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.
_____ /

ON APPEAL FROM THE FOURTH DISTRICT COURT
OF APPEAL OF FLORIDA

PETITIONERS' INITIAL BRIEF

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A. NATURE OF THE CASE

Petitioners, John Ryan, IV, Victoria Ryan, Carolina Ryan Camperio and Alin Ryan Smith (the "children"), and Robert Nall, as personal representative of the Estate of Julio Lobo Olabarria, appeal the decision of the Fourth District Court of Appeal that (1) affirmed the trial court's final summary judgment order which found that every claim for relief in Petitioners' Second Amended Complaint was barred by the statute of limitations, and (2) reversed the trial court's order denying Respondents' Motion for Sanctions/Fees and Costs Based on Proposal for Settlement, ruling that the trial court abused its discretion when it held that Respondents' $100 proposals for settlement were not made in good faith.

B. THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE

In 1957, Julio Lobo formed Chiriqui, a Panamanian corporation, to purchase the Hershey Sugar Corporation and its affiliated group of companies, Rosario Sugar Company and Compañía Azucarera Gomez-Mena from the Cuban Atlantic Sugar Corporation.[1] (R.633). The Chiriqui shares were represented by bearer stock certificates. (J. Gonzalez 6/16/99 depo. at p.38). The three properties, located in Cuba, consisted of vast agricultural lands, three mills and the largest refinery on

[1] Because the Hershey Corporation was one of the main Chiriqui assets, the parties often refer to the Chiriqui shares as the Hershey shares and use the terms interchangeably.

the island, with an integrated railroad system linking the three mills (the "Hershey properties"). (R.633). Even today, the Hershey properties are the "show-case" sugar properties in Cuba. (R.994-96). Julio Lobo purchased the Hershey properties for $25 million. (R.633).

To finance part of his purchase, Julio Lobo obtained a $9 million loan from First National City Bank ("City Bank") and pledged the Chiriqui shares and its underlying properties as collateral. (R.633). Due to the Cuban government's confiscation of his Cuban assets, Julio Lobo could not service the City Bank loan which resulted in a default. (R.990-92). At the request of their father, to protect him from default, save his good name and preserve the shares of the Hershey properties, his two daughters, Maria Luisa and Leonor, agreed to assume a portion of the Chiriqui debt. (Maria Luisa 10/3/96 depo. at p.20; J. Gonzalez 6/16/99 depo. at p.41).[2] The debt was actually assumed by the Moorings Development Company ("Moorings"), a Florida real estate development company financed and controlled by Julio Lobo but nominally owned by his daughters. (Maria Luisa 10/3/96 depo. at pp.22-24). Pursuant to an October 1963 Modification and Extension Agreement orchestrated by Julio Lobo, the daughters caused the

[2] The deposition transcripts are included in the record but the Clerk did not give them specific page numbers. Therefore, the deposition transcripts cited herein are referred to by the deponent's name followed by the date of the deposition (if the deposition took place on more than one day), followed by the page number.

Moorings to assume $3.7 million of the Chiriqui debt to City Bank, and secured the debt with a $3.7 million note to City Bank and a pledge of 100% of the shares of the Moorings. (Maria Luisa 10/3/96 depo. at pp.21-22). In turn, the Moorings received a $3.7 million note from Chiriqui. (J. Gonzalez 6/16/99 depo. at p.41).

Although Respondents suggest that the Chiriqui shares had no value after the Cuban government's appropriation of the Cuban assets, the undisputed facts, including the testimony of Respondents' own witnesses, leave no doubt that the Chiriqui shares continued to have substantial value. For example, in 1980, the Moorings' outside accountant, John Groh, one of Respondents' witnesses, explained to the IRS that there was a market for Cuban sugar mill properties which were actively traded in the United States, roughly tracking the discounted rate of the defaulted Cuban debt, trading between 10 to 40%. (Groh depo. at p.104, referencing pages 18-19 of Exh. 56 to Leonor depo.). Mr. Groh wrote this letter to justify that the Chiriqui shares were valued at over $7 million in 1963. *Id.* Active trading of shares of Cuban sugar mills has continued from the 1960s to today, which means that the shares of Chiriqui would have had a value of several million dollars throughout the 1960s, 1970s, and 1980s. (J. Gonzalez 6/16/99 depo. at p.42 and 3/7/00 depo. at pp.9-13; Groh depo. at p.104). Moreover, the Hershey Sugar Corporation owned the Hershey trademark, which was sold to Hershey of

Pennsylvania in 1968, with Julio Lobo receiving in excess of $100,000 from the sale. (J. Gonzalez 1/26/00 depo. at p.48).

Even now, the Chiriqui shares are valuable. On March 22, 2000, the Cuban government hosted representatives of United States sugar interests for a five-day visit at the Hershey Sugar Mill, renamed Camilo Cienfuegos by the Cuban government. Present were representatives of several multinational entities who met with Cuba's ministers of foreign trade and sugar. (R.994-97). The Cuban government's representatives touted the Hershey properties to the visiting multinationals as a possible foreign investment project, which clearly demonstrates that the Chiriqui lands are valuable assets.

At the time of Chiriqui's 1963 note to the Moorings, Chiriqui had no cash flow to pay the debt due to the prior confiscation by the Cuban Government of the underlying Hershey properties. (Leon 5/10/00 depo. at pp.43-45). As expected, Chiriqui never made **any** principal or interest payments on the note to the Moorings and defaulted. (R.990-92). Two letters written by the Moorings' president to Julio Lobo, one in 1965 and the other in 1966, each purported to inform Julio Lobo that the Moorings seized the collateral – thus there were **two** alleged "seizures" of the same collateral. *Id*.

It is undisputed that subsequent to the purported "seizures," the Moorings never took any steps to perfect the seizure or cancel the share certificates and have

them re-issued in the Moorings' name. (R.998). The Moorings never notified Chiriqui's registered agent or its directors of the change in ownership. *Id.* No Chiriqui corporate filings were made and no government taxes or resident agent fees were paid in Panama since the 1960s. *Id.* Indeed, the officers and directors of Chiriqui, who were all Panamanian residents, were not aware that the shares had been seized by the Moorings and that the ownership had changed until approximately March 14, 1996, when Leonor first filed corporate papers in Panama asserting a 100% ownership interest in Chiriqui. *Id.*

Importantly, the Moorings never listed the Chiriqui shares as an asset on any of its audited consolidated financial statements. (Groh depo. at pp.62-64, 115-17, 152). Despite the fact that U.S. income tax returns require disclosure of ownership in a foreign corporation, the Moorings federal tax returns affirmatively represent that the Moorings did not own the shares of a foreign corporation. (Groh depo. at pp.62-64, 152).

The Moorings never informed Maria Luisa of the purported seizure of Chiriqui or that Chiriqui had been acquired by the Moorings and was now an asset of the corporation. (Maria Luisa 10/3/96 depo. at p.44). Furthermore, Maria Luisa never received any financial statements from the Moorings reflecting that the Moorings owned the Chiriqui shares because the Moorings never listed the Chiriqui shares as an asset on its financial statements. (*Id.*; J. Gonzalez 1/27/00

depo. at p.253; Groh depo. at pp.62-63). Because no document provided to Maria Luisa indicated to the contrary, at all times Maria Luisa believed that the shares were actually still owned by her father, Julio Lobo. (Maria Luisa 10/3/96 depo. at p.38).

In about 1967, the Moorings began to operate independently of Julio Lobo despite his protests, and Julio Lobo was totally removed from control in the Moorings. Julio Lobo contacted attorneys in Miami and contemplated taking action to assert his interests. Julio Lobo did not, however, take action against his daughters because they reached an agreement in 1972 that the Chiriqui shares would be returned to him "at the appropriate time." (R.1000). This agreement was memorialized in a memo prepared by Enrique Leon. (R.1000-01). Mr. Leon was the primary attorney for Julio Lobo in Cuba from 1945 through 1960, and served Julio Lobo following their exile as an advisor from 1960 through 1973. (Leon 5/10/00 depo. at pp.7-12). Documents created thereafter reveal that the parties expected the shares to be returned to Julio Lobo in the future. For example, in 1973, Leonor's husband and then President of the Moorings, Jorge Gonzalez, confirmed in draft letters his understanding that the shares would be returned to Julio Lobo. (J. Gonzalez 1/26/00 depo. pp.119-23; 129-38, referring to Exhs. 17 and 21 to Leonor depo.). Moreover, as late as 1975, Julio Lobo indicated in writing that he still expected his daughters to return the Chiriqui shares to him at

the appropriate time. (J. Gonzalez 1/28/00 depo. at pp.343-44 and Exh. 14). Respondents have not offered any documents after this 1975 letter to suggest that Julio Lobo believed otherwise and that the shares would not be returned to him.

In 1971, Respondent Jorge Gonzalez was appointed President of a related company, The Moorings Development Company of Canada Ltd. ("Canadian Moorings"), which was also equally owned by Maria Luisa and Leonor. (R.636-933). Although Maria Luisa did not know it at the time Jorge Gonzalez was named president, this company's corporate documents provided that the president held the tie-breaking vote on corporate matters in the event of a shareholder deadlock. (J. Gonzalez 3/7/00 depo., Exh. 19). From that date forward, Leonor had effective control of the Canadian Moorings, a fact that Leonor often reiterated. (Maria Luisa 10/3/96 depo. at pp. 35-36; Victoria Ryan 2/3/00 depo. at pp.14-17).

In 1977, the Canadian Moorings and the Moorings merged in a "downstream merger" wherein the Moorings was the surviving company. (J. Gonzalez 3/7/00 depo., Exh. 18). As part of the merger process, Jorge Gonzalez sought to have the Moorings' corporate documents amended to provide him with the tie-breaking vote. *Id.* Although this amendment never occurred, Leonor and Jorge Gonzalez continued to inform Maria Luisa that they were in control of the Moorings. (Victoria Ryan depo. at pp. 14-17). In fact, in the late 1970s, Maria Luisa, as 50% shareholder, attempted to have a representative appointed to the board of directors.

It took over one year for her to have a director appointed to represent her interests. (Maria Luisa 10/3/96 depo. at pp.35-36; J. Gonzalez 3/7/00 depo. at pp.139-40). Until she redeemed her interest in the Moorings, Maria Luisa believed that Leonor controlled the Moorings through a tie-breaking vote held by her husband Jorge Gonzalez. (Victoria Ryan depo. at p.14-17).

In December 1980, as a result of financial and emotional problems and because of her belief that she had only minority control in the Moorings, Maria Luisa negotiated with Leonor and Jorge Gonzalez for the redemption of her interest in the Moorings. John Taylor Bigbie, an attorney licensed to practice in New York but residing in London, represented Maria Luisa during the negotiations. (R.553). Maria Luisa also received some limited advice in negotiating a suitable price from Gilberto Arias, a Panamanian attorney and the director she had finally named to the Board to represent her interests, and guidance from her stepfather, Manuel Angel Gonzalez Del Valle, an elderly architect who did not speak fluent English. (Maria Luisa 10/3/96 depo. at p.43; J. Gonzalez 1/27/00 depo. at pp.257-58).

Mr. Bigbie stated in a sworn affidavit that the Chiriqui shares were never disclosed as an asset of the Moorings and that the only properties of the Moorings which were disclosed to him and used as a basis for the valuation of the Moorings for purposes of calculating Maria Luisa's 50% interest in the Moorings were

development lands owned by the Moorings in Vero Beach, Florida. (R.553-56). Mr. Bigbie further stated that no reference was ever made, either oral or written, to the existence of any subsidiaries or corporations owned by the Moorings which owned properties in Cuba. *Id.*

In exchange for redeeming her shares, the Moorings transferred to Maria Luisa several tracts of land, which she sold for approximately $1.8 million. (R.553-56).

In 1984, four years after the sale of Maria Luisa's 50% interest in the Moorings, Leonor sold her entire 100% ownership in the Moorings at a substantially increased price. (J. Gonzalez 1/27/00 depo. at p.224). Shortly before the sale, however, Leonor and Jorge Gonzalez removed the Chiriqui shares from the premises of the Moorings. Leonor and Jorge Gonzalez concealed this fact from Maria Luisa and never disclosed the existence of the shares to the buyer. (J. Gonzalez 1/27/00 depo. at pp.269, 278). It is undisputed that Leonor never offered Maria Luisa 50% percent of the shares and that she never advised Maria Luisa that she was claiming **any** interest in the shares, much less 100% interest, until 1996.

The record is undisputed that prior to 1996, Leonor never asserted publicly or otherwise that she owned 100% interest in the Chiriqui shares. Rather, in her deposition, Leonor testified that she publicly announced at a 1996 meeting of the

Asociacion Nacional de Hacendadados de Cuba that she owned **50%** percent of the shares:

> Q. When did you first learn of that organization?
> A. I can't tell you the year, but I do remember getting a call from a young man called Nick Gutierrez. He called me up and he said: Why don't you start getting involved and coming to Meetings? And I said: I can't get involved in coming to meetings because my sister and I are in total disagreement. **And he said: But you can come anyway; and since you're 50/50, you can vote or whatever – do whatever for your 50 percent. And that's how I went, and that's – I didn't pretend to be speaking for both of us. When they said, "50 percent," I raised my hand and I said: Yes, I have 50 percent of my father's things.**
> Q. **You never said that you had a hundred percent with regard to the Hershey stock?**
> A. **Never. This is outright fabrication, never.**
> Q. **So you were acknowledging in 1996 that you personally owned 50 percent and your sister owned the other 50 percent, correct?**
> A. **Yeah. This is nineteen what?**
> Q. **1996.**
> A. **1996, yeah.**

(Leonor depo. at pp. 395-97) (Emphasis added).

Leonor made no attempt to publicly manifest her complete ownership rights over Chiriqui or otherwise notify Maria Luisa of her hostile claim to 100% of the shares prior to 1996. (Leonor depo. at p.396).

Julio Lobo died in 1983 in Spain, and his estate was never probated due to the fact that his assets and properties all remained in Cuba, except for personal effects which were distributed informally following his death. (J. Gonzalez 1/27/00 depo. at pp.304-05). In or about 1991, Petitioner John Ryan, IV, who is

Julio Lobo's grandson and one of the children of Maria Luisa and who is an attorney admitted in Florida and New York but residing in Switzerland, requested Enrique Leon to prepare an affidavit which would serve to leave a record of the properties owned by Julio Lobo in Cuba. (John Ryan, IV, 3/17/00 depo. at pp.95-96). Mr. Leon's affidavit sets forth the detailed inventory of all the industrial assets of Julio Lobo and was prepared with the sole purpose of serving as legal proof of asset ownership in future indemnification and restitution proceedings in Cuba. (Leon 5/10/00 depo. at p.104).

As part of this process, Leonor met with Mr. Leon in December 1995 to discuss the execution of the affidavit. (J. Gonzalez 3/7/00 depo. at p.235). At that meeting, Mr. Leon inquired as to the whereabouts of the Hershey shares and mentioned that those shares should be divided equally between the two sisters, at which point Leonor refused to respond, evaded the question, and terminated the meeting. (J. Gonzalez 3/7/00 depo. at pp.235-36; Enrique Leon 5/10/00 depo. at pp.128-30). It is undisputed that Leonor did not claim 100% ownership interest in Chiriqui at that meeting. (Leon 5/10/00 depo. at pp.129-30).

A draft affidavit prepared by Mr. Leon, which was circulated to Leonor and Maria Luisa, included the Chiriqui shares as an asset of Julio Lobo. (Enrique Leon 5/10/00 depo. at pp.126-30). Leonor did not object to listing the Chiriqui shares as

one of Julio Lobo's assets, and did not assert or disclose any position that she owned the shares outright.

The affidavit was finally executed in 1997 by Enrique Leon after extensive consultations with both Leonor and Maria Luisa. (Enrique Leon 5/10/00 depo. at p.131). Despite the fact that Chiriqui was prominently listed in the affidavit that was to be used in the future to recover the properties for the Estate, Leonor never advised Mr. Leon that she claimed a 100% ownership interest in Chiriqui and its underlying Cuban properties until after the affidavit had been completed, in a letter dated August 26, 1997. (Leon 5/10/00 depo. at pp.133, 138-39, 143-44).

In 1996, on the eve of the passage of the Cuban Liberty and Democratic Solidarity Act (referred to as the Helms Burton Act), 22 U.S.C.A. § 6081, John Ryan, IV, began to discuss with Leonor a unification of the families and resolution of any prior disputes. One of the issues discussed was holding Cuban properties through U.S. Corporations in order to benefit from the provisions of the Helms Burton Act. Prior to 1996, nothing had been done to transfer the Chiriqui shares and put them in Leonor's name or anyone else's name. (J. Gonzalez 3/8/00 depo. at p.262). During the time that John Ryan, IV, was searching for the whereabouts of the Chiriqui shares to have them transferred to a U.S. corporation for the entire family to benefit from the Helms Burton Act, Leonor affirmatively told Mr. Ryan that she was "looking into matters" and "would not do anything to harm" the

Ryans' interests. (J. Gonzalez 3/8/00 depo. at pp.266-306 and Exhibits referred to therein). In fact, in a letter from Leonor to John Ryan, IV, dated March 13, 1996, Leonor stated:

> Notwithstanding, rest assured that my delay is not due to 'lack of interest' on my part, and that I have no intention in damaging you or your sisters' interest in any way. As soon as I am in a position to talk to you I will do so, hoping we can yet find an amicable solution to our problems.

(Leonor depo., Exh. 75). Despite her representations to the contrary, **the day after sending the letter** to John Ryan, IV, Leonor filed a public document at the Panama Registry claiming to be the 100% owner of Chiriqui and transferred her interest in the Chiriqui shares to a Florida corporation. (J. Gonzalez 3/8/00 depo. at pp.282-83; Leonor depo. at p.409 and Exh. 70). Leonor did not disclose these filings to Maria Luisa, Mr. Leon, or Petitioners. *Id*. Obviously, this process was well underway prior to her March 13th letter to John Ryan, IV.

Shortly thereafter, in April 1996, Petitioners for the first time became aware that Leonor was claiming a 100% interest in Chiriqui. (Carolina Ryan depo. at pp.25, 29). Petitioners subsequently filed suit against Leonor and Jorge Gonzalez to recover one half of the Chiriqui shares. The Second Amended Complaint asserted eight counts. The Estate asserted a claim for a constructive trust in its favor for 100% of the Chiriqui shares, alleging that the Moorings held the Chiriqui shares in trust for Julio Lobo (count I). The children asserted a claim for a

constructive trust in their favor for 50% of the Chiriqui shares, alleging that Maria Luisa was not aware when she sold her 50% interest in the Moorings that she was also selling her interest in the Chiriqui shares because Leonor and Jorge Gonzalez misrepresented that the assets of the Moorings did not include the Chiriqui shares (count II). Based on these allegations, the children also asserted a claim for breach of fiduciary duty and for negligent misrepresentation (counts IV and VII). Alternatively, the children sought reformation of the documents dealing with Maria Luisa's sale of her interests in the Moorings, arguing that the parties' never intended to include the Chiriqui shares in the transaction (count III). The children further sought a declaratory judgment that they are 50% owners of Chiriqui (count V). The Estate sought a declaratory judgment that it owns 100% of Chiriqui (count VI). The children and the Estate sought a permanent injunction preventing Leonor from selling the Chiriqui shares (counts VIII and IX).

In their Answer to Petitioners' Second Amended Complaint, Respondents asserted that the statute of limitations barred Petitioners' claims. (R.943). However, Petitioners affirmatively alleged in their Second Amended Complaint that the statute of limitations was inapplicable because it did not begin to run until 1996, when Leonor first announced that she was the sole owner of the shares. (R.641). Alternatively, Petitioners also affirmatively alleged in their Second Amended Complaint that if in fact the statute of limitations had expired,

Respondents were equitably estopped from relying on the statute of limitations because Leanor intentionally omitted to disclose her position that she owned 100% of the Chiriqui shares until after the limitations period expired. (R.641-46).

The trial court ruled on summary judgment that the equitable estoppel doctrine was inapplicable because the doctrine required Maria Luisa to be aware of the existence of her cause of action prior to the expiration of the limitations period. (R.1008). After the trial court granted summary judgment in Respondents' favor, Respondents sought an award of reasonable attorney's fees and costs based on their offer of judgment to the children in the amount of one hundred dollars ($100), which had been rejected. (R2. 1-18). The trial court found that Respondents' offer of judgment was not made in good faith, as the offer did not bear a reasonable relationship to the amount of damages and a realistic assessment of liability. (R2. 66-67). Petitioners appealed the trial court's order granting summary judgment and Respondents appealed the trial court's order denying their Motion for Sanctions/Fees and Costs Based on Proposal for Settlement. The two appeals were consolidated.

The Fourth District affirmed the trial court's decision on the merits, and ruled that equitable estoppel does not support the children's claims because Maria Luisa was not aware that she had a cause of action until 1996 (finding erroneously that the last act of accrual of the cause of action occurred in 1980) and she was,

therefore, not induced to forego filing suit within the limitations period. *Ryan v. Lobo de Gonzalez*, 841 So. 2d 510, 520 (Fla. 4th DCA 2003). Likewise, the Fourth District also found that the trial court correctly found that Julio Lobo knew in 1974 that his demands for the Chiriqui stock were not being honored and there was no evidence that he was induced to forbear enforcing his rights. *Id*. The Fourth District also held that the trial court abused its discretion when it ruled that the offers of judgment were not made in good faith, finding that Respondents had a reasonable foundation upon which to believe they had a viable limitations defense when they made a $100 settlement offer to each of the children. *Id*. at 523.

Petitioners' Motion for Rehearing, Rehearing En Banc and for Certification was denied. Subsequently, Petitioners invoked this Court's jurisdiction under Article V, § 3(b)3 of the Florida Constitution based on the conflict with decisions of the Florida Supreme Court and other district courts of appeal regarding the issue of whether a plaintiff must be aware of the existence of her cause of action prior to the expiration of the statute of limitations period in order to rely on equitable estoppel to bar the application of the statute of limitations. This Court accepted jurisdiction on September 19, 2003.

II. ISSUES ON APPEAL

A. Whether a plaintiff must be aware of her cause of action prior to the expiration of the statute of limitations in order to apply the doctrine of equitable estoppel to bar the statute of limitations defense.

B. Whether the Petitioners' claims for constructive trust, declaratory judgment, and permanent injunction, as well as the Petitioner children's claim reformation are barred by the statute of limitations when the last act of those claims did not occur until 1996.

C. Whether Respondents' offer of judgment to each of the children was made in good faith where the offer did not bear a realistic assessment of liability because there were was uncertainty regarding the application of the equitable estoppel doctrine to the statute of limitations, the offer did not bear a reasonable relationship to the amount of potential damages, and where very limited discovery had been taken on the limitations issue at the time of the offer.

III. SUMMARY OF ARGUMENT

The Fourth District committed reversible error when it affirmed the trial court's ruling that Petitioners' claims were barred by the statute of limitations and that the doctrine of equitable estoppel did not prevent the application of the statute of limitations because Respondents were not aware of the existence of their cause of action prior to the expiration of the statute of limitations period. The Fourth

District decision incorrectly adds a non-existent element to the equitable estoppel doctrine.

This Court's recent decision in *Florida Department of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002), demonstrates that a plaintiff does not have to have knowledge of the existence of a cause of action during the limitations period to be entitled to rely on equitable estoppel to bar application of the statute of limitations. In addition, several district courts of appeal have also found that the doctrine of equitable estoppel is applicable in cases where a defendant is in a confidential relationship and has a duty to inform the plaintiff of material facts that would provide notice of a claim, but fails to do so until after the limitations period expires. The Fourth District's decision below frustrates the prime purpose of the doctrine as it would allow a wrongdoer to conceal his wrongful acts until after the statute of limitations expires, and thereby profit from his wrongdoing.

The record evidence in this case supports the application of the equitable estoppel doctrine. First, Leonor and Jorge omitted to disclose that the fact that Respondents – Leonor as 50% shareholder and director of the Moorings and Jorge as President of the Moorings, both having a fiduciary relationship to Maria Luisa – omitted to disclose their position that the Chiriqui shares were part of the Moorings at the time Maria Luisa sold her interest in the Moorings constitutes a breach of

their duty to speak and establishes a misrepresentation of a material fact that is contrary to Respondents' later position that Leonor owned 100% of the Chiriqui shares. Second, Maria Luisa relied on the conduct of the Respondents' in their failure to disclose that the Chiriqui shares were an asset of the Moorings at the time of her redemption. Third, Maria Luisa detrimentally changed her position by selling her interest in the Moorings based on the Respondents' omission. Therefore, Petitioners satisfy all three elements of equitable estoppel.

Further, even if this Court finds that equitable estoppel is not applicable to the facts of this case, this Court should permit Petitioners' action to proceed, as the claims for constructive trust, as well as the children's claims for declaratory judgment, permanent injunction and reformation are not barred by the statute of limitations since those claims were timely filed because they did not accrue until 1996. The record evidence demonstrates that Leonor herself believed and acted as though she owned only 50 % of the Chiriqui shares until 1996, and that she made public statements to that effect in early 1996. Therefore, because Leonor did not disclose or assert any position that she owned 100% of the Chiriqui shares until 1996, Petitioners' claims for constructive trust, declaratory judgment, permanent injunction, and the Petitioner children's claim for reformation, could not have become viable until 1996 and are thus not barred by the statute of limitations. In other words, the last act giving rise to a cause of action – breach of constructive

trust and the transfer of 100% of the shares to her name – did not occur until approximately March 14, 1996.

Regarding the record evidence, it is essential to recognize that there are three different possible factual conclusions and each of the three scenarios affords full relief for the Petitioners. First, that the sham seizures were real and the Moorings actually owned the Chiriqui shares. The statute of limitations would then accrue in 1980, but would be deflected by the equitable estoppel doctrine due to the conduct of the defendants. Notably, the trial court found that the Moorings did not own the stock. Second, that the Chiriqui shares were always held by Leonor in trust for her father or herself and her sister, but in 1996 she decided to assert 100% ownership because of greed: the potential increase in value due to the Helms Burton Bill. The cause of action would accrue in 1996 when the last act occurred, i.e., when the trust was breached. There would be no need to rely on equitable estoppel. Third, that Leonor always intended to keep 100% of the Chiriqui shares but by word and/or conduct lead her sister and her father to believe that she was holding the shares in trust. The first knowledge of a cause of action for breach of the trust occurred in 1996 and the cause action for breach of the constructive trust imposed by law would arise in 1996 or the statute of limitations would be deflected by the equitable estoppel doctrine.

The Fourth District also committed reversal error when it ruled that the trial court abused its discretion in denying Respondents an award of attorney's fees and costs based on the offers of judgment. The record evidence supports the trial court's finding that Respondents' offer was not made in good faith because the offer did not bear a reasonable relationship to the amount of damages and a realistic assessment of liability. The record shows that Respondents believed that 50% of the Chiriqui shares were valued at over $3.5 million. Moreover, very little discovery on the limitations issue and the application of equitable estoppel had taken place at the time of the offers. Therefore, because the record does not justify the conclusion that the trial court abused its discretion, this Court should reverse the Fourth District's decision and affirm the trial court's order denying Respondents an award of attorney's fees and costs.

IV. ARGUMENT

A. THE DOCTRINE OF EQUITABLE ESTOPPEL PREVENTS RESPONDENTS FROM RELYING ON THE STATUTE OF LIMITATIONS DEFENSE.

1. Equitable Estoppel Does Not Require The Plaintiff To Be Aware Of Her Cause of Action Prior to the Expiration of the Statute of Limitations.

The Fourth District adopted Respondents' argument that the statute of limitations barred Petitioners' claims and that for a plaintiff to rely on equitable estoppel to bar the application of the statute of limitations, the plaintiff must be aware of the existence of her cause of action prior to the expiration of the statute of

limitations period. However, the Fourth District's construction of the elements of the equitable estoppel doctrine overlooks the "prime purpose" of the doctrine in that the legal prerequisite imposed by the Fourth District's decision would prevent the application of the doctrine in situations in which the conduct of the defendant prevents the plaintiff from learning of the existence of a cause of action until after the limitations period expires. In the present case, reversal of the Fourth District's decision is appropriate and would be consistent with this Court's reliance upon the principle that courts will not protect defendants who are directly responsible for a plaintiff's delay in filing a cause of action because of the defendants' own willful conduct.

This Court is obligated to review the Fourth District's decision affirming the trial court's order granting final summary judgment *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County*, 760 So. 2d at 130. It is basic that "[i]n reviewing a judgment entered pursuant to a motion for summary judgment, reasonable inferences should be resolved in favor against the movant." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003) (citations omitted).

In *Morsani v. Major League Baseball*, 790 So. 2d 1071, 1079 (Fla. 2001), this Court recognized that equitable estoppel comes into play after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. This Court held in *Morsani* that:

> Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim.

Id. at 1077. This Court also held that a prime purpose of the doctrine of equitable estoppel "is to prevent a party from profiting from his or her wrongdoing." *Id*. at 1078.

In its recent decision in *S.A.P.*, this Court reaffirmed that the equitable estoppel doctrine can be used to bar a defendant's reliance on the statute of limitations. In *S.A.P.*, this Court explained, quoting *Morsani*, that "[l]ogic dictates that a defendant cannot be taken by surprise by the late filing of a suit when the defendant's own actions are responsible for the tardiness of the filing." *S.A.P.*, 835 So. 2d at 1099.

The elements of equitable estoppel, as set forth by this Court in *State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981), are:

> (1) a representation as to a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

In *Miami Gardens v. Conway,* 102 So. 2d 622, 626 (Fla. 1985), this Court found that one of the essential elements of equitable estoppel is that a person who claims the benefit of the doctrine has been influenced or has relied upon the conduct, act, or **omission to act** of the opposing party. (Emphasis added). Moreover, several district courts of appeal have found that the representation may be made by words or conduct and, "**where there is a duty to speak, failure to do so can be a representation relied upon by a party claiming estoppel**." (Emphasis added). *Head v. Lane*, 495 So. 2d 821, 824 (Fla. 4th DCA 1986); *Travelers Ins. Co. v. Spencer*, 397 So. 2d 358, 361 (Fla. 1st DCA 1981); *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850, 853 (Fla. 2d DCA 1978). In *Travelers*, the First District found that an omission sufficient to apply the doctrine of equitable estoppel means negligent or culpable omission in instances where the party failing to act is under a duty to do so. *See Travelers*, 397 So. 2d at 361.

This Court's recent decision in *S.A.P.* demonstrates that equitable estoppel does not require that a plaintiff have knowledge of her claim prior to the expiration of the limitations period in order to preclude application of the statute of limitations. In *S.A.P.*, the plaintiff alleged in her complaint that an internal HRS investigation in 1992 revealed for the first time that HRS employees had

obstructed the criminal investigation of the 1979 abuse and neglect of the plaintiff. *S.A.P.*, 835 So. 2d at 1093-94. The plaintiff in *S.A.P.* contended that "in light of HRS' allegedly fraudulent acts and its 'active concealment' of those acts, the doctrine of equitable estoppel should bar the department from asserting a statute of limitations defense." *Id*. at 1094. This Court agreed, holding that "[t]his prohibition on the ability of HRS to articulate the defense is consistent with this Court's reliance upon the principle that our courts will not protect defendants who are **directly responsible for delays of filing because of their own willful acts**." (Emphasis added). *Id*. at 1094.

The plaintiff in *S.A.P.* had no knowledge of her claim until 1992, some 13 years after the alleged wrongful conduct occurred, well outside the statute of limitations. Despite the fact that plaintiff had no knowledge of the existence of her claim prior to the expiration of the statute of limitations, this Court ruled that equitable estoppel could bar the defendant's use of the statute of limitations.

In his concurring opinion in the decision below, Judge Gross suggests that *S.A.P.* should be limited to abuse cases, and stated:

> The question is whether the supreme court in *S.A.P.* has expanded the doctrine of equitable estoppel to apply in all situations where a defendant's conduct prevents a plaintiff from even being aware of a cause of action. Such an extension would push equitable estoppel beyond its application in any other Florida case. We 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.

Ryan, 841 So. 2d at 525. Contrary to Judge Gross' analysis, this Court's decision to apply the equitable estoppel doctrine in *S.A.P.* was not limited to abuse cases in that the plaintiff did not seek relief for abuse. Rather, the plaintiff's claim against HRS was for HRS' **negligence** in failing to remove the child from an abuse situation. Moreover, the equitable estoppel argument arose from the HRS' "active concealment" of records that would have disclosed the negligence cause of action. This Court ruled that the HRS should not be permitted to profit from its wrongful concealment of facts that would have disclosed the existence of a cause of action. *See S.A.P.*, 835 So. 2d at 1093.

In this case, like in *S.A.P.*, the complaint alleges that the Respondents actively concealed facts from the Petitioners. Petitioners' complaint also alleges that Leonor, as a 50% shareholder and effectively as the controlling person of the Corporation through her then husband and the majority of the Board of Directors, and Jorge as the President of the Moorings, owed a strict fiduciary obligation of loyalty and of utmost good faith to Maria Luisa. Pursuant to this fiduciary obligation, Leonor and Jorge were bound to make full disclosure of all material facts concerning the purchase of Maria Luisa's 50% interest in the Moorings. The complaint further alleges that the Respondents concealed the facts until after the limitations period expired, thus preventing Petitioners from recognizing that they had a cause of action. The complaint also alleges that if Respondents had not

concealed the relevant facts, Petitioners would have asserted their rights in a timely manner.

The allegations in the case at bar are nearly identical to the allegations in *S.A.P.*, where this Court held that under those circumstances, the wrongdoer is precluded, by the doctrine of equitable estoppel, from relying on the statute of limitations to bar a plaintiff's claim. This Court's ruling in *S.A.P.* thus demonstrates that Petitioners are entitled to rely on the doctrine of equitable estoppel to bar Respondents' reliance on the statute of limitations even though they did not have knowledge of the existence of a claim during the limitations period.

Petitioners recognize that Florida courts have applied the equitable estoppel doctrine to prevent application of a statute of limitations in circumstances where a plaintiff is aware of her claim prior to the expiration of the statute. However, Petitioners found, and Respondents and the Fourth District court cited, no case applying Florida law which held that the plaintiff cannot rely on equitable estoppel to bar inequitable reliance on the statute of limitations **unless she first** proves that she was aware of the cause of action prior to expiration of the limitations period.[3]

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[3] In their motion for summary judgment, Respondents relied on *City of Brooksville v. Hernando County*, 424 So. 2d 846 (Fla. 5th DCA 1983) for their proposition that a plaintiff must know of the existence of a cause of action prior to the expiration of the limitations period. (R.715-16). However, the C*ity of Brooksville* decision did not reach the issue of whether the doctrine was applicable because the court ruled that estoppel is an avoidance that was not plead in the case. The case therefore did not discuss the estoppel elements and does not hold that

Because the basis for excusing the plaintiff's untimely filing is the conduct of the **defendant**, not the conduct of the plaintiff, it is illogical that such a rigid requirement should be adopted. Situations in which the conduct of the defendant prevents the plaintiff from learning of the existence of a cause of action until after the limitations period expires should be even more appropriate for application of the equitable estoppel doctrine, because the doctrine is based on concepts of equity and fundamental fairness, i.e., a defendant should not be able to take advantage of her own wrongdoing. *See Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 79 S. Ct. 760 (1959).

Moreover, the Florida equitable estoppel cases which involved a statute of limitations do not specifically require that the plaintiff know of the existence of her claim during the limitations period. For example, in *Alachua County v. Chesire*, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992), the Court held that:

> A party will be estopped from asserting the statute of limitations defense to an admittedly untimely action where his conduct has induced another into forbearing suit within the applicable limitations period.

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plaintiff must have knowledge of the cause of action during the limitations period. Respondents also cited *Armbrister v. Roland Int'l Corp*., 667 F. Supp. 802 (M.D. Fla. 1987), in support of their proposition. That case, however, is a federal case that applied federal, not Florida law, and has not subsequently been cited by any Florida appellate court.

Therefore, the concept does not **require** knowledge of the claim during the limitations period. The key requirement is that a defendant engage in conduct that induces the plaintiff to refrain from filing suit within the limitations period. Where the defendant is in a confidential relationship and has a duty to inform the plaintiff of material facts which would provide notice of a claim, but fails to do so until after the limitations period expires, this is an omission that constitutes "conduct" that "induces" a plaintiff from filing suit during the limitations period.

Indeed, as this Court recognized in *Morsani* and *S.A.P.*, the prime purpose of equitable estoppel is to bar a wrongdoer's use of the statute of limitations where the wrongdoer induced the plaintiff not to file her claims prior to the expiration of the limitations period. The conduct of a wrongdoer who fails to disclose facts that would put the plaintiff on notice that she had a cause of action in an attempt to induce the plaintiff to refrain from filing suit during the limitations period, as is the case here, is no different in practical effect than a situation where the defendant affirmatively induces the plaintiff not to file her claims prior to the expiration of the limitations period. Because the conduct of the wrongdoer causes the same result in both circumstances, not permitting a plaintiff to rely on equitable estoppel in omission cases such as the case at bar would frustrate the purpose of the doctrine.

In *Morsani*, this Court recognized that the doctrine of equitable estoppel has

been a fundamental tenet of Anglo American jurisprudence for centuries:

> "Estoppe," says Lord Coke, "cometh of the French word *estoupe,* from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead [otherwise]."

Morsani, 790 So. 2d at 1076 (citing Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* 1 (3d ed.1923)). The doctrine, which was part of the English common law when the State of Florida was founded, was adopted and codified by the Florida Legislature in 1829. *Id*. Other states also continue to apply the doctrine of equitable estoppel to preclude a defendant from asserting the bar of the statute of limitations where the defendant's acts or **omissions** contribute to the running of the statute of limitations. *See, e.g., Regions Bank v. Schmauch*, 582 S.E.2d 432, 446 (S.C. Ct. App. 2003) (finding that "silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel."); *Nicolopulos v. Superior Court*, 106 Cal. App. 4th 304, 312 (Cal. 2d 2003) (recognizing that while estoppel may arise from silence, there must be a duty to speak); *Bad Boys of Cripple Creek Mining Co., Inc. v. City of Cripple Creek*, 996 P.2d 792, 797 (Colo. App. 2000) (finding that "[w]hen a party's acts or omissions contribute to the running of the statute of limitations, the doctrine of equitable estoppel may bar that party's raising the limitations statute as a defense."); *Shell Western E&P, Inc. v. Dolores County Board of Commissioners*, 948 P.2d 1002, 1007 (Colo. 1997) (recognizing that "where a party's acts or omissions contribute

to the running of the statute of limitations, the doctrine of equitable estoppel may bar that party's raising the limitations statute as a defense."); *Ferrell, III v. Ferrell*, 719 P.2d 1, 5 (Kan. App. 1986) (finding that to invoke the doctrine of equitable estoppel to toll the statute of limitations, the mere fact that silence by the party sought to be estopped is sufficient where the silence causes another party to take timely action which he would have taken had he possessed such knowledge); *Huntington TV Cable Corp. v. State of New York Commission on Cable Television*, 463 N.Y.2d 314, 317 (N.Y. App. Div. 1983) (recognizing that equitable estoppel prohibits a person, upon principles of honesty, fair play and open dealing, from asserting rights, the enforcement of which, through his omissions or commissions, work fraud and injustice).[4] Petitioners are not aware of any jurisdiction specifically limiting the application of the equitable estoppel doctrine to abuse cases.

The Supreme Court of Tennessee in *Frayser v. Dentsply International Inc.*, 78 S.W.3d 242, 248 (Tenn. 2002), recently recognized that it is well established in the State of Tennessee that "equitable estoppel embraces not only ideas conveyed

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[4] In some states, the equitable estoppel doctrine operates to toll the statute of limitations, unlike Florida, where the doctrine applies after the limitations period has expired. However, although there is a difference in the manner in which the limitations period is deflected, the theory of equitable estoppel is consistently applied to situations where a defendant's wrongful actions or omissions have been the cause of a plaintiff's failure to institute a timely action.

by words written or spoken and things actually done but includes the silence of one under a duty to speak and his or her omission to act, as well; negligent silence may work an equitable estoppel, and acts of conduct which are calculated to mislead and do in fact mislead will work an estoppel notwithstanding there was no intention to do so." (citing *Lusk v. Consolidated Aluminum Corp.*, 655 S.W.2d 917, 920 (Tenn. 1983)).

In the present case, Respondents' omission is "conduct" that induced Maria Luisa to forbear filing suit within the limitations period, regardless of whether she knew that the conduct occurred at that time. In a court of equity, the fact that Maria Luisa did not know of Leonor's wrongful conduct should support the Petitioners' equitable estoppel claim, not destroy it. Therefore, because *S.A.P.* and other appellate decisions teach that the plaintiff does not have to have knowledge of the existence of a cause of action during the limitations period to be entitled to rely on equitable estoppel to bar application of the statute of limitations, the Fourth District's decision below requiring that a plaintiff be aware of the existence of her cause of action prior to the expiration of the statute of limitations period should be reversed.

2. Record Evidence Exists to Support the Petitioners' Equitable Estoppel Claim.

In the present case, there are facts in the record that, if proven at trial, would demonstrate that Respondents are equitably estopped from relying on the statute of

limitations as a defense to all the children's claims. The record evidence in this case establishes that in 1980, in connection with Maria Luisa's redemption of her interest in the Moorings, Leonor as director and 50% owner of the Moorings and Jorge Gonzalez as President of the Moorings, who had led Maria Luisa to believe that they controlled the Moorings, failed to disclose their purported belief that the Moorings held title to the Chiriqui shares despite the fact that they had a duty to speak. Had the fact been disclosed, Maria Luisa would have chosen not to sell her interest in the Moorings because she did not want to give up her rights to the Chiriqui shares. (R.562; Maria Luisa 10/3/96 depo. at pp.39-40). Alternatively, if Maria Luisa believed, as she testified, that the shares belonged to her father and not to the Moorings, she could have filed suit to have the shares returned to her father. As discussed below, there is record evidence that establishes all three elements of equitable estoppel. Therefore, Respondents should be barred by equitable estoppel from asserting the statute of limitations defense.

Petitioners satisfy the first element of equitable estoppel – "representation as to a material fact that is contrary to a later asserted position." *See Anderson*, 403 So. 2d at 400. The record demonstrates that after the alleged "seizures" in 1965 and 1966, Respondents never informed Maria Luisa that the Moorings allegedly owned the Chiriqui shares; no financial statement of the Moorings reflected that the Moorings owned the Chiriqui shares; Respondents omitted to disclose to Maria

Luisa that the Moorings allegedly owned the Chiriqui shares when the Moorings redeemed her 50% interest in 1980; and Maria Luisa's stepfather and family intermediary on the transaction, Manuel Angel Del Valle, was not informed that the Moorings allegedly owned Chiriqui or that the Chiriqui stock was part of the redemption agreement. (Avery depo. at p.160; R.554).

In fact, when the Moorings redeemed Maria Luisa's 50% interest in the Moorings in 1980, the Moorings did not list the Chiriqui shares as a subsidiary or an asset. Neither Gilberto Arias nor John Taylor Bigbie, who were both attorneys, were informed that the Moorings allegedly owned the Chiriqui shares. (R.554-55). Mr. Bigbie stated in a sworn affidavit that the Chiriqui shares were never disclosed as an asset of the Moorings:

> 4. At no time did Mr. Jorge Gonzalez or Mrs. Leonor Gonzalez advise me that the Moorings owned other properties besides development lands in Vero Beach, Florida. Specifically, I was never advised or informed by Mr. Jorge Gonzalez or Mrs. Leonor Gonzalez, or any other person, that the Moorings also owned, claimed or held the shares of Chiriqui Sugar Mills Corporation, a Panamanian holding company which owned corporations which owned lands and properties in Cuba, including the Hershey, Rosario and San Antonio sugar mills and lands.
>
> 5. From my discussions with Mr. Jorge Gonzalez and Mrs. Leonor Gonzalez, and reviewing the documents which were provided to me by Mr. Jorge Gonzalez and Mrs. Leonor Gonzalez in 1980 during the sale negotiations, including financial statements and other related disclosure documents, it was my informed belief that the only properties owned by the Moorings were development lands located in Vero Beach, Florida.

6. The only properties of the Moorings which were disclosed to me and used as a basis for the valuation of the Moorings for purposes of calculating Mrs. Maria Luisa Lobo's 50% interest in the Moorings were development lands owned by the Moorings in Vero Beach, Florida. No reference was ever made, either oral or written, to the existence of any subsidiaries or corporations owned by the Moorings which owned properties in Cuba.

7. The valuation of Mrs. Maria Luisa Lobo's 50% interest in the Moorings was arrived at by calculating the value of the assets owned by the Moorings and subtracting from that the amount of liabilities of the corporation, including debts to banks and other liabilities.

8. The principal basis for the valuation of the assets of the Moorings was the Landauer real estate appraisal report, which valued the various lots of land owned by the Moorings in Vero Beach, Florida, and did not refer to or identify any subsidiaries or corporations held by the Moorings which owned properties in Cuba.

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10. On a number of occasions before the redemption of Mrs. Maria Luisa Lobo's 50% interest in the Moorings, I spoke and corresponded with Mr. Gilberto Arias, Mrs. Maria Luisa Lobo's representative on the Board of Directors of the Moorings. He never mentioned to me the existence of hidden Cuban properties or that the Moorings owned, claimed or held the shares of Chiriqui Sugar Mills Corporation, or any other corporations owning properties in Cuba.

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12. I never discussed the existence of Chiriqui Sugar Mills Corporation, or its Cuban properties, with Mr. Jorge Gonzalez, Mrs. Leonor Gonzalez, Mrs. Maria Luisa Lobo, Mr. Gilberto Arias, or any other person, either prior to the redemption of Mrs. Maria Luisa Lobo's shares or thereafter. The first time I learned that the Moorings owned or claimed to own Chiriqui Sugar Mills Corporation, or any other Cuban properties, was in February of 2000.

(R.553-56).

The valuation of Maria Luisa's 50% interest in the Moorings was arrived at by calculating the value of the assets of the Moorings, but the Chiriqui shares which had at least some value were never considered at all in these calculations. (Groh depo. at pp.104, 178; R.554). In addition, the Moorings' audited consolidated financial statements and tax returns never indicated the alleged ownership of the Chiriqui shares and its underlying properties by the Moorings. (Groh depo. at pp.62-64, 152).

Leonor maintains that she owns 100% of the Chiriqui shares because the Moorings, as 100% owner of the Chiriqui shares in 1980, allegedly obtained Maria Luisa's 50% interest in the Chiriqui shares when she surrendered her 50% interest in the Moorings. (Leonor depo. at p.313). Nevertheless, she never told anyone, she never took any steps to amend the Chiriqui corporate records (until she did so surreptitiously in 1996), and importantly, Leonor still maintained that she only had 50% of the Chiriqui stock and that Maria Luisa had the other 50% at the 1996 Hacendados meeting. (Leonor depo. at p.396). Therefore, there is record evidence to support the first element of equitable estoppel.

The second element of equitable estoppel requires reliance on the misrepresentation or omission. *See Anderson*, 403 So. 2d at 400. Maria Luisa did not know that the Moorings allegedly owned the Chiriqui shares at the time the Moorings redeemed her interests. (R.556, 562; Maria Luisa 10/3/96 depo. at

pp.26, 44). Consequently, Maria Luisa relied upon Respondents' omissions in having her Moorings' shares redeemed. Had Maria Luisa known that the Moorings allegedly owned the Chiriqui shares, she would not have sold her interest in the Moorings unless said shares were excluded. (Maria Luisa 10/3/96 depo. at pp.39-40; R.562). Thus, there is record evidence to satisfy the second element of equitable estoppel.

The last element of equitable estoppel requires a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *See Anderson*, 403 So. 2d at 400. There is certainly ample record evidence to demonstrate that Petitioners meet the last requirement. Maria Luisa took a position that was detrimental to her in reliance on Respondents' omissions. As set forth above, Maria Luisa testified that she would not have proceeded with the redemption unless said shares were excluded, (Maria Luisa 10/3/96 depo. at pp.39-40), which is supported by the sworn statements of John Ryan III and John Taylor Bigbie. (R.556; 562). Therefore, the record evidence supports each of the traditional elements of equitable estoppel.

Moreover, assuming that a plaintiff must prove that defendants' conduct induced her into forbearing suit within the limitations period, there is ample record evidence to show that Respondents' failure to disclose that the Chiriqui shares were assets of the Moorings at the time Maria Luisa redeemed her Moorings'

shares induced Maria Luisa to refrain from filing suit during the limitations period. The record evidence supports application of the equitable estoppel doctrine to prevent Respondents' reliance on the statute of limitations. At the very least, this evidence creates a genuine issue of material fact which precludes summary judgment. The limitations placed on the application of the equitable estoppel doctrine by the Fourth District – that a victim must be aware of the cause of action prior to the expiration of the statute of limitation – would literally destroy the important public policy that supports application of the doctrine. Accordingly, reversal of the Fourth District's decision is required.

B. APPLICATION OF THE EQUITABLE ESTOPPEL DOCTRINE TO PETITIONERS' CLAIMS FOR CONSTRUCTIVE TRUST, DECLARATORY JUDGMENT AND PERMANENT INJUNCTION, AS WELL AS THE PETITIONER CHILDREN'S CLAIM REFORMATION IS NOT NECESSARY BECAUSE THOSE CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

In their Second Amended Complaint, the children, as assignees of their deceased mother Maria Luisa, and the Estate, asserted a claim for constructive trust (counts I and II), declaratory judgment (counts V and VI), and permanent injunction (counts VIII and IX). The Petitioner children also asserted a claim for reformation (count III). Respondents argued that the statute of limitations on those claims accrued in 1980 when Maria Luisa sold her interest in the Moorings. The Fourth District found as follows:

> As for the children's claims, the statute of limitations began to run at the latest in 1980 when Maria Luisa redeemed her fifty percent interest in the Moorings.

Ryan, 841 So. 2d at 517. The Fourth District also found:

> In the instant case, the trial court correctly ruled that equitable estoppel does not support the children's claims because Maria Luisa was not aware that she had a cause of action until 1996 (**even though the last act of accrual of the cause of action occurred in 1980**) and she was, therefore, not induced to forego filing suit within the limitations period. Likewise, **Julio Lobo knew in 1974**, at the latest, that his claims and demands for the Chiriqui stock were not being honored and there is no evidence that he was induced to forbear enforcing his rights.

Id. at 520. (Emphasis added).

It appears that the Fourth District failed to address the statute of limitations independently of the equitable estoppel doctrine. Application of the record evidence to the correct legal standard concerning the accrual of Petitioners' claims for constructive trust claims, declaratory judgment, permanent injunction, as well as the children's claim for reformation, establishes that those claims did not accrue until 1996 when Leonor disclosed for the first time that she did not hold the Chiriqui shares in constructive trust either for her father, and his Estate, or equally with her sister Maria Luisa – directly contrary to what she herself apparently believed and had publicly stated as late as 1996. This Court is obligated to apply the same standard of review (*de novo*) to the Fourth District's decision affirming the trial court's order granting final summary judgment on the basis that

Petitioners' claims were barred by the statute of limitations. *See Volusia County*, 760 So. 2d at 130.

It is basic that the statute of limitations does not begin to run until a cause of action "accrues." Fla. Stat. § 95.031. According to Fla. Stat. § 95.031(1), "A cause of action accrues when the last element constituting the cause of action occurs." Petitioners' claims for constructive trust, declaratory judgment, permanent injunction and the Petitioner children's claim for reformation, simply could not accrue until 1996, when Leonor took the position for the first time that she owned 100% of the Chiriqui shares and asserted ownership by clandestinely having 100% of the shares registered in her name. Because the Petitioners filed their claims within four years of this disclosure, their claims are not barred by the statute of limitations.[5]

1. Constructive Trust

"A constructive trust is one raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it." *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1025 (Fla. 4th DCA 1996) (quoting *Quinn v. Phipps*, 113 So. 419 (Fla. 1922)). "A constructive trust is a remedial device with

[5] According to Fla. Stat. § 95.11, the statute of limitations for each of the children's causes of action is four years, except for the reformation count, which is five years. *See* Fla. Stat. § 95.11(2)(b).

dual objectives -- to restore property to the rightful owner and prevent unjust enrichment." *Id*. (citing *Abreu v. Amaro*, 534 So. 2d 771 (Fla. 3d DCA 1988)).

To impose a constructive trust, "there must be (1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship and (4) unjust enrichment." *Provence*, 676 So. 2d at 1025. For recovery on the constructive trust theory, the Petitioners **do not** rely and **need not** rely upon the equitable estoppel doctrine. The time that Petitioners knew or reasonably knew of the **breach of the trust – 1996 –** is **also** the first time that the breach of trust occurred.

It is well settled that on a motion for summary judgment all inferences must be drawn in favor of the party against whom summary judgment is sought. *See Villazon*, 843 So. 2d at 853; *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). In this case, there was simply no cause of action for breach of the trust and no basis to impose a constructive trust until 1996 since Leonor: (1) did not treat the Chiriqui shares as an asset of the Moorings at the time of the redemption of Maria Luisa's stock (J. Gonzalez 1/27/00 depo. at p. 253; Groh depo. at pp. 62-64, 152); (2) did not treat the shares as an asset of the Moorings at the time of her sale of the Moorings; (3) publicly acknowledged that Maria Luisa had a 50% interest in those shares subsequent to the sale of the Moorings until early 1996 (Leonor depo. at pp. 395-97); and (4) never asserted ownership of 100% of the shares until 1996 when

she clandestinely took action in Panama to have the shares transferred to her name after assuring John Ryan, IV, that she had "no intention in damaging [him] or [his] sisters' interest in any way." (Leonor depo. at p. 396; J. Gonzalez 3/8/00 depo. at pp. 282-83; Leonor depo. at p. 409 and Exh. 70 and 75).

It can be inferred from the record that Julio Lobo's transfer of the Chiriqui shares to the Moorings in the first instance was a sham transaction and that the sisters thus each acquired a 50% ownership interest in the shares either directly from their father Julio Lobo or through his Estate. Leonor was holding 100% of the shares in constructive trust for her father or herself and her sister. Thus, the statute of limitations **could not run** on the constructive trust cause of action until the breach occurred in 1996, **not in 1980**. Since the inference from the facts is that Leonor's conduct is consistent with the existence of the shares being held on a 50-50% basis with her sister Maria Luisa in constructive trust until 1996, no cause of action for breach of constructive trust could have arisen before the actions taken by Leonor in early 1996.

In other words, the Fourth District overlooked the fact that for the breach of constructive trust cause of action the statute of limitations did not and could not begin to run until 1996 since the **conduct** of asserting 100% ownership in the Chiriqui shares did not occur until 1996. If one can infer – as one must in applying the principles applicable to a motion for summary judgment – that there was no

evil intent and that 50% of the shares **were** being held in trust, which would be consistent with (1) Leonor Gonzalez's publicly stated position until early 1996 that she owned the shares 50-50 with her sister Maria Luisa; (2) the failure to carry the shares on the books when admittedly the shares had value (J. Gonzalez 6/16/99 depo. at 42 and 3/7/00 depo. at pp. 9-13; Groh depo. at p. 104); and (3) the failure to transfer the shares as part of the sale of the Moorings, (J. Gonzalez depo. 1/27/00 at pp. 269, 278), the first time the breach occurred creating the causes of action for constructive trust was by the action taken by Leonor in 1996 to transfer 100% of the shares to herself. Therefore, the filing of the complaint in 1998 was timely as to the causes of action for constructive trust regardless of the application of principles of equitable estoppel.

2. Declaratory Judgment

To state a claim for declaratory judgment, a plaintiff must show that "there is a bona fide need for a declaration based on present, ascertainable facts." *Santa Rosa County v. Administration Comm'n, Div. of Adm. Hearings*, 661 So. 2d 1190 (Fla. 1995). Here, there was no dispute as to the ownership of the Chiriqui shares until 1996, when Leonor changed her position and first announced that she owned 100% of the shares. Thus, as with the constructive trust claim, the first time that any controversy arose was 1996, and the declaratory judgment claims did not accrue until that time.

3. Permanent Injunction

There are four elements necessary to establish entitlement to an injunction: (1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy at law; and (4) consideration of public interest. *Dania Jai Alai Int'l, Inc. v. Murua*, 375 So. 2d 57, 58 (Fla. 4th DCA 1979). Here, the elements of irreparable harm and clear legal right could not have existed prior Leonor's 1996 declaration of her 100% ownership of the Chiriqui shares.

4. Reformation

In the Second Amended Complaint, the children alternatively asserted that when Leonor redeemed her Moorings shares, the parties mistakenly failed to indicate in the agreement that the Chiriqui shares were not included in the transaction. As a result of this mutual mistake, reformation of the agreement is the appropriate remedy. This cause of action could not have accrued until 1996 when Leonor first disclosed that she believed she acquired 100% of the shares in 1980 when Maria Luisa redeemed her Moorings shares. Thus, the mistake was not revealed until 1996 and the cause of action could not have accrued prior to that date.

Citing *Whigham v. Muehl*, 500 So. 2d 1374 (Fla. 1st DCA 1987), Respondents alleged below that Maria Luisa had legal knowledge that the Moorings owned the Chiriqui shares prior to the Moorings' redemption of her

shares because of her status as a director and shareholder, and argued that her cause of action accrued in 1980. However, the trial court below ruled as a matter of fact and law that the Moorings did not own the Chiriqui shares. (R.1006-07). At the very least, a material issue of fact exists as to whether the Moorings owned Chiriqui, but clearly if it did not, assuming the court's finding is correct, supports Petitioners' position that a cause of action could not have accrued before 1996.

Respondents attempted to show that the Moorings owned the Chiriqui shares, relying on the Hershey trademark sale. However, the facts relating to the sale do not contradict Maria Luisa's testimony that the Moorings held the shares for the benefit of Julio Lobo. In fact, because Julio Lobo received over $100,000 from the sale when he had no ownership interest in the Moorings, the transaction actually supports Maria Luisa's testimony that the Moorings held the shares for Julio Lobo's benefit. Thus, there is simply no factual or legal support for Respondents' imputed knowledge claim.

Consequently, regardless of whether the equitable estoppel doctrine may not save other causes of action, which Petitioners by no means concede, the application of the doctrine to the claims for constructive trust, declaratory judgment, permanent injunction and reformation is not even necessary if the claims did not accrue until 1996. At the very least, Leonor's own testimony creates a

genuine issue of fact as to the date she first asserted 100% ownership over the Chiriqui shares, and reversal on those grounds is required.

C. RESPONDENTS' $100 PROPOSALS FOR SETTLEMENT TO THE CHILDREN WERE NOT MADE IN GOOD FAITH BECAUSE THE PROPOSALS DID NOT BEAR A REASONABLE RELATIONSHIP TO THE AMOUNT OF DAMAGES AND A REALISTIC ASSESSMENT OF LIABILITY.

After prevailing on the statute of limitations defense, Respondents sought an award of reasonable attorney's fees and costs based on their proposal for settlement to each of the children in the amount of one hundred dollars ($100), which had been rejected. The trial court found that Respondents' offer of judgment was not made in good faith as the offer did not bear a reasonable relationship to the amount of damages and a realistic assessment of liability. Respondents appealed arguing that the trial court abused its discretion when it refused to consider the limitations defense as a basis for the proposal. Respondents further argued that the trial court misapplied the law when it analyzed the reasonableness of the offers from the standpoint of the children rather than Respondents', weighed the factors related to the amount of fees, and denied sanctions on grounds that the offer was "nominal." The Fourth District agreed with the Respondents and held that the trial court abused its discretion in denying Respondents an award of attorney's fees and costs based on their proposals for

settlement. However, the record evidence establishes that the trial court correctly applied the law when it determined that the offers were not made in good faith.

The standard of review on determining whether a proposal for settlement is made in good faith is abuse of discretion. *Alexandre v. Meyer*, 732 So. 2d 44 (Fla. 4th DCA 1999). This Court is compelled to affirm a trial court's determination of the amount of attorney's fees and costs based on a proposal for settlement pursuant to Section 768.79, Florida Statutes, where the record does not justify the conclusion that the trial court abused its discretion. *See Donohoe v. Starmed Staffing Inc.*, 743 So. 2d 623, 624 (Fla. 2d DCA 1999).

The Fourth District's comprehensive analysis concerning the issue of whether Respondents' claims were barred by the statute of limitations demonstrates that there were significant issues in an unclear area of the law as to the application of the delayed discovery[6] and equitable estoppel doctrines to the statute of limitations defense. Indeed, the Supreme Court decisions in *Morsani*; *S.A.P.*; and *Monahan v. Davis*, 832 So. 2d 708 (Fla. 2002) show that there was uncertainty as to the application of the delayed discovery and equitable estoppel doctrines to the statute of limitations defense. Therefore, there was a reasonable

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[6] Petitioners alternatively argued below that the their claims did not accrue until 1996 based on the delayed discovery doctrine. Nothing in this appeal challenges the Fourth District's finding that the delayed discovery doctrine is not applicable in this case.

basis for the Respondents to be concerned about their position which would in turn make Respondents' nominal offer of judgment totally unreasonable.

A nominal offer in the amount of $100 cannot have been made in good faith where there was a legitimate dispute concerning the application of the equitable estoppel doctrine to the facts of this case. In *Deltona House Rentals, Inc. v. Cloer*, 734 So. 2d 586, 588 (Fla. 5th DCA 1999), the Fifth District Court of Appeal recognized that "[s]ome cases, especially where the dispute is legal rather than factual, may be decided against a plaintiff on summary judgment but yet may be novel or complex or otherwise **difficult to assess**, and a low offer in such a case may well be found to be not a good faith offer." (Emphasis added). In this case, it appears that the Fourth District overlooked the fact that Respondents could not have made a realistic assessment of liability given the uncertainty of the application of the delayed discovery and equitable estoppel doctrines to the statute of limitations defense, and thus the Fourth District's decision should be reversed.

Despite Respondents' claims to the contrary, the trial court applied the correct legal standard and made specific findings of fact and law that establish that Respondents were not entitled to an award of attorney's fees and costs. A trial court may, in its discretion, disallow an award of fees and costs if it determines that the proposal for settlement was not made in good faith. *See TGI Friday's Inc. v. Dvorak*, 663 So. 2d 606, 612 (Fla. 1995). In this case, the record evidence

supports the trial court's finding that Respondents' offer was not made in good faith.

In *Fox v. McCaw Cellular Communications of Florida, Inc.*, 745 So. 2d 330, 323-33 (Fla. 4th DCA 1998), the Fourth District Court of Appeal explained:

> [T]he question of good faith in making an offer under *section 768.79* involves an inquiry into the circumstances shown by the entire record of the case. Each case requires its own analysis, and must be considered on its own facts. Whether an offer was made in bad faith involves a matter of discretion reposed in the trial judge to be determined from the facts and circumstances surrounding the offer. That determination is not controlled by a legal imperative requiring a finding of bad faith merely because the offer was nominal. Some nominal offers will have been made in good faith; some not so. The trial judge will have to consider all the surrounding circumstances when the offer was made.

In the present case, although Respondents claim otherwise, the record demonstrates that the trial court correctly assessed the reasonableness of the proposals from the viewpoint of the Respondents, and supports the trial court's finding that Respondents did not have a reasonable foundation to make a $100.00 offer. The trial court correctly found that Respondents' proposals for settlement did not bear a reasonable relationship to the amount of damages and a realistic assessment of liability.

Before Petitioners filed their initial complaint, Respondents made a settlement demand that demonstrated that they assessed the value of one half of the Chiriqui shares to be in excess of $3.5 million. Respondents' subsequent proposals

for settlement in the amount of $100 were inconsistent with their valuation of the Chiriqui shares. Therefore, the trial court's finding that Respondents' proposals were not made in good faith because they bore no reasonable relationship to the amount of potential damages is supported by record evidence.

Furthermore, the trial court correctly found that Respondents' proposals did not bear a reasonable relationship to a realistic assessment of liability because substantial discovery had not been completed. The discovery taken after Respondents served their proposals for settlement demonstrates that Respondents could not have made a reasonable assessment of liability as to their statute of limitations defense. In fact, very little discovery on the limitations issue had taken place at the time of the offer. Therefore, because the record does not justify the conclusion that the trial court abused its discretion, this Court should affirm the trial court's order denying Respondents an award of attorney's fees and costs.

V. CONCLUSION

For the foregoing reasons, the Fourth District's decision under review must be reversed and remanded, with directions to reverse the trial court's order granting summary judgment in favor of Respondents, and to affirm the trial court's order denying Respondents' Motion for Sanctions/Fees and Costs Based on Proposal for Settlement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on October 13, 2003, to: George H. Moss, Moss, Henderson, Blanton & Lanier, P.A., Attorney for Defendants, 817 Beachland Boulevard, Vero Beach, Florida 32964.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font requirements contained in Fla.R.App.P. 9.210(a)(2) and that this Initial Brief is submitted in Times New Roman 14 point font.

By:_____
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