IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC03-933

JOHN J. RYAN, IV, ET AL.,

Petitioners,

v.

LEONOR LOBO DE GONZALEZ and
JORGE GONZALEZ,

Respondents.

JURISDICTIONAL BRIEF OF RESPONDENTS

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Statement of the Case and the Facts

Respondents adopt the rendition of this case as set forth in *Ryan v. Lobo de Gonzalez*, 841 So. 2d 510 (Fla. 4th DCA 2003).

Summary of Argument

The Petitioners complain that the Fourth District's holding in this case conflicts with decisions of other district courts of appeal, and with this Court's decision in *S.A.P.*, because it 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.

As the Fourth District explained both in the main opinion and in the concurrence, it is not new or novel that the doctrine of equitable estoppel presupposes that a plaintiff knows of the facts underlying the cause of action prior to the expiration of the limitations period. To the contrary, it is the rule illustrated by the Florida and federal authorities applying the doctrine in limitations cases.

There is no conflict between *Ryan* and the district court of appeal case law cited by Petitioners, because those cases are not on point. None of the cases addresses the equitable estoppel issue in the context of the statute of limitations, which is at issue here.

Nor does *Ryan* conflict with *S.A.P.*, given this Court's limited review of that case and its uniquely compelling facts involving allegations of child abuse. As the Fourth District explained at length, this Court's decision in *S.A.P.* did not reflect that the intent to change the historical understanding of equitable estoppel as reflected in the universe of Florida and federal decisions cited both in *S.A.P* as well as in *Ryan* which hold, explain, and otherwise illustrate 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.

To hold otherwise would be to rewrite applicable Florida Statutes and recent authority from this Court, which provide that concealment may not toll a limitations period or delay the accrual of a cause of action unless there is a specific statutory authorization to do so. Petitioners therefore fail to show any conflict warranting the exercise of this Court's discretionary jurisdiction over this case.

Petitioners' request that this Court review this case on the basis that it presents an issue of great public importance is also misplaced. To be reviewed on the basis that it presents an issue of great public importance, a decision must first be certified by the district court of appeal as being of great public importance. Since the Fourth District refused to so certify its decision in this case, it is outside the scope of this Court's discretionary jurisdiction under Rule 9.030(a)(2)(vi).

Argument

1. Petitioners fail to establish that the decision of the Fourth District Court of appeal in this case expressly and directly conflicts either with the decisions of other district courts of appeal or with this Court's decision in *Florida Department of Health and Rehabilitative Services v. S.A.P.,* 835 So. 2d 1091 (Fla. 2002).

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.

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 posits 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).

In fact, the doctrines are "mutually exclusive because one requires proof that the plaintiff knew he had a claim, while the other requires proof that the plaintiff *did not* know of the facts establishing his claim." *Armbrister v. Roland Intern. Corp.*, 667 F. Supp. 802, 809 (M.D. Fla. 1987). Put another way:

> 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 v. McCulloch Properties, Inc., 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980). 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 conflicts with a decision of any other district court of appeal or of this Court.

The district court of appeal decisions Petitioners say are in conflict with *Ryan* are in fact inapposite. Although they involve equitable estoppel in the broadest sense, none of them address the doctrine in the statute of limitations context. *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).

When compared to Florida decisions that are truly comparable, the Fourth Districts decision in this case reveals itself to be consistent with the Florida decisions analyzing equitable estoppel. As pointed out in the concurrence, the Florida cases in which the doctrine has been applied to bar a limitations defense involve factual situations in which the plaintiff claiming equitable estoppel was aware of his cause of action prior to the expiration of the applicable statute of limitations. *Ryan*, 841 So. 2d at 524, 524 n. 9, (Gross, J., specially concurring). Petitioners therefore fail to show a conflict in this regard.

Petitioners also complain that the Fourth District's decision is in conflict with this Court's decision in *S.A.P.* because the equitable estoppel argument in that case arose from allegations that the plaintiff did not know of her cause of action because it was concealed from her, in seeming contradiction to the general rule in equitable estoppel cases. Petitioners' Brief at 7-8. For a number of reasons, however, and as the Fourth District explained, *S.A.P.* should not be read so broadly as to present any such conflict.

As the Fourth District noted, it did not read *S.A.P.* to work such 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, agreed with by the entire panel, 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 decision did not expressly say, for example, that the Florida and federal decisions cited in it were wrong. Nor did this Court 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 in a lawsuit. *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 factually undeveloped, legally undeveloped, and tentative. The Court pointed out, for example, that it did "not address the question of whether any other 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.* at 1100.

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* guides 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 that all Florida causes of action accrue when the "last element" occurs. Fla. Stat. § 95.031. Moreover, statutory limitations periods begin to run at that time unless they are tolled by a specific statutory tolling provision or unless there is a statutory provision for the delayed accrual of the cause of action. Fla. Stat. § 95.031. As such, allegations of fraudulent concealment can only toll limitations periods or delay the accrual of the cause of action where there is a specific statutory authorization such as in fraud,

malpractice or other actions. *Davis*, 832 So. 2d at 709-710.

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 Fourth District was correct in affirming the trial court's ruling that the equitable estoppel doctrine was inapplicable because Maria Luisa was unaware of the existence of her cause of action prior to the expiration of the limitations period. The decision does not expressly or directly conflict with *S.A.P.* or any other decisions of the Florida Supreme Court or district courts of appeal. Therefore, this court should decline to exercise its discretionary jurisdiction over this case.

2. Petitioners fail to invoke this Court's discretionary jurisdiction on the grounds that this case involves questions of great public importance because the Fourth District refused to certify it as such.

Petitioners next invite this court to exercise discretionary jurisdiction over this case on the grounds that the equitable estoppel issue is of great public importance. The invitation misapprehends the nature of discretionary jurisdiction.

The Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal as being of great public importance only if the district court has certified it to be so. Art. V, § 3(b)(4), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(v). Discretionary jurisdiction will not lie merely because a party contends that an issue is one of great public importance. *Allstate Insurance Co. v. Langston*, 655 So. 2d 91 (Fla. 1995).

In this case, Petitioners requested the Fourth District to certify this case as presenting issues of great public importance, however, the Fourth District denied that request. Therefore, this case falls outside the scope of this Court's discretionary jurisdiction as provided under Fla.R.App.P. 9.030(a)(2)(v).

Conclusion

For the foregoing reasons, this Court should decline to exercise its discretionary jurisdiction over the decision below.

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 Petitioners, 201 South Biscayne Boulevard, 10th Floor, Miami, Florida 33131 this ____ day of June, 2003.

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Certificate of Compliance

I HEREBY CERTIFY that the foregoing 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: _____
George H. Moss, II