

**IN THE SUPREME COURT OF FLORIDA**

ELIZABETH L. DAVIS,            )  
  )  
          Petitioner,            )     CASE NO. SC: SC01-1157  
  )  
vs.                                )  
  )  
HELEN K. MONAHAN,            )  
  )  
          Respondent.         )  
\_\_\_\_\_)

**PETITIONER’S REPLY BRIEF**

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On Review from the District Court

of Appeal, Fourth District

State of Florida

No. 00-1982

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## **SUMMARY OF THE ARGUMENT**

Respondent opens her argument with a plea for this Court to “act” and create an exception to the statutory limitations scheme by providing a discovery rule for the accrual of her claims. The policy considerations offered by Respondent are not complete and ignore the broader policy considerations supporting statutes of limitation in general and the constitutionally mandated separation of powers. Simply, this Court cannot ignore § 95.031(1) of the Florida Statutes and create a judicial exception to the rule establishing when causes of action accrue.

The legislative history of the 1974 revisions to chapter 95 shows that the Florida legislature considered the causes of action to which a discovery rule applied and codified those exceptions and no others. Policy considerations and the creation of exceptions based on social policy should be left to the legislature and not the judicial system. Respondents’ reliance on case law from other jurisdictions to create an agency exception is incomplete and not persuasive. The Florida legislature has adopted a specific statute governing limitations and administration of trusts under § 737.307 but not other agency relationships. Respondent relies on cases from New York that are similarly based on New York statutory law. On the other hand, California law, cited by Respondent, does not offer a compatible rule with Florida’s statutory limitations scheme since California’s legislature has not defined when causes

of action accrue as in Florida. In short, the Florida legislature should be the body to create a discovery rule for the claims raised by Respondent. Respondent's argument that her claims somehow fit under the discovery rule provided for fraud claims is inaccurate since nowhere does she plead or prove that her claims arise from misrepresentation.

Even if a discovery rule were to apply, Monahan cannot avoid the uncontroverted record evidence establishing Monahan knew of the alleged conduct giving rise to her claims. Nor can Monahan avoid her counsel's admissions that Monahan received a letter from the IRS in 1993 which disclosed the redemption of the U.S. Savings Bonds. Additionally, no exception applies to allow Monahan's hearsay statements into evidence.

## **ARGUMENT**

### **I. ABSENT FRAUD, THE LEGISLATURE HAS NOT SET FORTH A DISCOVERY RULE FOR THE ACCRUAL OF INTENTIONAL TORTS WHICH GIVE RISE SOLELY TO ECONOMIC HARM.**

#### **A. Broader Policy Considerations.**

Respondent, in her Answer Brief, sets forth policy considerations to promote establishing a discovery rule for the accrual of the claims raised in this action. However, if there are policy considerations to be made with regard to the statute of

limitations, it is for the Florida legislature to assess those policies and to make law. Policies that establish a rule of law based on moral terms should be legislated not created by the judicial system. In short, Monahan's policy considerations are short sighted and miss the issue.

Monahan seeks this Court to "act" to impose a rule of law that provides an exception to the statute that provides when causes of action accrue if the causes of action arise from transactions between family members. While it is clear that there is no "We're family" exception set forth in the statutory limitations scheme, Monahan essentially argues for a rule founded on moral terms – simply, that family members should be able to trust one another and therefore should be exempt from strict application of the statute of limitations when one family member claims to have depended on another. The legislature is the body that sets forth social policy, not the judicial system. See State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997) ("As we have said time and again, the making of social policy is a matter within the purview of the legislature – not this Court . . . ."); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. 3d DCA 2001) ("The power to legislate belongs not to the judicial branch of government, but to the legislative branch."). With the amendments to chapter 95 of the Florida Statutes in 1974, the legislature did not enact a discovery rule for the accrual of claims of intentional torts which give rise solely to economic harm, absent

fraud. The judicial system cannot and should not create an exception to the statutory scheme.

Section 95.031(1) provides that a cause of action accrues when the last element constituting a cause of action occurs. § 95.031(1), Fla. Stat. (1997). Analysis of the legislative history of § 95.031(1) and the other 1974 revisions of chapter 95 indicates that the legislature was aware of the application of the discovery rule to various types of causes of action, and specified in chapter 95 the specific times when a discovery rule applies. See Thomas E. Bevis, Florida Law Revision Council, Project on Statutes of Limitation: Some Policy Considerations, at 16-17 (Apr. 8, 1972) (unpublished report held by Florida State Archives); Ch. 74-382, § 3, at 1208, Laws of Florida; CS/HB 895, § 3, Fla. Legis. (section summary); Memorandum re: CS/HB 895 (Statute of Limitations), Table of Changes at 1-3 (Apr. 30, 1974). App. 001-042.<sup>1</sup>

In 1972, prior to the enactment of § 95.031(1) of the Florida Statutes, a report of the Florida Law Revision Council set forth some policy considerations underlying the revisions to chapter 95. See Bevis at 1-18; App. 002-019; see also, Hearndon v. Graham, 767 So. 2d 1179, 1185 n.3 (Fla. 2000). The report specifically addressed the issue of when a cause of action accrues. See Bevis at 16; App. 017.

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<sup>1</sup> Citations to the appendix of this Reply Brief will be made by the letters “App.” and the appropriate page number of the appendix.

In noting that special problems arise in certain tort and fraud cases where the plaintiff cannot readily discover the injury done him or her, the report sets out only two specific problems arising in medical malpractice and fraud cases. Id. at 16-17; App. 017-18. No other types of causes of action are specified.

The Committee Substitute for House Bill No. 895 (which became law ch. 74-382 enacting § 95.031(1)), in section 3 states:

Traditionally, at common law, ignorance of the wrongful act or damages of another is no excuse for not filing a timely lawsuit, and the tardy claim is barred by the running of the Statute of Limitations. Three exceptions to this general rule currently exist in Florida law, and this section of the bill codifies the general rule and the exceptions into one section. The exceptions are for actions based on: (1) fraud . . . (2) professional malpractice . . . and (3) products liability . . . .

CS/HB 895, § 3. App. 030. The Table of Changes to Bill 895 also shows the legislature intended to only set forth a discovery rule for fraud, professional malpractice, and products liability and no other causes of action. See Memorandum re: CS/HB 895, Table of Changes at 1-3. App. 040-42. In summary, the legislature analyzed several policy considerations, including the codification of the “three exceptions” to the accrual of a cause of action based on delayed discovery. Cf. Federal Ins. Co. v. Southwest Fla. Ret. Ctr., Inc., 707 So. 2d 1119, 1122 (Fla. 1998). Any further policy considerations and exceptions should also be left for the legislature to enact.

In setting forth her alleged policy considerations, Monahan seeks to put this Court in the position of choosing between right and wrong; between the alleged wrongdoer and the alleged victim. These are one-sided (mis)characterizations in a dispute between family members. This Court is not faced with such a simple task. Clearly, if it was -- if alleged equities were the sole guideline of when to apply the statute of limitations -- then the statute of limitations may never apply and every alleged action, no matter how old, could be pursued.

**B. There are No Exceptions to the Statute of Limitations Based on Termination of Agency or Request for an Accounting.**

Monahan argues for this Court to establish an exception to the application of the statute of limitations by holding that causes of action that arise from the breach of an agency relationship accrue upon termination of the relationship or the request of an accounting. There is no such exception under the Florida statutory limitations scheme. Monahan relies on two out of state decisions, Central States Res., Corp. v. First Nat'l Bank in Morrill, Neb., a Nebraska decision, and Grindey v. Smith, an Iowa decision, both standing for the proposition that with regard to a general or continuing agency, a cause of action against the agent by the principal does not begin to accrue until the agency is terminated or an accounting is requested. Central States, 501 N.W.2d 271, 276 (Neb. 1993) (holding action against bank holding proceeds which

should have gone to plaintiff participating bank, was not barred by statute of limitations since a continuing agency existed); Grindey, 21 N.W.2d 465, 466-67 (Iowa 1946) (holding where relationship between principal and agent is that of trustee and cestui que trust, the statute of limitations begins to run upon termination or demand for accounting).

Florida has codified a similar rule followed in Grindey with regard to administration of trusts. See § 737.307, Fla. Stat. (2001) (“Limitations on proceedings against trustees after beneficiary receives account”). However, the statute does not apply to agents acting pursuant to a power of attorney and no such rule has been codified with respect to such agents. See chs. 95; 709 (governing powers of attorney), Fla. Stat. (1997).<sup>2</sup>

Respondent also relies on two cases from New York. See Palombi v. Dutcher, 221 N.Y.S.2d 347, 350 (N.Y. Sup. Ct. 1961)(in action against escrow agent, statute of limitations did not begin to run until plaintiff made demand for return of the money); Estate of Allen, 220 N.Y.S.2d 296, 301 (N.Y. Sur. Ct. 1961)(in action between principal and agent for property held for principal, statute of limitations begins

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<sup>2</sup> Section 709.08 is only applicable to those durable powers of attorney executed on or after October 1, 1995. § 709.08 (12), Fla. Stat. (1997). Monahan did not plead an action pursuant to §709.08 in the Court below and it is clear that the power of attorney in favor of Davis was executed before October 1, 1995. (R: 972).

to run upon demand or when the principal knew or should have known that agent was holding property for own use). However, the rule of law followed in these two cases is based on New York statutory law. See Palombi, 221 N.Y.S.2d at 350 (citing Civ. Prac. Act § 15); Allen, 220 N.Y.S.2d at 301(same). Former Civil Practice Act § 15 is now set forth in Civil Practice Law and Rules § 206(a) which provides that the limitations period in an action against a trustee, agent, attorney or other person acting in a fiduciary capacity arising from their detention of money or property begins to run upon demand or upon discovery of the cause of action. See N.Y. C.P.L.R. § 206(a) (Consol. 2001); adv. comm. notes (1<sup>st</sup> sentence). Other than § 737.307 of the Florida Statutes governing trustees, there is no provision under Florida law similar to § 206(a) under New York law. The rule of law sought by Monahan should be set forth by statute as in New York, not by judicial determination.

In any event, the record evidence only establishes that Monahan never requested an accounting from Davis or from someone retained to represent Davis, and that Monahan revoked Davis' power of attorney in February of 1996. (R: 976; 1511 at 306-07; 2022; 2028-29). The rule argued by Monahan would mean that a principal, who knows and consents to the transactions completed by the agent, who never requests an accounting, and who terminates the agency after the otherwise applicable statute of limitations runs, can still bring an action against the agent. The accrual of

causes of actions and the running of applicable statutes of limitations should not be extended when the principal has knowledge of the alleged activity.

**C. The Delayed Discovery Doctrine Under California Law is Materially Different From Florida Law and is not Persuasive.**

Respondent argues that this Court should adopt the delayed discovery doctrine followed by California with regard to actions against fiduciaries. See Prudential Home Mortgage Co., Inc. v. Superior Court of Orange County, 78 Cal. Rptr. 2d 566, 571 (Cal. Ct. App. 1998) (holding delayed discovery doctrine applicable to action against bank for alleged violation of statute); April Enters., Inc. v. KTTV, 195 Cal. Rptr. 421, 433-34 (Cal. Ct. App. 1983) (holding discovery rule applied to actions for breach of fiduciary duty between joint venturers and for breach of contract).

However, unlike Florida where the legislature has expressly set forth when a cause of action accrues, California's statutory scheme does not define the accrual of a cause of action. See Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 430-31 (Cal. 1971) ("The Legislature has enacted no statute which describes for each class of civil action, the date of accrual . . . ."); Cal. Civil Proc. Code § 312 (Deering 2001). In California, the accrual of each cause of action is determined by judicial decision. See Neel, 491 P.2d at 431. Additionally, the delayed discovery

doctrine is broader in California since it is applied to actions for breach of contract, unlike Florida, where this Court has held that the discovery rule does not govern the accrual of an action for breach of contract. Compare April Enters., 195 Cal. Rptr. at 434-37 (holding a discovery rule can govern the accrual of an action for breach of contract) with Federal Ins., 707 So. 2d at 1122 (holding legislature did not provide for a discovery rule for the accrual of actions for breach of contract). Accordingly, adopting California's delayed discovery rule does not harmonize Federal Ins. and Hearndon as Monahan contends, but rather requires this Court to overrule Federal Ins. and disregard the express language of § 95.031(1).

**D. Monahan Has Not Plead Nor Proven Fraud.**

Monahan argues that her claim of breach of fiduciary duty also states a cause of action for fraud relying on Ambrose v. Catholic Soc. Servs., Inc., 736 So. 2d 146 (Fla. 5<sup>th</sup> DCA 1999). However, Ambrose never expressly stated that a breach of fiduciary duty claim was the same as a fraud claim. Ambrose, 736 So. 2d at 149. In Ambrose, a wrongful adoption case, the plaintiff alleged five causes of action -- the first four theories alleged fraudulent conduct and the last negligence, despite their apparent headings. Id. at 148. The appellate court agreed with the appellant/plaintiff that the first four theories were essentially fraud claims arising out of an alleged pre-adoption misrepresentation that the biological father had no history of disease. Id. at

148-49. The appellate court held that the four year statute of limitation began to run on the date the plaintiff knew or should have known of the misrepresentation of the father's medical history. Id. at 149. The court did not hold that the breach of fiduciary duty claims were a recognized form of fraud. Here, Monahan has not alleged that Davis made misrepresentations nor has she plead a cause of action for fraud. (R: 938-46).

## II. MONAHAN CANNOT RELY ON HEARSAY AND TESTIMONY LACKING IN PERSONAL KNOWLEDGE.

Monahan attempts to rebut the record evidence of Monahan's knowledge arguing that Davis impersonated Monahan when cashing the U.S. Savings Bonds at Citizens Bank because she endorsed Monahan's name on the back of the bonds. Monahan relies on the testimony of Sadler. However, Sadler confirmed she had no personal knowledge with regard to the cashing of the bonds. (R. 1529 at 278; 1533 at 314). Monahan also claims that Citizens Bank has no record of any account opened in Monahan's name. However, this too is based on Sadler's testimony based on an alleged oral statement made to her by Monahan and from alleged letters given to Sadler by Monahan from the bank. (R. 1481 at 71-72). Sadler's testimony is hearsay. Accordingly, Monahan's claims of subterfuge are unsupported by the record evidence. Monahan also seeks to avoid the record evidence that showed that

in 1993 Monahan was audited by the IRS for failing to report the income generated by the liquidation of the U.S. Savings Bonds in 1990 and had received the letter from the IRS notifying her of the audit. (R. 680; 1478 at 46, 47; 1485 at 98; 1979 at 45, 47-48). Monahan claims that this argument was not raised below. Respondent may not have reviewed the recording of the oral argument, but it is clear that the argument was raised about 16 minutes into the oral argument by Petitioner. Nevertheless, the trial court relied on this evidence in making its correct determination. (R. 1979 at 45, 47-48). Respondent should not be able to avoid it on appeal not having done so at the trial level.

Respondent also argues that there is no record evidence of the letter received by Monahan, but mere argument of counsel. In fact, it was Monahan's counsel that admitted that Monahan had received the letter from the IRS in 1993 at her home. (R. 1979 at 45). Admissions by counsel are binding. A party is bound by factual concessions made by that party's attorney before a judge in a legal proceeding. Dicus v. District Bd. of Trs. for Valencia, 734 So.2d 563, 564 (Fla. 5<sup>th</sup> DCA 1999); see Fla.R.Jud.Admin. 2.060(1). Contrary to Monahan's assertions, no record evidence was provided that she did not or should not have understood the letter in 1993.

Monahan also seeks to invoke a hearsay exception under § 90.803(24) to attempt to use Sadler's testimony regarding Monahan's alleged statements made to her

in 1995. Monahan did not raise this argument at the trial court level or before the district court. In any event, in order for the exception to apply in this case, Monahan must prove (1) that the out-of court statements sought to be admitted into evidence were made by an “elderly person” or “disabled adult” as defined by § 825.101 and (2) that the statements describe an act of abuse, neglect, or exploitation. § 90.803(24), Fla. Stat. (2001). To be a “disabled adult” within the meaning of § 825.101, the person must be incapacitated or restricted from performing the normal activities of daily living. § 825.101(4), Fla. Stat. (2001). To be an “elderly person” within the meaning of §825.101, the person’s ability to provide adequately for the person’s own care or protection must be impaired. § 825.101(5), Fla. Stat. (2001).

Monahan should be estopped from raising this argument since until now, Monahan has always claimed that Monahan was competent and self-sufficient before this action was filed. (R. 1475-76 at 19 - 20, 22 - 26, 1484 at 90, 1488 at 126-27, 1493 at 166, 1572 at 398; 1978 at 7). Accordingly, Monahan was not an “elderly person” or “disabled” when she allegedly requested Sadler’s assistance in 1995 and made the out-of-court statements supporting her alleged lack of knowledge with regard to her financial status in 1995. Additionally, Monahan has not specified the exact out-of-court statements allegedly made by Monahan to Sadler upon which she relies. Accordingly, Monahan has not shown that the statements upon which she relies

describe an act of abuse, neglect, or exploitation. In any event, Monahan's alleged statements inferring a lack of knowledge of the alleged misappropriations are not descriptions of the alleged act of abuse, neglect, or exploitation and accordingly cannot fall within the exception.

In addition, under § 90.803(24), Monahan must support Monahan's alleged statements with corroborative evidence since Monahan has since been declared incompetent, and accordingly is unavailable to testify. See §§ 90.803(24)(a)(2); 90.804(1)(d), Fla. Stat. (2001). Corroborative evidence is evidence supplementary to that already given and tending to strengthen or confirm it, but must be other evidence than the alleged victim's out-of-court statement. Delacruz v. State, 734 So. 2d 1116, 1120-21 (Fla. 1<sup>st</sup> DCA 1999). Monahan must offer corroborative evidence of the statements allegedly proving Monahan did not know of the alleged misappropriations until 1995. Sadler cannot testify with regard to Monahan's alleged lack of knowledge since Sadler's testimony would rely on Monahan's own hearsay statements. Accordingly, Respondent can offer no corroborative evidence to support the § 90.803(24) exception.

## **CONCLUSION**

Based on the foregoing, petitioner, Elizabeth L. Davis, respectfully requests this Court to quash the District Court's decision in this case, and affirm the

trial court's rulings dismissing petitioner from this action with prejudice, and granting to Davis such other and further relief as this Court deems just and proper.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to **Amy D. Shield, Esq.**,  
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**CERTIFICATE OF COMPLIANCE**

I certify that this brief, in Times New Roman 14 point font, complies with  
the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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