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STATEMENT OF THE CASE AND OF THE FACTS

Respondent, S.A.P., accepts the statement of the case and of the facts as contained in the initial brief of the Petitioner, Department of Health and Rehabilitative Services. References to the record on appeal will be identified by "R" followed by the page number.

SUMMARY OF THE ARGUMENT

The question, as certified, should be answered in the affirmative.¹

The argument of HRS, that the state is immune from the application of the principle of fraudulent concealment, should be rejected. The policy considerations underlying the basic purposes of sovereign immunity are not offended by the application of the principles of fraudulent concealment and equitable estoppel. In fact, the very words of the sovereign immunity statute speak to making the sovereign liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. The statute contemplates the application of these common law principles by declaring that the state will be liable in accordance with the general laws of this state.

¹The initial brief of HRS did not challenge or address the conclusion of the First District Court of Appeal in this cause that S.A.P. had sufficiently stated both a cause of action for negligence and the equitable principle of fraudulent concealment. Accordingly, this issue is not addressed in the Answer Brief of S.A.P.

The decisions of this court and the district courts of appeal have maintained a firm and consistent vigil against the dramatic expansion of immunity which is called for by the briefs of HRS and the Solicitor General.

Similarly, acts of state employees can be attributed to the state for purposes of tolling the statute of limitation and the principle of equitable estoppel. Immunity from liability in tort does not extend to acts of fraudulent concealment that may toll the statute of limitations or estop the offending sovereign from asserting the defense.

The principle of equitable estoppel is a distinct historical common law principle which has been honored and upheld by the courts of this state and those of a host of federal and state jurisdictions. Equitable estoppel comes into play after the limitations period has run and estops the offending party from asserting the defense. This common law principle survives both the enactment of §95.051(2), Florida Statutes (1975), and this court's withdrawn opinion in Fulton County Adm'r. v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997).

Even if the certified question is answered in the negative, this court should permit S.A.P.'s action to proceed. As the First District expressed in its original opinion in this cause, even if the allegations of her complaint were not sufficient to invoke the doctrine of fraudulent concealment, her action should be permitted to proceed because, during her minority, there was no one acting on her behalf and no one who could have filed suit for the child. A close analysis of the distinction between the "accrual" of an action and the "tolling" of the statute of limitations reveals that S.A.P.'s action did not accrue until December of 1992. Accordingly, her action should proceed.

ISSUES ON APPEAL

QUESTION CERTIFIED:

**CAN THE DOCTRINE OF FRAUDULENT CONCEALMENT
APPLY TO TOLL THE STATUTE OF LIMITATIONS IN
A NEGLIGENCE ACTION?**

- A. The Doctrine of Fraudulent Concealment Tolls the Statute of Limitations in a Negligence Action, When the Defendant Enjoys Sovereign Immunity.
- B. The Acts of State Employees Can Be Attributed to the State for the Purposes of Tolling the Statute of Limitations and the Principle of Equitable Estoppel.
- C. Equitable Estoppel Is a Distinct Common Law Principle Which Survives the Enactment of the Statute of Limitations.
- D. Even if this Certified Question Is Answered in the Negative, this Action Should Be Permitted to Proceed.

ARGUMENT

QUESTION CERTIFIED:

CAN THE DOCTRINE OF FRAUDULENT CONCEALMENT APPLY TO TOLL THE STATUTE OF LIMITATIONS IN A NEGLIGENCE ACTION?

A. The Doctrine of Fraudulent Concealment Tolls the Statute of Limitations in a Negligence Action, When the Defendant Enjoys Sovereign Immunity.

S.A.P. does not agree that the certified question should be re-phrased. Nonetheless, S.A.P. will address her first argument to the issue of fraudulent concealment as it applies to a sovereign defendant. The tolling of the statute of limitations by concealment or fraud is applicable to the Department of Health and Rehabilitative Services.

Any consideration of fraudulent concealment and a sovereign defendant should begin with a consideration of the basic purposes of sovereign immunity. The doctrine of sovereign immunity rests on two public policy considerations:

The protection of the public against profligate encroachments on the public treasury and the need for the orderly administration of government, which, in the absence of

immunity, would be disrupted if the state could be sued at the instance of every citizen. Spangler v. Florida State Turnpike Auth., 106 So.2d 421 (Fla. 1958); Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3rd DCA 1981), aff'd. 422 So.2d 838 (Fla. 1982).

In Vargas v. Glades Gen. Hosp., 566 So.2d 282 (Fla. 4th DCA 1990), the Fourth District considered the exact question as suggested by HRS. The court's well grounded analysis concluded that tolling the limitations period for fraudulent concealment would not damage the public pocket because to do so in no way affected the legislature's determination that the state only be liable up to the limits set forth in the statute. The court reasoned that to disallow the doctrine of equitable tolling of the statute of limitations for fraudulent concealment in cases against state agencies would defeat the legislative purpose of allowing citizens who have been injured by tortuous state conduct to recover damages. Id. at 285.

The philosophy behind this exception to the statute of limitations is that our courts will not protect defendants who are directly responsible for delays of filing because of their

own willful acts. Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976). Fraudulent concealment can toll the running of the statute of limitations, such as in the case at bar, when the fraud perpetrated upon the injured places him in ignorance of his right to sue. Wirt v. Central Life Assurance Co., 613 So.2d 478, 479 (Fla. 2nd DCA 1992).

The Vargas court cited an additional provision of §768.28, Florida Statutes, that has significance for the argument now before this Court. "The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances," §768.28(5), Fla. Stat.(1979)(emphasis supplied). Further, the statute waives immunity for negligent or wrongful acts of the state, "If a private person, would be liable to the claimant, in accordance with the general laws of this state" §768.28(1), Fla. Stat. (1979) (emphasis supplied). The Florida legislature was clear in declaring that the state was to be regarded like a private citizen and that the general laws of the state should be applied under this concept. General common laws such as the tolling of the

statute of limitations based on fraudulent concealment equally applies to the sovereign defendant.

Accordingly, the Fourth District in Vargas held that the statute of limitations contained in §768.28(11), Florida Statutes, the predecessor to §768.28(13), may be tolled by fraudulent concealment of the facts necessary to put the injured party on notice of the negligent act or the resulting injury. The Vargas analysis was based upon a fair and appropriate consideration of the policies surrounding sovereign immunity and of the overwhelming public policy consequences if the courts affirmed the fraudulent acts of the litigants.

In its brief, HRS has referred to the well considered logic of the Fourth District as the purest dicta. This court should embrace the sound and sensible holding in Vargas and affirm it as the law of the state of Florida.

HRS argues that any tolling of the limitation period or delayed accrual of S.A.P.'s cause must come from §768.28, Florida Statutes alone. The import and continuing life of the principle of equitable estoppel, as separate and distinct from the sovereign immunity statute, is addressed below.

HRS asks this Court to examine the immunity of the sovereign as if it exists in a vacuum, immune not only from liability in tort, but also from participation in our common law and our comprehensive legislative scheme. To do so would cast an artificial and unforgiving light upon the very purpose of our sovereign immunity statute. The legislature waived immunity because of its belief that our citizens, under limited circumstances and recoveries, should be able to seek legal redress for their injuries. Berek, 396 So.2d at 758.

Similarly, S.A.P. seeks to determine the responsibility of the state for the horrors she endured as a four-year-old innocent.

**B. The Acts of State Employees Can Be
Attributed to the State for the Purposes of
Tolling the Statute of Limitations and the
Principle of Equitable Estoppel.**

The Solicitor General, as Amicus Curiae, argues that since the fraudulent acts of the Department employees are not attributable to the Department for purposes of liability, it follows, as the day the night, that such acts cannot constitute the fraudulent concealment that tolls the statute or provides

a basis for equitable estoppel. The phrase, "liable in tort," does not contemplate immunity for the state for actions which do not result in responsibility for damages.

The operative section of Florida Statutes, §768.28(9)(a) (1979), states as follows:

The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his or her employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. (Emphasis supplied)

This court has previously rejected the sovereign's attempt to extend immunity principles beyond liability in tort. In Berek v. Metropolitan Dade County, 422 So.2d 838 (Fla. 1982), this court found itself as the subject of a similar request on behalf of a sovereign defendant. This court, relying upon the words of §768.28 declaring that the state shall be liable for claims in the same manner and to the same extent as a private individual, refused to exempt the sovereign defendant from the applications of §57.041, Florida Statutes, providing for the recovery of costs. This court concluded that the general provisions of our law which make costs and interest recoverable

by the prevailing party are applicable when a tort claimant prevails against the state. Id. at 840.

The same reasoning has been invoked by this and other Florida courts in denying the state special protection from guardian ad litem fees and legal costs. Simpson v. Merrill, 234 So.2d 350, 351 (Fla. 1970); In the Interest of R.W., 409 So.2d 1069, 1070 (Fla. 2d DCA 1981), rev. denied, 418 So.2d 1279 (Fla. 1982).

In Carida v. Holy Cross Hosp., Inc., 427 So.2d 803, 806 (Fla. 4th DCA 1983), the Fourth District construed the word "liability" to mean responsibility for damages proximately resulting from a tort. There is no suggestion in §768.28, Florida Statutes, that the legislature intended to provide the kind of protection now requested by the Solicitor General and HRS. In fact, our Florida appellate courts have ruled to the contrary.

The limits of sovereign immunity were effectively characterized in Proser v. Berger, 132 So.2d 439, 442 (Fla. 3rd DCA 1961), where the court concluded that the fact that an agency of the sovereign would not be liable in damages for its

tortious acts does not thereby destroy the characterization of its acts as tortious, but renders immune the state agency from responding in damages for such actions.

The principles of estoppel have been applied to political subdivisions of the state of Florida and other sovereign defendants. In Martin v. Monroe County, 518 So.2d 935 (Fla. 3rd DCA 1987), rev. denied, 528 So.2d 1182 (Fla. 1988), the court held that the Department of Insurance, Division of Risk Management, was estopped from denying receipt of a claim which was filed after the expiration of the statute of limitations.

Again, the argument of HRS and the Solicitor General runs headlong into a brick wall with a banner bearing the words of the waiver statute itself, making the state liable in the same manner to the same extent as a private individual under like circumstances, and in accordance with the general laws of this state.

Two additional arguments made by the Solicitor General require comment. First, the Solicitor argues that it is by some slight of hand that S.A.P. brings her action for the

Department's negligence, and yet relies upon individual employee acts of fraudulent concealment. Under established tort principles, it is HRS' duty to monitor a child's placement in foster care, its duty to supervise its caseworkers, and its negligence in failing to remove the child from an abusive home that serves as the basis of this action. Dept. of Health and Rehabilitative Servs. v. Whaley, 574 So.2d 100 (Fla. 1991); Yamuni v. Dept. of Health and Rehabilitative Servs., 529 So.2d 258 (Fla. 1988). This is not sorcery. Rather, it is a simple application of established principles of tort liability.

Finally, it is important to note that S.A.P.'s cause of action was rejected via a Motion to Dismiss. Only under extraordinary circumstances where the facts of the Complaint, taken as true, conclusively show that the action barred by the statute of limitations, should a Motion to Dismiss on this ground be granted. Ambrose v. Catholic Social Servs., Inc., 737 So.2d 146 (Fla. 5th DCA 1999).

Because of the extraordinary action of the trial court, we do not have any idea whether the conduct of Department employees in falsifying documents, obstructing the police

investigation, and concealing the cause of action were committed within the scope of employment. Conduct may be within the scope of employment, even if it is unauthorized, if it is of the same general nature as that authorized or is incidental to the conduct authorized. Lewis v. Walston & Co., 487 F.2d 617 (5th Cir. 1973). Just as the court concluded in Hennagan v. Dept. of Highway Safety & Motor Vehicles, 467 So.2d 748, (Fla. 1st DCA 1985), S.A.P.'s Complaint alleges a number of actions which could be found to exceed authority, but not be outside the scope of employment. For example, the use of excessive force by an officer in effecting an arrest may render the employer liable for the intentional torts inflicted thereby. City of Miami v. Albro, 120 So.2d 23 (Fla. 3rd DCA 1960).

C. Equitable Estoppel Is a Distinct Common Law Principle Which Survives the Enactment of the Statute of Limitations.

Morsani v. Major League Baseball, 739 So.2d 610 (Fla. 2nd DCA 1999), a decision rendered after this court's initial opinion in Fulton Co. Adm'r. v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), provided a scholarly and judicious

analysis of the doctrine of equitable estoppel. Morsani is now before this court.

The Second District effectively stepped up to the plate, reviewing the historical common law basis for the doctrine of equitable estoppel in Florida and in a host of additional state and federal jurisdictions. The Second District concluded that tolling the statute of limitations is concerned with the point at which the limitation period begins to run and with the circumstances in which the running of the limitations may be suspended. Morsani, 739 So.2d at 614.

Equitable estoppel, however, is a distinct principle that comes into play only after the limitations period has run and addresses itself to circumstances in which a party will be estopped from asserting the statute of limitations as a defense. The application of equitable estoppel is wholly independent of the limitation period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Id.

Neither §95.051(2), Florida Statutes(1975), nor this court's withdrawn opinion in Fulton Co. Adm'r. v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), effectively remove equitable estoppel as a living principle of our common law.

The doctrine of fraudulent concealment was originally recognized in this state in 1953 in Proctor v. Schomberg, 63 So.2d 68 (Fla. 1953). In 1946, the United States Supreme Court concluded that the equitable doctrine of fraudulent concealment was, at that time, read into every federal statute of limitation. Holmberg v. Ambrecht, 327 U.S. 392, 397 (1946). Speaking for the court, Mr. Justice Frankfurter offered strong support for the role and import of equitable estoppel:

Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair... Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud.

Id. at 396.

The Fifth District Court of Appeal has concluded that this principle of estoppel is applicable even subsequent to the 1975 enactment of subsection (2) of §95.051. City of Brooksville v. City of Hernando County, 424 So.2d 846, 848 (Fla. 5th DCA, 1982).

In this cause of action, HRS should be barred by equitable estoppel from asserting the defense of the statute of limitations. This 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. Nardone, 333 So.2d at 36.

D. Even If this Certified Question Is Answered in the Negative, this Action Should Be Permitted to Proceed.

The decision of the First District Court of Appeal in this cause not only concluded that S.A.P. had sufficiently stated both a cause of action for negligence and the equitable principle of fraudulent concealment, but also ruled that even if the allegations of the Complaint were not sufficient to invoke the doctrine of fraudulent concealment, S.A.P.'s action

should be permitted to proceed. The court concluded that S.A.P. had sufficiently alleged that during her minority, there was no one acting on her behalf, no friend or guardian, who could have filed suit on her behalf.

When a minor is injured, the statute of limitations will begin to run as to the parents or the legal guardian of the minor, in their capacity of next friend, when the parents or guardian knew, or reasonably should have known, of the invasion of legal rights. Drake v. Island Community Church, Inc., 462 So.2d 1142, 1144 (Fla. 3rd DCA 1984), rev. den., 472 So.2d 1181 (Fla. 1985). Under the facts at bar, any statute of limitations could not begin to run against S.A.P. until a parent, guardian, or next friend knew, or reasonably should have known, of facts which supported the child's cause of action.

The tragic circumstances of S.A.P.'s life as a child left her without an advocate, or an opportunity to seek redress in the courts. She had no knowledge of her own injuries, and no opportunity under Florida Rule of Civil Procedure 1.210 to apply to the courts. As the First District concluded, the

Second Amended Complaint alleged that S.A.P.'s records were confidential under Florida law and that no one, no natural parent, no adoptive parent, no guardian ad litem, and no next friend was aware of the Department's negligence in the supervision of this child.

In this analysis, it is important to consider the blurring of the distinction between "accrual" and "tolling" in the decisions of our Florida courts. In Proctor, the Florida Supreme Court described the effect of fraudulent concealment as postponing the commencement of the running of the statute until discovery, or until reasonable opportunity of discovery, by the owner of the cause of action. Proctor, 63 So.2d at 70.

This issue, whether tolling refers to both the traditional concept of a cessation of the running of the statute of limitations and to a delay in the accrual of a cause of action, is now before this Court in Hearndon v. Graham, 710 So.2d 87 (Fla. 1st DCA 1998).

§768.28(11), Florida Statutes (1979), reinforces reliance on this concept because it specifically refers to the "accrual of the action" as the operative event for the purpose of

limitations. The applicable statute of limitations in this action did not commence until December 21, 1992, when the Department's own Inspector General's report revealed the negligence of the Department, falsification of records, and the obstruction of the law enforcement investigation into the matter.

Notice of more than mere injury is needed for the statute of limitations to begin to run. The statute of limitations does not begin to run where there has been a fraud or a concealment. Grossman v. Greenberg, 619 So.2d 406, 408 (Fla. 3rd DCA 1993), rev. denied 629 So.2d 133 (Fla. 1993). Notice of a possible invasion of one's legal rights is necessary before it can be claimed that one should have discovered their cause of action. Nardone, 333 So.2d at 39.

CONCLUSION

The certified question should be answered in the affirmative. The opinion of the First District Court of Appeal in this cause should be affirmed. Even if the certified question is answered in the negative, the cause of action should be reinstated on other grounds and portions of the opinion of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

In compliance with this Court's Administrative Order dated July 13, 1998, the undersigned certifies that the type size and style used in this brief is 12-point Courier New.

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing has been furnished by U.S. Mail to: Robert A. Butterworth, Attorney General and Charlie McCoy, Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050, on this the _____ day of February, 2000.

Attorney

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<u>Appendix</u>	<u>Item</u>	<u>Date</u>
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