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' REPLY BRIEF

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I. RESPONDENTS' ANSWER BRIEF ESTABLISHES THAT MATERIAL ISSUES OF FACT REMAIN WHICH PRECLUDE SUMMARY JUDGMENT

In their Answer Brief, Respondents cite purported "facts" which they rely on to argue that summary judgment was proper. However, Respondents' purported "facts" are merely biased interpretations of statements made in certain record documents. More importantly, Respondents totally ignore record evidence that contradicts their "facts." A complete review of the record demonstrates that material issues of fact remain and that entry of summary judgment was in error.

Three purported "facts" from the Answer Brief are illustrative. First, in an attempt to show that Maria Luisa's claims accrued in 1980 when she redeemed her Moorings' shares, Respondents contend that Maria Luisa had knowledge that the Chiriqui shares were part of the Moorings. *See* Ans. Br. pp.2-7. Respondents cite several documents – a March 28, 1968 Avery letter to Maria Luisa (Avery depo., Pls.' Exh.2); a May 18, 1968 Link letter (Maria Luisa 10/4/96 depo., Exh. G-3); and the February 20, 1980 Groh Report (Avery depo., Def. Exh.11).

However, a review of the Avery and Link letters reveal that the letters were related to the Hershey trademark sale, which did not include the Chiriqui shares at issue. 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.

Further, John Groh, the Moorings' accountant who authored the "Groh Report," admitted that 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).

Second, Respondents repeatedly state that before and after 1972, Julio Lobo sought the return of his Chiriqui stock to somehow show that he had a claim against the Moorings at that time, and that the statute of limitations accrued at that time. *See* Ans. Br. pp.7-15, 37-44. However, because Julio Lobo reached an agreement with his daughters in 1972, wherein they agreed to hold the Chiriqui shares for Julio Lobo and to return them to him "at the appropriate time," all Respondents pre-1972 record cites are irrelevant. (R.1000-01). Moreover, a close examination of the quotes and the underlying documents reveals that after 1972, Julio Lobo was trying to get the **Moorings'** stock back, not the **Chiriqui** shares.

See quotes in Ans. Br. p.13, e.g., the quote from the May 14, 1974 document states "I gave up my formal rightful claim on the **Moorings**." (Emphasis added).

Respondents state that Julio Lobo's writings indicate that the "appropriate time" for the return of his shares occurred while he was alive, citing numerous documents. However, Respondents ignore the record evidence that establishes that Julio Lobo still expected his daughters to return his shares to him in the future. Documents authored by Jorge Gonzalez in 1973 and by Julio Lobo in 1975 are but two examples. *See* In. Br. pp.6-7. These documents show that a material issue of fact exists as to when the "appropriate time" was to take place and whether Julio Lobo had a cause of action prior to his death.

Third, Respondents argue that Julio Lobo abandoned or waived his claim to the Chiriqui shares in 1973. The record cites purportedly supporting this theory on pages 12-13 and 43-44 of the Answer Brief relate to Julio Lobo's waiver of his rights to the **Moorings**, not to **Chiriqui**. The only mention of the Chiriqui shares in those documents is in the May 14, 1974 letter where Julio Lobo discusses a potential resolution of his dispute with the Moorings, and he states that he would like the return of his Cuban properties as part of any settlement. (R.916-19). This isolated quote does not demonstrate that Julio Lobo waived his claim to the Chiriqui shares; rather it shows he still expected the Cuban properties to be returned to him. At the very least, a material issue of fact exists on this issue.

Respondents' "spin" on these documents suggests that the Moorings owned the Chiriqui shares outright. However, the trial court made two express findings of fact to the contrary when it ruled that: (1) when the Moorings took control of the Chiriqui stock, "the Chiriqui stock (still in bearer certificates) was being held for the benefit of [Julio Lobo];" and (2) "the Chiriqui stock was not shown as an asset on the company's financial statements and [Maria Luisa] was not aware that the Moorings had control of the stock until 1996." (R.1006-07). Also, numerous documents cited in the Initial Brief show that the Moorings **never** asserted ownership over Chiriqui, and Maria Luisa testified that she believed that the Moorings held the Chiriqui shares for the benefit of Julio Lobo. *See* In. Br. pp.5-6; Maria Luisa 10/3/96 depo. p.38. Thus, it is inaccurate and misleading for Respondents to state that Maria Luisa knew that the Moorings **owned** the Chiriqui shares and that the cause of action accrued in 1980.

II. EQUITABLE ESTOPPEL DOES NOT REQUIRE THAT THE PLAINTIFF KNOW OF HER CAUSE OF ACTION PRIOR TO EXPIRATION OF THE LIMITATIONS PERIOD.

Respondents state in their Answer Brief at pages 24 and 25 that in every case where equitable estoppel was used to avoid the statute of limitations, the plaintiff was aware of its cause of action prior to the expiration of the limitations period and was induced by the defendant's wrongful conduct to delay filing suit until after the period expired. Specifically, Respondents argue that the Fourth

District Court's 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 this issue, which purportedly require a plaintiff to know of his cause of action. *See* Ans. Br. p.22-23. Respondents further argue that the Fourth District Court's opinion in this case is not necessarily at odds with *Florida Department of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002), because all the Florida estoppel cases cited in *S.A.P.*'s extensive footnotes involved plaintiffs who knew of their claims. *See* Ans. Br. p.25.

However, Respondents do not cite a single Florida case that holds that a plaintiff cannot rely on equitable estoppel to bar inequitable reliance on the statute of limitations unless the plaintiff first proves that she was aware of the cause of action prior to expiration of the limitations period. Such a requirement would be inconsistent with the "prime purpose" of the doctrine.

In *Morsani v. Major League Baseball*, 790 So. 2d 1071, 1078 (Fla. 2001), this Court reaffirmed that the equitable estoppel doctrine can be used to bar a defendant's reliance on the statute of limitations, and stated that a "prime purpose of the doctrine. . . is to prevent a party from profiting from his or her wrongdoing." 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 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 this case would frustrate the purpose of the doctrine.

In their Answer Brief, Respondents attempt to explain this Court's decision in *S.A.P.* by asserting that the focus of *S.A.P.* was 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. *See* Ans. Br. p.26. Respondents also explain the distinction between equitable estoppel and equitable tolling by citing several cases relied upon by this Court in *S.A.P.* *Id*. at pp.23-27.

However, Petitioners have not and do not rely on the doctrines of equitable tolling or fraudulent concealment. This Court's decision in *Morsani* clearly explains that the equitable estoppel doctrine comes into play after the limitations period has run. Further, this Court's recent decision in *S.A.P.* 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 *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.

Florida courts have been consistent in holding that the basis for excusing the plaintiff's untimely filing is the conduct of the **defendant**, not the conduct of the plaintiff. As recognized by the *S.A.P.* decision, the concept behind the application of the equitable estoppel doctrine 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, as in the case at bar, 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, such "conduct" is an omission that "induces" a plaintiff from filing suit during the limitations period.

By alleging that those cases involved equitable estoppel only in the broadest sense and that those cases did not address the doctrine in the statute of limitations context, Respondents unsuccessfully attempt to distinguish the district court cases cited by Petitioners. Such cases address the elements of the equitable estoppel doctrine and unambiguously hold that an omission, particularly in cases where there is a duty to speak, can be a representation relied upon by a party claiming estoppel.

Moreover, Respondents do not even attempt to distinguish the cases cited by Petitioners from other jurisdictions which 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* In. Br. pp.30-31. Respondents have simply failed to provide any support for their position that a plaintiff must be aware of her cause of action in order to rely on the equitable estoppel doctrine.

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. 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. Therefore, as the Fourth District Court found that summary judgment in favor of Respondents was proper because the children could not satisfy the non-existent "knowledge" requirement, reversal is required.

III. THE CHILDREN'S ACCRUAL THEORY IS NOT INCONSISTENT WITH THE PLEADINGS

In response to Petitioners' argument that the causes of action did not accrue until 1996, Respondents claim that the focus of the Complaint is on the 1980 Moorings transaction, and that there is no basis to suggest that the "last act" giving rise to the children's claims occurred in 1996. *See* Ans. Br. pp.30-33. However,

the Children repeatedly alleged in their pleadings that until 1996, the Chiriqui shares were either held by Maria Luisa and Leonor as fifty-fifty owners or alternatively, that the Moorings held the shares in trust for the benefit of Julio Lobo and the Estate. *See* Initial Complaint, ¶¶ 23, 37, 38 and 39. (R.5, 9-10); Amended Complaint, ¶¶ 37-38 (R.123, 124-127); and Second Amended Complaint, ¶¶ 42, 43, 44 & 46 (R.641, 643-44, 646). Thus, the allegations of the Complaint are consistent with Petitioners' arguments that the children's claims could not have arisen until 1996 when Leonor, for the first time, asserted 100% ownership of the shares and there is no basis for Respondents' statement that the children's claims all allege a wrong in 1980.

IV. AN ISSUE OF FACT EXISTS AS TO WHETHER MARIA LUISA HAD KNOWLEDGE THAT THE MOORINGS OWNED THE CHIRIQUI SHARES

Respondents claim 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 conclude that her cause of action accrued in 1980. *See* Ans. Br. pp.33-36. However, as set forth above, the trial court 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.[1]

Respondents attempt to establish that the Moorings owned the Chiriqui shares and that Maria Luisa had knowledge of documents showing that the Moorings owned the Chiriqui shares since 1968 by relying on several documents, including corporate correspondence regarding the Moorings claim to the Chiriqui shares. Respondents first cite to a March 28, 1968 Avery letter to Maria Luisa and a May 18, 1968 Link letter. Respondents then cite to board minutes ratifying the sale of Hershey trademark, and to the February 20, 1980 Groh Report.

However, as established above, the Avery and Link letters as well as the board minutes and the Groh report, do not contradict Maria Luisa's testimony that the Moorings held the shares for the benefit of Julio Lobo. Furthermore, Respondents have been unable to dispute that John Groh, the Moorings' accountant, admitted 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). Indeed, despite the fact that U.S. income tax returns require disclosure of ownership in a foreign corporation, the Moorings federal tax returns affirmatively

[1] The trial court's factual finding that the Moorings did not own the Chiriqui shares, but rather held them for the benefit of Julio Lobo, is supported by numerous record facts set forth on page 5 of the Initial Brief which show that the Moorings took no steps to assert ownership over the shares.

represent that the Moorings did not own the shares of a foreign corporation. (Groh depo. at pp.62-64, 152).

The record demonstrates that Respondents omitted to disclose to Maria Luisa that the Moorings allegedly owned the Chiriqui shares when the Moorings redeemed her 50% interest in 1980. Maria Luisa's stepfather and family intermediary in 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 addition, 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. Further, neither Gilberto Arias nor John Taylor Bigbie, who were both attorneys, were informed that the Moorings allegedly owned the Chiriqui shares. (R.554-55). Therefore, there is simply no factual or legal support for Respondents' imputed knowledge claim regarding Maria Luisa. Indeed, all of the record supports an inference that the Moorings did not actually own the shares, but rather they were held in trust.

V. THE ESTATE'S CLAIMS WERE FILED WITHIN FOUR YEARS OF THE ISSUANCE OF THE LETTERS OF ADMINISTRATION

Respondents also contend that even if the Estate's claims accrued in April 1996, they are nevertheless barred by the statute of limitations because the Estate

waited more than four years – until August of 2000 – to bring suit. *See* Ans. Br. at p.37. This claim is groundless for at least two reasons.

First, it is basic that the statute of limitations does not begin to run for claims belonging to an estate until there is a grant of administration of the estate because there must be some person capable of suing upon the claim. *See Berger v. Jackson*, 23 So. 2d 265, 269 (Fla. 1945). *See also Matthews v. Matthews*, 177 So. 2d 497, 502 (Fla. 2d DCA 1965). In this case, the Ancillary Letters of Administration were issued on July 20, 2000. The Estate and its claims were added immediately thereafter in the Second Amended Complaint on August 3, 2000. (R.631). The Estate's claims were timely filed because they were filed well within four years after a grant of administration of the estate – the issuance of the letters of administration.

Second, the Estate's claims were also timely filed because they were raised by the children in the Amended Complaint filed on September 30, 1999. (R.114). The children raised the claims on behalf of the Estate because they believed that as beneficiaries they could act on behalf of the Estate. (*Id.*). Where a person asserts claims on behalf of an estate, but is later determined to be unqualified, the claims of the later appointed (and proper) representative of the estate relate back to the date of the claims asserted by the unqualified representative for purposes of the statute of limitations. *See Griffin v. Workman*, 73 So. 2d 844, 846-47 (Fla. 1954).

See also Cunningham v. Florida Dep't of Children and Families, 782 So. 2d 913, 916 (Fla. 1st DCA 2001); *Talan v. Murphy*, 443 So. 2d 207, 208 (Fla. 3d DCA 1984). Here, even assuming that the children were not properly qualified to raise the Estate's claims, the fact that a personal representative was subsequently appointed requires that the Estate's claims relate back to the date the children first asserted them, which was within the limitations period.

Furthermore, contrary to Respondents' allegations, in addition to its argument that its causes of action did not accrue until 1996, the Estate did argue that equitable estoppel applied to its claims. The Second Amended Complaint alleges in paragraph 44 that Respondents are precluded from relying on the statute of limitations as an affirmative defense based on the doctrine of equitable estoppel because Leonor intentionally omitted to disclose her position that she owned 100% of the Chiriqui shares until after the limitations period expired. (R.641-646); In. Br. pp.14-15. Therefore, the equitable estoppel doctrine is applicable to both the Petitioner children's claims and the estate's claims.

VI. THE FOURTH DISTRICT INCORRECTLY FOUND THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING RESPONDENTS ATTORNEY'S FEES BASED ON THEIR PROPOSALS FOR SETTLEMENT

Respondents argue in their Answer Brief that Petitioners chief argument in support of their claim that the Fourth District Court improperly reversed the trial court's order denying Respondents' request for fees based on the proposal for

settlement to the Petitioner children is that the Fourth District did not appreciate that three recent Florida cases showed "uncertainty" in the delayed discovery and equitable estoppel doctrines. *See* Ans. Br. pp.47-50. Respondents argue that the cases relied upon by Petitioners are very recent opinions that did not exist at the time that the proposals for settlement were served on October 20, 1999 and therefore, the Fourth District ruling that Respondents had a reasonable basis at the time of the offer to conclude that their exposure was nominal was proper.

Contrary to Respondents' allegations, the crux of Petitioners' argument is that the Fourth District abused its discretion in granting 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.

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.[2] Respondents' subsequent

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[2] Respondents argue that their previous settlement offers were inadmissible to prove the value of the children's claims under Fla. Stat. § 90.408. *See* Ans. Br. p.49. However, Respondents fail to cite to any authority that holds that a previous settlement offer cannot be considered when determining whether the offer of judgment bears a reasonable relationship to the amount of damages within the context of an offer of judgment.

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 Defendants' proposals did not bear a reasonable relationship to a realistic assessment of liability because substantial discovery had not been completed. The discovery taken after Defendants served their proposals for settlement demonstrates that Defendants could not have made a reasonable assessment of liability as to their statute of limitations defense. 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.

CONCLUSION

For the reasons set forth herein, and in the Initial Brief, Petitioners respectfully request this Court to reverse the Fourth District Court of Appeal's decision affirming the trial court's order granting final summary judgment and reversing the trial court's order denying Respondents' Motion for Sanctions/Fees and Costs Based on Proposal for Settlement, and to remand the case to proceed to trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on December 1, 2003, to: George H. Moss, II, Esq. and Casey Walker, Esq., 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 Reply Brief complies with the font requirements contained in Fla.R.App.P. 9.210(a)(2) and that this Reply Brief is submitted in Times New Roman 14 point font.

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