during my lifetime and have them near me when the time comes**."

(R.725). (Emphasis added).

Julio Lobo's failure to bring suit would also be consistent with the belief, which all of the players shared, that the Chiriqui shares were "worthless" after the sale of the Hershey trademark. This belief, admitted to by Maria Luisa as shown above, was echoed by Julio Lobo's own admission in 1975, that:

> I furthermore want to call to your attention to the fact that I turned over to the [National City Bank], as collateral, the shares of Hershey for which I had paid already ten or fifteen million dollars in other Cuban collateral. If it can be done I would like to get the Hershey stock back, <u>worthless today but could have a value someday</u>.

(Jorge Gonzalez depo., pp. 343-44, Ex. 14). (Emphasis added).

Regardless of his reasons for not bringing suit, and regardless of whether he had abandoned his claim to the Chiriqui bearer shares or not, it is undisputed that

both Julio and Maria Luisa knew that (a) the Moorings held the bearer shares since 1968 and that (b) the Moorings gave the shares to Julio.

2. Brief Procedural History.

The initial complaint in this case was filed in December, 1998, setting forth seven causes of action on behalf of by the Estate of Maria Luisa, and by the children who claimed through Maria Luisa as assignees. (R.1-17). All seven causes of action were based on the 1980 redemption of Maria Luisa's shares in The Moorings, in which she was a 50% shareholder. (R.1-17).

In their original complaint, the Estate of Maria Luisa and the children alleged that at the time Maria Luisa redeemed her shares in The Moorings in 1980 and received lands worth nearly two million dollars, she supposedly did not know that The Moorings claimed ownership of the Chiriqui bearer shares. (R. 1). All seven counts were based on Maria Luisa's claim to be unaware in 1980 that the Moorings claimed to own the Chiriqui bearer shares after seizing them in the mid-1960's, and included claims for constructive trust, reformation, breach of fiduciary duty, declaratory judgment, fraudulent inducement, negligent misrepresentation, and injunctive relief. (R.1-17).

Although Maria Luisa claimed that she first learned that the Moorings claimed the Chiriqui bearer shares in 1996, it was not until nearly one year after her death in

February, 1998, that the children brought this suit. (R.17). By that time, in addition to Maria Luisa, other vital witnesses were also dead, such as her principal advisors in connection with the 1980 redemption, Manuel Angel Gonzalez del Valle and her Panamanian lawyer Gilberto Arias.

Defendants raised the limitations defense by motion to dismiss. (R. 62-64). Plaintiffs opposed the limitations defense, claiming Defendants were equitably estopped from raising it. (R.92-102). In response, Defendants argued, and the trial court agreed, that Plaintiffs had failed to allege facts constituting equitable estoppel. (R.110-113). By Order dated September 10, 1999, the trial court dismissed all seven causes of action as time-barred under applicable statutes of limitation and/or laches, and further held that Plaintiffs' fraud in the inducement claim was barred by the statute of repose. (R.110-113).

On September 30, 1999, Plaintiffs served an Amended Complaint consisting of six counts. (R.114-191). For unknown reasons, the Estate of Maria Luisa Lobo was dropped, leaving the children claiming as Maria Luisa's assignees. (R.114).

Once again, Plaintiffs asserted the same constructive trust, reformation, breach of fiduciary duty, and negligent misrepresentation causes of action as they did in their first complaint. As with the former counts, these counts were also predicated on the 1980 redemption by The Moorings of Maria Luisa's shares.

In their general allegations, however, the children alleged an new and contradictory theory - that the Chiriqui bearer shares did not belong to them as Maria Luisa's assignees, but to Julio Lobo instead. This claim was based on the allegation that Julio Lobo's pledge of the Chiriqui bearer shares to the Moorings as collateral for the Chiriqui debt and the later seizure of it by the Moorings were a sham, and that the Moorings actually was to return the Chiriqui shares to Julio Lobo under this alleged secret agreement "at an appropriate time." (R. 119).

Defendants moved for summary judgment on numerous grounds, chief among which was that the Plaintiffs' claims were barred by applicable statutes of limitation. Defendants also pointed out that no Plaintiff had the standing or capacity to assert claims of the Estate of Julio Lobo, which was not represented by a personal representative.

The trial court ruled that this first summary judgment was premature in light of pending discovery, and gave Plaintiffs the chance to complete discovery and open the Estate with a new Personal Representative. (R. 623-24). This was done, and the next complaint was filed, adding the Estate as a party in August, 2000, more than four years following the April, 1996 date on which Plaintiffs claimed to be aware of their cause of action. (R. 631-709). In due course, Defendants filed a second motion for summary judgment on their limitations defense. (R. 710).

At summary judgment, Leonor and Jorge Gonzalez accepted for purposes of that motion only the children's claims that Maria Luisa was in ignorance of the true facts. They showed that even under the Plaintiffs' hypothetical version of the facts, Leonor and Jorge Gonzalez were entitled to summary judgment as a matter of law on limitations grounds both as to Leonor and as to the Estate. (R. 1005). In so doing, Leonor and Jorge Gonzalez overcame the only avoidance Plaintiffs attempted to raised in opposition, namely the equitable estoppel doctrine. (R. 1005-9). The remainder of the procedural history of this case is as set forth in the *Ryan* opinion and in Petitioners' Brief.

Summary of the Argument

The children are not entitled to a reversal based on equitable estoppel principles because Maria Luisa's own allegations and testimony is that she was unaware she had a cause of action until 1996. As the Fourth District Court of Appeal correctly concluded, she was unable to show an essential element of equitable estoppel, *i.e.*, that she knew of her cause of action before it became time-barred.

Although the children say this is a "nonexistent" element, the case law is to the contrary. As reflected by the Fourth District's opinion in this case, the Federal decisions from which Florida courts derived the doctrine are explicit that equitable

estoppel presupposes that a plaintiff knows of her cause of action but is induced through fraud or inequitable conduct from bringing suit within the applicable limitations period. Every single Florida decision applying the doctrine in a limitations case has involved such a plaintiff except one; this Court's decision in *Florida Dept. of Health and Rehabilitation Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002). For the reasons expressed by the Fourth District in this case, however, that case should not control the outcome of this one.

The children's alternate theory, that Leonor's 1996 public announcement regarding 100% ownership of Chiriqui was the "last act" giving rise to their claims, is unsustainable. It is inconsistent with the children's own pleadings, which ground every one of the children's six causes of action in the 1980 redemption of Maria Luisa's shares by the Moorings, which is the time they alleged Leonor's wrongful conduct occurred.

The Estate's 1996 "last act" theory is also unsustainable. It is belied by Julio's evidentiary admissions that any claims by him arose in the 1960s and 70s. Even if its claims did somehow accrue in April, 1996, the Estate still waited over four years to bring suit and its claims are still time-barred.

The trial court's summary judgment against the children is sustainable on alternative grounds as well. The fact that Maria Luisa was a director and

shareholder of the Moorings at all material times means that knowledge of Moorings acts and records showing its ownership of the Chiriqui shares is imputed to her as a matter of law. This is fatal to all of her claims, which depend on her claims of ignorance regarding the Chiriqui bearer shares. There being no grounds to reverse the trial court's summary judgment or the Fourth District's opinion in this case, it should be affirmed in all respects.

The Fourth District was also correct in reversing the trial court's denial of attorney's fees on Respondents' offers of judgment. Although they complain that case law from this Court made Respondents' legal position uncertain, that case law did not exist at the time the offers were made. And, although the children say the Fourth District mistakenly reversed the trial court's denial of attorney's fees, the record in this case is that the denial was an abuse of discretion in which the trial court applied the wrong legal standards to the claim and considered inadmissible evidence, as well.

Argument

On this appeal, the children restate their position that equitable estoppel bars Defendants' limitations defense. Initial Brief at 21-32. They argue that the Fourth District mistakenly imposed a requirement that a plaintiff must know of her cause of action during the limitations period in order to invoke the doctrine. *Id.* In the

alternative, the children argue that their claims did not accrue at the time of Maria Luisa's 1980 sale, but instead that the "last act" giving rise to their claims occurred sixteen years later, in 1996. *Id.* at 38-44. The Estate echoes this argument. Finally, the children challenge the Fourth District's reversal of the trial court's denial of fees under the offers of judgment in this case. For the reasons that follow, the judgment of the Fourth District should be affirmed.

1. The trial court and the District Court of Appeal correctly determined that the children could not establish equitable estoppel by claiming Maria Luisa did not know of her cause of action.

The Petitioners complain that the Fourth District's holding in *Ryan* conflicts with decisions of other district courts of appeal, and with this Court's decision in *Florida Department of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002), because the Fourth District held that a plaintiff must be aware of her cause of action prior to the expiration of the statute of limitations to invoke the doctrine of equitable estoppel. The complaint is misplaced.

On the first issue, Petitioners claim that several district court of appeal decisions have applied equitable estoppel where a party to a confidential relationship fails to disclose material facts "until after the limitations period expires." Initial Brief at 18. Their brief however, fails to cite even one such case.

To the contrary, Petitioners cite cases involving equitable estoppel only in the broadest sense. None of the cases address the doctrine in the statute of limitations context. *See Head v. Lane*, 495 So. 2d 821 (Fla. 4th DCA 1986)(plaintiff estopped from recovering damages when he attempted to repudiate the obligations and validity of transaction after accepting the benefits resulting from it); *Travelers Insurance Co. v. Spencer*, 397 So. 2d 358 (Fla. 1st DCA 1981)(estoppel cannot apply to bar an inactive, silent insured from statutory right to UM coverage); *Pasco County v. Tampa Development Corp.*, 364 So. 2d 850 (Fla. 2nd DCA 1978)(absence of zoning regulations at time of commencement of development was not sufficient omission by county upon which to base equitable estoppel).

Nor is the *Ryan* Court's opinion necessarily at odds with *S.A.P.* As the Fourth District took pains to demonstrate both in its main opinion and in Judge Gross' concurrence, with which Judges Hazouri and Shahood expressly agreed, its application of equitable estoppel in this case was in harmony with the historical understanding of the doctrine in the universe of Florida and federal decisions on the issue. *Ryan*, 841 So. 2d at 518-19, 519 n. 5, 523-26. That historical understanding is that the doctrines of equitable tolling and equitable estoppel are "as different as apples and oranges." *S.A.P.*, 835 So. 2d at 1096, *citing Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001).

S.A.P. cites a number of federal and Florida cases for the well-settled proposition that a defendant may be equitably estopped from asserting a limitations defense where equitable tolling principles are inapplicable or unavailable. *Id.* at 1097-98 nn. 10-12. The cases in fact confirm the historical treatment of equitable tolling and equitable estoppel as alternate – and mutually exclusive – doctrines.

In *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980), cited by *S.A.P.*, the court stated that:

> Equitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed. The doctrine of equitable tolling, on the other hand, is grounded in the fraudulent concealment of harm which gives rise to the right to sue.

Aldrich, 627 F.2d at 1043 n. 7; (Cited at *S.A.P.*, 835 So. 2d at 1098 n. 12).

Explaining the "conceptual distinction" between equitable tolling and equitable estoppel, the Eleventh Circuit repeated the *Aldrich* analysis word for word in *Cook v. Deltona Corp.*, 753 F.2d 1552, 1563 (11th Cir. 1985), which is another case that was relied upon by this Court in *S.A.P.* *Id.* at 1097 n. 12. As yet another case relied upon by the Court in *S.A.P.* states, the doctrines are "carefully distinguished" on this basis. *Cange v. Stotler and Co.*, 913 F.2d 1204, 1209 (7th Cir. 1990).

The mutual exclusivity of equitable tolling and equitable estoppel is further shown by *Darms v. McCulloch Oil Corp.*, 720 F.2d 420 (8th Cir. 1983), another case relied upon by the *S.A.P.* Court. *Id.* at 1097 n. 12. As the court in that case stated:

> Furthermore, we agree with the Tenth Circuit that, at the time the plaintiff filed this action, the three-year limitation in the ILSFDA was absolute and could not be tolled with evidence of fraudulent concealment, although evidence that the defendants induced the plaintiffs to forego suit once the basis for the action was known might create an equitable estoppel preventing the defendants from asserting the statutory limitation.

Darms, 720 F.2d at 494, *citing Aldrich*, 627 F.2d at 1043 n. 7.

As Respondents pointed out below in their Answer Brief and Supplemental Brief, incorporated herein by reference, these federal decisions are the same ones historically cited by Florida cases applying equitable estoppel to limitations cases, none of which state or imply that equitable estoppel doctrine is somehow different in Florida than in other places. To the contrary, these Florida cases – also cited in *S.A.P.* – show that equitable estoppel principles have been applied in accordance with the federal decisions requiring that a plaintiff claiming equitable estoppel know of his cause of action. Examples include *Major League Baseball v. Morsani, supra., Alachua Co. v. Cheshire*, 603 So. 2d 1334 (Fla. 1st DCA 1992), *Glantzis v. State Auto. Mut. Ins.*, 573 So. 2d 1049 (Fla. 4th DCA 1991), and *Jaszay v. H.B.*

Corp., 598 So. 2d 112 (Fla. 4th DCA 1992). As the *Ryan* concurrence pointed out, all of the Florida equitable estoppel cases cited in *S.A.P.'s* extensive footnotes involved plaintiffs who knew of their claims. *Ryan*, 841 So. 2d at 524.

In another case relied upon by *S.A.P.*, the rationale for the doctrine was explained as follows:

> When a defendant has had notice from the beginning that the **plaintiff sets up and is trying to enforce a claim against it because of specified conduct**, the reasons for the statute of limitations do not exist.

City of Brooksville v. Hernando County, 424 So. 2d, 846, 848 (Fla. 5th DCA 1983), *citing New York Central and Hudson River Railroad Co. v. Kinney*, 260 U.S. 340 (1922) (Emphasis added). Given the well-settled historical treatment of equitable estoppel as requiring a plaintiff to know of his cause of action, Petitioners fail to show that the Fourth District's decision in this case is incorrect.

As the Fourth District noted, it did not read *S.A.P.* to work a "drastic[]" change in the law of equitable estoppel. *Ryan*, 841 So. 2d at 519 n. 5. As Judge Gross noted in his special concurrence, the extension of equitable estoppel to cases involving the concealment of a cause of action "would push equitable estoppel beyond its application in any other Florida case." *Id.* at 525. Accordingly, the concurrence stated that "[w]e therefore conclude that *S.A.P.* is

not an extension of the law, but a case that is limited to the unique cause of action there at issue." *Id.*

A close reading of *S.A.P.* supports the Fourth District's interpretation of the case. The *S.A.P.* Court did not explain that it was extending or changing the doctrine as it has historically been understood. Indeed, the focus of the opinion is not upon the prerequisites of the equitable estoppel doctrine *per se,* but instead upon the question of whether Florida's waiver of sovereign immunity is broad enough to allow equitable estoppel to be asserted against it like any other defendant. *Id.* at 1094.

The order under review in *S.A.P.* was one granting a motion to dismiss. Moreover, the equitable estoppel issue was not raised until the respondent's answer brief was filed with this Court. *Id.* at 110 n. 20, Harding, J., dissenting).

As this Court wrote, the review was "limited to the allegations contained in the complaint." *S.A.P.* 835 So. 2d at 1100. Based on this "limited" review, this Court pointed out that its holding was "narrow[]." *Id.*

As a result, this Court's application of the doctrine to the facts of that case was not fully developed. The Court pointed out, for example, that it did "not address the question of whether any <u>other</u> considerations may operate to restrict the use of equitable estoppel in [the] case." *Id.* at 1100. (Emphasis added).

Compounding the lack of factual and legal development of the equitable estoppel issue in *S.A.P,* is that the case is a child abuse case involving repressed memories. Specifically, the case involved "serious acts of sustained, long-term child abuse" in which the plaintiff and her sister had been "bruised over their entire bodies, burned, beaten, choked, [and] malnourished." *Id.*

The Plaintiff in *S.A.P.* alleged that the "trauma and abuse which she endured caused her to lose any active memory of the events in question." *Id.* Because *S.A.P.* was a 1995 case, however, she lacked the benefit of the legislature's 1999 amendment of § 95.11(7), Florida Statutes, allowing for the delayed accrual of torts based on child abuse.

In a case presenting similar difficulties, *Hearndon v. Graham,* 767 So. 2d 1179 (Fla. 2000), this Court held that the delayed discovery doctrine could apply to the case despite the refusal of the legislature to write such an exception into the statutes. Despite the broad language of that opinion, which suggested that a judicial "delayed discovery" doctrine was applicable to all Florida causes of action whether or not the legislature had provided for one, this Court later made it clear that *Hearndon* was limited to its unique facts. *Davis v. Monahan*, 832 So. 2d 708, 712 (Fla. 2002).

As noted in the concurrence, the example of *Hearndon* should guide the

reconciliation of *S.A.P.* with the Fourth District's decision in this case. *Ryan*, 841 So. 2d at 525, (Gross, J., concurring). Despite broad suggestion to the contrary, *S.A.P*. does not explicitly purport to change or extend the clear law of equitable estoppel, which requires a plaintiff to be aware of his cause of action.

Nor should it. In 1974 the Legislature made it clear when Florida causes of action accrue when it enacted Fla. Stat. § 95.031 which provides that "a cause of action accrues when the last element constituting the cause of action occurs." The statute also provides that statutes of limitation begin to run on a Florida cause of action when they "accrue." *Id.* The "obvious purpose" of the statute was to make "more precise the dates on which various causes of action accrued." *Moorey v. Eytchison & Hoppes, Inc.*, 338 So. 2d 558, 559 (Fla. 2nd DCA 1976). The statute does not include any exception for "fraudulent concealment" or "delayed discovery," and as such all Florida causes of action accrue when the "last act" occurs, and all limitations periods begin to run at that time. Fla. Stat. § 95.031.

Given the foregoing allegations of delayed discovery or fraudulent concealment can only toll limitations periods or delay accrual where there is a specific statutory authorization such as in fraud, malpractice or other actions. *Davis*, 832 So. 2d at 709-710. Other examples are securities fraud [§95.11(4)(e)], professional malpractice [§95.11(4)(a)], medical malpractice [§95.11(4)(b)], actions

for personal injury relating to herbicide exposure while serving in the armed forces from 1962 through 1975 [§95.11(4)(g)], intentional torts based on abuse [§95.11(7)], and actions involving latent defects in real property [§95.11(3)(c)].

To extend the doctrine of equitable estoppel to encompass fraudulent concealment cases would be to obliterate Fla. Stat. § 95.031. As pointed out in the *Ryan* concurrence, it would also be to overrule *sub silentio* the very recent case of *Davis v. Monahan, supra.* which clarified that the delayed discovery doctrine can only delay the accrual of a cause of action where it is specifically provided by statute. *Ryan*, 841 So. 2d at 526, (Gross, J., concurring). As Judge Gross noted, "it is unlikely that the supreme court narrowed the delayed discovery doctrine in *Davis* on November 7, 2002, only to have it subsumed by equitable estoppel on November 27, 2002 in *S.A.P.*" *Id.*

The children's claim of equitable estoppel cannot prevail. The trial court and the District Court of Appeal correctly found that Maria Luisa could not invoke the equitable estoppel doctrine due to her claim that she was unaware of her cause of action until 1996, 16 years after the 1980 redemption of her shares in the Moorings. The summary judgment should therefore be affirmed.

2. The children fail to show that the "last act" of their causes of action occurred in 1996.

As an alternative to their equitable estoppel argument, the children say that the "last act" of their causes of action was actually not until 1996. This "last act" theory is fatally inconsistent with their pleadings, however, which unequivocally assert causes of action arising in 1980, 16 years before:

> 37. On December 10, 1980, due to her poor financial and emotional condition, relying on the above information and the fiduciary duty of [defendants], . . . [Maria Luisa] sold her 50% interest to [Leonor].
>
> * * *
>
> 44a. On When the Moorings redeemed [her] 50% shareholding in the Moorings in 1980, the Moorings did not disclose in any financial statutes, disclosure document, or any other materials, that the Moorings owned the Chiriqui shares and that in signing the redemption agreement, [Maria Luisa] would be giving up her rights to the Chiriqui shares.
>
> * * *
>
> 59. [Leonor] breached [her] fiduciary duties to [Maria Luisa] and abused [her] confidential and fiduciary relationship, [and] failed to disclose the alleged ownership of the Chiriqui stock by The Moorings and misrepresented the assets of The Moorings to induce [Maria Luisa] to sell her 50% interest . . . .
>
> * * *
>
> At the time of [Leonor's] sale of The Moorings in 1984, [Leonor] carefully concealed from [Maria Luisa] the fact that the Chiriqui shares had been excluded from the sale and transferred directly to [Leonor].

(R. 631-709). On the state of the pleadings in this case, there is simply no basis to locate the "last act" giving rise to the children's claims in 1996.

All of the children's causes of action describe an alleged wrong occurring in 1980. They depend on Leonor and/or the Moorings "inducing" Maria Luisa's 1980 sale, and Maria Luisa's reliance on alleged fraudulent conduct in that sale. They also depend on Leonor's "intent to defraud" Maria Luisa in 1980. This in turn would require that Leonor believe the Moorings owned the Chiriqui bearer shares and that she would gain exclusive right to them after the sale in 1980.

This is further confirmed by the children's constructive trust and other counts that are based on a breach of fiduciary duty which itself did not exist after 1980. Since it is undisputed that the sisters Leonor and Maria Luisa were not close, but indeed had a "longstanding sibling rivalry," the only basis for the children's claim that Leonor had a fiduciary duty to Maria Luisa was their status as co-shareholders in the Moorings. (R. 637-39, 651). In a similar vein, Jorge's supposed fiduciary duty to Maria Luisa resulted from his position as President of the Moorings during the time she was a shareholder. (R. 636, 651).

Consistent with this theory, the children said that it was the "fiduciary duty of [Leonor] and [Jorge] to disclose that the Chiriqui shares were part of the redemption agreement" in 1980. (R. 641). Their alleged failure to make this

disclosure in 1980 was the basis for the childrens' claims throughout their general allegations.

These general allegations were specifically reincorporated into the counts the children now seek to revive. (R. 649). On top of that, the constructive trust count specifically stated that it was based on the 1980 redemption:

> 59. As described herein, GONZALEZ and JORGE GONZALEZ breached their fiduciary duties to LOBO and abused their confidential and fiduciary relationship, failed to disclose the alleged ownership of the Chiriqui stock by The Moorings and misrepresented the assets of The Moorings to induce LOBO to sell her 50% interest in The Moorings to GONZALEZ.

(R. 649). Given the state of the record, no 1996 last act theory can be harmonized with the claims the children put before the trial court.

If the children had truly taken the position that the last act giving rise to their causes of action happened in 1996, there would have been no need to claim that Defendants committed fraud or negligent misrepresentation in 1980, no need to accuse them of breaching fiduciary duties in 1980, and no need to ask that the 1980 redemption documents be reformed to account for the Chiriqui bearer shares. There would have been no need to name Jorge Gonzalez as a party, either, since there is no claim that he had any role in any of the 1996 events the children now complain about.

The children's 1996 last act theory cannot succeed on appeal where it is inconsistent with and undermined by the theories pled and litigated below. The summary judgment should therefore be affirmed.

3. Summary judgment as to the children was correct on the alternative basis that Maria Luisa is charged with knowledge of documents showing the Moorings owned the Chiriqui bearer shares since 1968.

Although summary judgment against the children was proper for the foregoing reasons, it was proper on alternative grounds, as well. Specifically, as a shareholder and director of the Moorings at all material times, Maria Luisa was as a matter of law charged with the knowledge of corporate acts and records reflecting that the Moorings claimed ownership of the Chiriqui bearer shares at the time of the Hershey trademark sale in 1968, and at the time she sold her interest in 1980. *Whigham v. Muehl*, 500 So. 2d 1374 (Fla. 1st DCA 1987). Given that all of the children's claims are predicated on her not having such knowledge, they fail as a matter of law.

As set forth above, the Moorings lay claim to the Chiriqui bearer shares not later than 1968, when it negotiated the sale of Chiriqui's only marketable asset, the Hershey trademark. During these negotiations, which marked the palace revolution that divested Julio of control over the Moorings and the Chiriqui bearer shares,

Maria Luisa was the designated recipient of multiple corporate correspondence regarding the Moorings' claim to the Chiriqui bearer shares.

The first of these was the Avery Letter on March 28, 1968. In that letter, Moorings' attorney Martin Avery told Maria Luisa that after the sale of the Hershey trademark, the "Moorings [would be] allowed to retain, for whatever they are worth, the rights to the Cuban lands which were the basis of Hershey's Cuban property tax loss." (Avery 4/21/99 depo., Pls.' Ex. 2).

Maria Luisa was also the designated recipient of the May 18, 1968 Link Letter, in which the President of the Moorings gave her the same information. Specifically, Link indicated that she "would be glad to know that our arrangements provide for [the Moorings] retaining all rights, title and interest whatsoever it might be to your Hershey property in Cuba. *Id.* at Def. Ex. 5.

Further confirming the Moorings' ownership of Chiriqui is Maria Luisa's own ratification of the Moorings' 1968 Hershey trademark sale. That ratification occurred when she signed and initialed the same board minutes that documented the sale. *Id.* at Def. Ex. 7; (Maria Luisa 10/4/99 depo. at 12-13, Ex. G-4).

In addition to the manifestation of ownership inherent in the Moorings' act of selling assets belonging to Chiriqui, the undisputed fact as that the Moorings' claim was hostile to Julio, who opposed the sale. (Avery 4/21/99 depo., Pls.' Ex. 21).

Further documenting the Moorings' ownership of the Chiriqui bearer shares was the Groh Report. In August of 1980, the Groh Report was requested by, sent to, and received by Maria Luisa's hand-picked director and advisor in the sale, Yale-educated lawyer Gilberto Arias. (Avery 4/20/99 depo., Def. Ex 12, p.3).

The Groh Report is explicit that the Moorings retained all rights to the Cuban lands belonging to Chiriqui which had been nationalized by Fidel Castro. *Id.* at Def. Ex. 11, p. 17. The Groh Report was dated ten (10) months before Maria Luisa's 1980 sale, and confirmed that after the Moorings' seizure of the Chiriqui bearer shares:

> [t]he Florida companies and Moorings of Canada [predecessors to the Moorings] retained all of the rights, benefits and proceeds attaching to or resulting from the Chiriqui Pledge Agreement, the Chiriqui collateral and the Hershey Guaranty (effectively all of the assets in Cuba purchased for $24,500,000 on December 31, 1957).

(Maria Luisa depo., Ex. G-7).

Mr. Arias acknowledged receiving the Groh Report in a letter dated August 21, 1980. That letter thanked Jorge Gonzalez "for the 23-page letter-report by the Moorings auditor, John H. Groh, to the I.R.S. on February 20, 1980." (Avery 4/20/99 depo., Def. Ex. 12, p. 3).

It is not necessary for a court to evaluate the credibility of any denial by

Maria Luisa that she was aware of these documents. Given her status as a director of the Moorings, "it is elementary that [she was] charged with full knowledge of the conduct of the affairs of the corporation . . . and [she] cannot be heard to say that [she had] nothing to do with the management of the business." *Whigham*, 500 So. 2d at 1378. (Internal cites and quotations omitted).

These corporate records and acts show that the Moorings claimed ownership of the Chiriqui bearer shares from 1968 until she sold her interest in 1980. As a result, all of her claims (and therefore the children's claims) must fail because they are based on her claimed ignorance of the true facts. The trial court's summary judgment was proper on these grounds as well and should be affirmed.

4. Summary judgment against the Estate was proper because the Estate fails to establish that its cause of action accrued in 1996.

In this appeal, the Estate asks this Court to vindicate a August, 2000, demand, which was made seventeen (17) years after Julio Lobo's death, for the same "return" of Chiriqui which Lobo first demanded thirty-two (32) years earlier, in 1968. Florida limitations law should not countenance such a result.

The Estate did not argue equitable estoppel at the Fourth District and does not do so here. Instead, it argues that its causes of action did not accrue until

1996. The Estate's argument, however, ignores the factual record that shows its claims accrued not later than 1972. It is also inconsistent with the pleadings before the trial court, which say its cause of action accrued in 1984. Moreover, it fails to acknowledge that even if the Estate's claims had accrued in April, 1996, they are still untimely and time-barred because they were not filed until August, 2000.

A. The Estate's claims are time-barred because Julio Lobo's causes of action accrued not later than 1972.

The Estate alludes repeatedly to the existence of a 1972 "agreement" by Leonor and Maria Luisa through the Moorings to return the shares to Julio Lobo at an indeterminate "appropriate time." (Initial Brief, p. 6). The Estate provides no insight, however, as to when it believes that "appropriate time" was, or how it was to be identified. In fact, since this agreement would have been breached as soon as the "appropriate time" came, the Estate's 1996 accrual theory depends on persuading this Court that it did not come until 1996, 30 years after the Moorings took possession of the Chiriqui bearer shares and 13 years after Julio Lobo's death.

Fortunately, Julio Lobo provided plenty of insight into what he believed an "appropriate" time was while he was alive, filling his correspondence with his own evidentiary admissions that the "appropriate" time to give him Chiriqui was when he

demanded it, starting in the mid-1960's and through to the mid-1970's when he admits waiving his claim.

Julio Lobo clearly expected the Moorings to return the Chiriqui shares to him from the earliest days, regardless of any agreement. In January of 1971, for example, in correspondence to his Shutts & Bowen attorneys, Julio Lobo stated that he was the rightful owner not only of the Hershey properties, but of The Moorings as well, "totally and completely." (R.719). His expectation survived the palace revolution of 1967-68. As Julio Lobo wrote to his attorney in January 1971:

> . . . The Moorings are totally and completely mine and I have ample documents to prove it when the time comes. The properties were placed in their name for the above aforemented [*sic*] reasons as my two daughters were my rightful legal heirs, only they elected to inherit me in life and not in death, and pulled the rug out from under me just at the time, when I needed the most the backing of the properties. They have kept my Hershey properties which were put into The Moorings for safekeeping; they kept the proceeds of the sale of the Hershey brand $235,000.00 which was mine, and absolutely mine . . . .

(R.719).

By this time, Julio Lobo believed his daughters would not return the Chiriqui shares to him unless forced to. As a result, he instructed his Shutts & Bowen attorneys that "you are to proceed accordingly with the utmost alacrity, celerity and

energy." (R.719-20). As Julio Lobo also wrote to his lawyer in January of 1971:

> It is a sad state of affairs when a father has to sue his two daughters. They have stolen the only property I have left, which I need to get back on my feet. They will inherit me when I go but certainly not now. I have no other recourse and they leave me no other alternative.

(R.720). In handwritten notes on this same correspondence, Julio Lobo states that:

> I intend to hit back & to hit hard. The time has come now to act.

(R.720).

It is without doubt that Julio Lobo believed he had a cause of action against the Moorings and his daughters at least as early as 1971, and continued to believe this for years afterward. His numerous letters to his lawyers and others regarding the Chiriqui properties specifically demonstrate this belief:

January 26, 1971

> We must conduct a concentrated offensive against the - Moorings and its pseudo-owners, against Link, and against Avery.
>
> I need now very badly these properties and will do everything within my reach by hook or crook to recuperate them and to put Link in jail for malversation of funds (Moorings and mine), and Berryhill for incompetency and drunken habits while handling my cases.
>
> I MUST GET MY MONEY BACK OUT OF THE MOORINGS.

January 28, 1971	I have finally decided to go after The Moorings and try to recuperate my properties and my note from the City Bank. Recuperate the Hershey properties which at all time were mine and were injected into The Moorings to prevent a possible seizure, and . . . recuperate the possession and stock of The Moorings which I can prove is completely and totally mine . . . .
January 30, 1971	My two daughters have left for Florida together with the Arab. I want the Hershey stock out of their hands and into mine.
February 3, 1971	I want to recuperate my Hershey properties which were injected into The Mooring[s] for safekeeping.
February 11, 1971	To me it is immaterial whether The Moorings go[es] bankrupt or not. [T]o hell with my daughters and with the Arab. Nothing would please me more than to see them there or rather to know that they are there. Give no quarter and have no mercy on Link, Berryhill, Avery, daughters, the Arab. I am sick and tired of being the anvil, I want to be the hammer now.
May 10, 1971	I told you in no uncertain terms and also Tom Wolfe what four points I wanted to have settled to wit . . . return of my Hershey shares which I unduly put into The Moorings. Should they, the ex-daughters, refuse all of the above alternatives I shall then be forced to take the case to court here in Spain where I am a resident.

May 19, 1971	I am telling you - and this is privileged correspondence - that I intend to su[e] here against both ex-daughters . . .
February 9, 1972	I want you to tell me frankly whether some lawyer in your firm can handle the matter against my daughters . . .
February 15, 1972	You know full well of course, what has happened with regards to The Moorings and the dastardly way in which they have behaved towards me.
August 1, 1972	I want to warn you that under no circumstances and no matter how important this information may be I refuse to see my daughters or Jorge Gonzalez. They are thieves of the worst nature because any daughter that steals from her father ought to be ostracized from society to say the least.
September 5, 1972	Confidentially, I do not intend to do anything with regards to The Moorings, for the time being at least. Let's get out of this first and give them the works later. I can prove with all sorts of documents that those properties were in my name until 1963, when, for reasons well known to you, they had to placed in their name. I have all the canceled checks and vouchers in my possession, proving all of the foregoing. As you know, an agreement was reached with the ex-daughters by Enrique Leon in my name, roughly two years ago. That agreement has never been fulfilled in any way shape or form and I am getting tired.
November 17, 1972	Since you and your firm are acting as my lawyers when you get through with your IRS suit, then my instructions will be to fire away against my daughters and that crook called Gonzalez (I would have thrown him out of your office).

	I am sick and tired of being pushed around. That fellow Gonzalez has a fancy salary, the daughters also have a salary doing nothing, and the father, the originator of all this windfall, he gets nothing.
June 16, 1973	Let's get ready for a really good fight, because I do not want to die without letting the world know the crooks that my daughters and sons-in-law have turned out to be. We should begin to plan all this.
January 17, 1974	The Arab is a crook of the first war to begin with when I had millions of dollars he married without a penny.
	Now I wish he would steady the case; me against my two daughters for having stolen the property . . . I think you should declare the war against them.

(R.720-724).

Julio Lobo never tried to enforce the rights he claimed to the Chiriqui bearer shares. The record evidence is that he waived his claim after his fall in 1973. After the fall, Julio Lobo expressed the desire to reestablish friendly relations with his daughters, as follows:

April 20, 1974	I think this is the opportunity to settle all matters once and for all with The Moorings, now that friendly contact, thank God!, has been restaured [*sic*] with my daughters.
	Now that we are reaching a final conclusion with the Internal Revenue, I think that we simultaneously have to reach an agreement with The Moorings <u>for their benefit and mine, and all of those concern</u> [*sic*].
May 2, 1974	I want to clear my standing with my two daughters with

	regards to my position within The Moorings.
	I have already waived my rights on those properties.
May 14, 1974	Upon your recommendation, I gave up my formal rightful claim on The Moorings.

(R.724-25).

This thaw in relations between Julio Lobo and his daughters did not completely dispose of claims to the Chiriqui properties for some months. By August 30, 1974, however, Julio Lobo had decided to give up any claim he may have had to the Chiriqui bearer shares. As Julio Lobo stated in correspondence of that date, "no matter what my rights are, I am not going to claim ownership." (R.725).

Even assuming there was an "agreement" in place to give Chiriqui back to Julio Lobo, and furthermore assuming it was dated as "recently" as 1972, as the Estate claims, Julio Lobo's signed correspondence is chock full of his own admissions that he believed he had a cause of action against both Leonor and Maria Luisa based on their breach of this "agreement" decades ago. And, whether Julio waived his claims to Chiriqui or not, whatever actions Leonor took in 1996 were insufficient to breathe life into the rights Julio Lobo slept on for 30 years before filing suit.

Notably, the Estate's attempt to locate the "last act" giving rise to its causes of action in 1996 is also inconsistent with the pleadings put before the trial court. As the Second Amended Complaint makes clear, the Estate's claim was that although it was the true owner of the Chiriqui bearer shares, they were "wrongfully retained by [Leonor Gonzalez] by her wrongful assignment of the shares to herself at the time of the 1984 sale of the Moorings, which assignment was carefully concealed from Lobo. (R. 641). (Emphasis added). For this reason as well, the children fail to show that the Fourth District's opinion in this case should be reversed.

b. Even assuming the Estate's causes of action did not accrue until 1996, its claims are nevertheless time-barred.

The Estate's theory regarding a 1996 accrual of its claims is based on Leonor's allegedly new disclosure of her ownership of Chiriqui in April, 1996. (Initial Brief, p.16). However, the Estate still waited over four years after that until August of 2000 to bring suit. Accordingly its claims are time-barred under the four-year limitations period applicable to its constructive trust, injunctive relief and declaratory relief causes of action.

This result is not affected by the relation back doctrine, which does not apply to the addition of new parties or claims. Florida cases are legion in this

regard, and unambiguously provide that under Fla.R.Civ.P. 1.190(c), the addition of a new party to an action will not relate back to the original complaint. *Schwartz v. Wilt Chamberlain's of Boca Raton, Ltd.*, 725 So. 2d 451 (Fla. 4th DCA 1999), *citing Kozich v. Shahady*, 702 So. 2d 1289 (Fla. 4th DCA 1997); *Troso v. FIGA*, 538 So. 2d 103 (Fla. 4th DCA 1989); *Lindsey v. H.H. Raulerson, Jr. Memorial Hospital*, 505 So. 2d 577 (Fla. 4th DCA 1987); *Lewis v. South Broward Hospital District*, 353 So. 2d 562 (Fla. 4th DCA 1977).

Moreover, relation back will also not be permitted where an amendment states a "new and distinct cause of action from that set forth in the original pleading." *West Volusia Hospital Authority v. Jones*, 668 So. 2d 635 (Fla. 5th DCA 1996)(citations omitted); *See also School Board of Broward County v. Surette*, 394 So. 2d 147 (Fla. 4th DCA 1981). The record in this case is that the operative complaint did not include any claims on behalf of the Estate until August of 2000.[1]

The August, 2000 Second Amended Complaint not only added a new party, the Estate, but also added a new and different cause of action to the lawsuit.

---

[1]Although the children's September 1999 Amended Complaint alluded to the Estate, the Plaintiffs successfully resisted summary judgment on the grounds that the Estate was not a party to suit. (R. 565). Accordingly, they are judicially estopped to claim otherwise on this appeal.

Specifically, and in direct opposition to the children's claims, the Estate asserted that the Chiriqui shares were never lawfully owned by the Moorings, and that Maria Luisa was therefore not entitled to 50% of the bearer shares upon the redemption of her Moorings stock, as the children claimed then and still claim today. Instead, the Estate was the wronged party and was entitled to 100% of the Chiriqui shares.

Being as the Estate was a new party, asserting a new and different cause of action in direct opposition to the claims already pending before the trial court, the amendment did not relate back. This is so, despite the irrelevant fact that Defendants were aware of the potential opening of the Estate and the further possibility that it would assert claims. *See West Volusia Hospital Authority v. Jones*, *supra* at 636-37. (Mere fact that defendant knew of the existence of a later-added plaintiff and his claims was insufficient to trigger relation back; no occasion to depart from the rule that the assertion of a separate claim by a separate party would have to be brought within the statute of limitations).

5. The District Court of Appeal correctly found that the trial court abused its discretion in denying attorney's fees.

The children next complain that the Fourth District incorrectly reversed the trial court's denial of fees under the offers of judgment in this case. Their chief argument is that the appellate court did not appreciate that three recent Florida

cases showed an "uncertainty" in the delayed discovery and equitable estoppel doctrines which precluded Defendants from predicting their success in this case at the time they served their proposals for settlement, and the proposals were therefore made in bad faith.

The children did not make this argument until their Motion for Rehearing at the District Court of Appeal. Moreover, the cases upon which the children rely, *Morsani*, *Davis* and *S.A.P.*, are very recent opinions, none of which existed at the time the proposals for settlement were served on October 20, 1999. Indeed, the children's first-ever cite to *Hearndon* in this case was in their initial brief with the Fourth District.

The children do not explain how these 2000, 2001 and 2002 opinions could have logically affected Defendants' 1999 assessment of liability. What can be explained is that as of October 20, 1999, the Florida Supreme Court's decision in *Hearndon* had not yet injected uncertainty into the accrual statutes with broad statements regarding delayed discovery doctrine. Nor had the Florida Supreme Court's decision in *S.A.P.* potentially impacted the historical understanding of equitable estoppel. Whatever "uncertainty" the children say is reflected in the opinions, they fail to substantiate any claim that it was apparent in October of 1999.

As the Fourth District noted in its opinion, all Defendants needed to have

was "'a reasonable basis at the time of the offer to conclude that their exposure was nominal.'" Order at 10, *quoting Fox v. McCaw Cellular Communications of Florida, Inc.*, 745 So. 2d 330, 333 (Fla. 4th DCA 1998). (Emphasis added). Since none of the delayed discovery or equitable estoppel "uncertainties" had been created at the time of the offer, the children do not support any claim that the offers were made in bad faith.

Nor do the children show any error in the Fourth District's conclusion that the trial court abused its discretion in denying entitlement to attorney's fees. As was painstakingly set forth in Respondents' briefing at the Fourth District, incorporated herein by reference, the children persuaded the court to apply the factors set forth in 768.79(7)(b), Fla. Stat., which go to the reasonableness of the amount of fees, not to the entitlement of fees. (R2. 84-85, 90-92, 97). (Reply Brief of Leonor Lobo de Gonzalez and Jorge Gonzalez at 4-10). Additionally, the trial court erroneously found that the offers were made in bad faith due to the absence of discovery at the time they were made, when the true facts were that the Defendants were already in possession of all or nearly all of the documents and testimony upon which they relied at summary judgment. *Id.* at 12-14. Indeed, the Defendants filed their first motion for summary judgment only two weeks after serving the offers of judgment, which was substantially identical to the second

motion for summary judgment upon which they prevailed. *Id.*

Finally, the children indicate that the proposals for settlement were inconsistent with the true value of the Chiriqui bearer shares given the dollar amounts mentioned in previous settlement offers by Leonor Gonzalez. However, these settlement offers were inadmissible to prove the value of the children's claims under Fla. Stat. §90.408, and the trial court erred in considering them. *Id.* at 11-12.

The children fail to show that the Fourth District erred in reversing the trial court's denial of attorney's fees for abuse of discretion. Accordingly, the Fourth District's opinion should be affirmed in all respects.

Conclusion

Petitioners fail to justify setting aside commercial transactions that happened anywhere from twenty to thirty years ago involving actors most of whom are dead. For the reasons expressed, the Fourth District Court of Appeal's opinion in this case should be affirmed in its entirety.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via First Class U.S. Mail to **Gerald F. Richman, Esquire**, RICHMAN, GREER, WEIL, BRUMBAUGH, MIRABITO & CHRISTENSEN, P.A., Attorneys for Appellants, One Clearlake Centre, 250 Australian Avenue South, Suite 1504, West Palm Beach FL 33401 this _____ day of NOVEMBER, 2003.

MOSS, HENDERSON, BLANTON, LANIER, KRETSCHMER & MURPHY, P.A.
817 Beachland Boulevard (ZIP: 32963)
P.O. Box 3406
Vero Beach, FL 32964-3406
Telephone: (772) 231-1900
Facsimile: (772) 231-4387

By:_____
George H. Moss
Florida Bar No. 057035
Casey Walker
Florida Bar No. 099848

Certificate of Compliance

I HEREBY CERTIFY that the foregoing Answer Brief is submitted utilizing **Times New Roman 14 point font** in compliance with the font requirements of Fla.R.App.P. 9.210(a)(2).

By:_____
Casey Walker