

I. STATEMENT OF THE CASE AND FACTS

The petitioners' "Introduction" and "Statement of the Case and the Facts" are more argument than introductory statement, and they are not entirely accurate. We are therefore constrained to restate the case and facts. The issue before the Court, of course, is the certified question that provides the Court with jurisdiction:

Does section 95.051, Florida Statutes (1993), prohibit the application of the doctrine of equitable estoppel to an action filed outside of the applicable statute of limitations?

Actually, the question appears to have been inartfully worded. We think what the district court meant to ask is the following:

Does section 95.051, Florida Statutes (1993), prohibit assertion of an equitable estoppel defense to a statute of limitations defense?

This question arises from the following factual and procedural background.

The respondents, Frank Morsani and Tampa Bay Baseball Group, Inc., were plaintiffs below in a multi-count action against numerous defendants, nearly all of whom were associated with Major League Baseball in one capacity or another at the relevant times. The gravamen of the plaintiffs' action was two-fold: (1) that the defendants had tortiously interfered with various contractual rights and advantageous business relationships which the plaintiffs had developed over the years in their efforts to acquire ownership of a major league baseball team for the Tampa Bay area; and (2) that, by conspiring together and acting in combination to prevent the plaintiffs from succeeding in that endeavor, the defendants had violated Florida's anti-trust laws. At the insistence of the defendants, the trial court dismissed the plaintiffs' First Amended

Complaint in its entirety for failure to state legally cognizable claims; on appeal, however, a unanimous panel of the District Court of Appeal, Second District, reversed the order of dismissal in its entirety, holding that the plaintiffs' allegations stated valid causes of action. *Morsani v. Major League Baseball*, 663 So.2d 653 (Fla. 2d DCA 1995), *review denied*, 673 So.2d 29 (Fla. 1996).

The present appellate proceeding involves the plaintiffs' Third Amended Complaint (R. 1-30). According to the allegations of Count I of that complaint, in 1984, the owners of a majority of the stock of Minnesota Twins, Inc., Calvin Griffith and Thelma Griffith Haynes, agreed to sell their controlling interest to the plaintiffs on condition that they first buy H. Gabriel Murphy's 42.14% minority interest in the corporation. The plaintiffs then negotiated and entered into a fully-executed written contract with Murphy for the purchase of his interest, at a purchase price of \$11,500,000.00 (Exhibit A to Third Amended Complaint). Thereafter, with full knowledge of these agreements, various of the defendants conspired together and used improper means to prevent the plaintiffs from consummating their purchase. They caused Griffith and Griffith-Haynes to sell their majority interest to Karl Pohlrad. They also demanded that the plaintiffs assign their contract with Murphy to Pohlrad, and that Murphy consent to the assignment. At the time this assignment was demanded, the value of the minority interest purchased by the plaintiffs had increased from \$11,500,000.00 to \$25,000,000.00.

The plaintiffs balked at the demand and sought payment for the \$13,500,000.00 increase in the value of the contract, as well as reimbursement of the \$2,900,000.00 previously expended, as a condition to assigning the contract to Pohlrad. Various of

the defendants then threatened the plaintiffs that they would never own an interest in a major league baseball team, and that there would never be a major league baseball team in the Tampa Bay area, unless the plaintiffs (1) assigned the contract as demanded, (2) accepted only \$250,000.00 as reimbursement for the expenses incurred, and (3) agreed to forbear pursuing any legal remedies for the additional \$16,150,000.00+ in damages in exchange for obtaining an ownership interest in another team in time to begin the 1993 season. In exchange for the prospect of another team, the plaintiffs succumbed to the defendants' tactics, assigned their contract to Pohlad, and withheld their plainly substantial claims.

Count II of the complaint alleges a similarly aborted attempt to purchase the Texas Rangers in 1988. Count III of the complaint alleges a similarly aborted attempt to obtain a 1993 expansion team. Count IV is an action for violation of Florida's anti-trust laws, bottomed upon the facts underlying each of the three separate transactions.^{1/} The defendants answered, denied liability, and alleged affirmatively (among other things) that the plaintiffs' claims were barred by the statute of limitations (R. 31-46). Because the plaintiffs' complaint had anticipated this defense by alleging facts supporting an equitable estoppel defense to the statute of limitations defense, there was no need for the plaintiffs to plead further to the defense.

The defendants moved for summary judgment on all four counts (R. 47-51). In their moving papers and accompanying memoranda, the defendants acknowledged

^{1/} To eliminate possible confusion on the point, we advise the Court that Tampa Bay's present baseball franchise, the Tampa Bay Devil Rays, was later awarded to another group of investors (after the instant suit was filed) -- not to the plaintiffs.

that equitable estoppel was a viable defense to a statute of limitations defense, and contended merely that there was no factual support in the record for the plaintiffs' equitable estoppel defense (R. 49 [¶3C3], 91-96, 1203-18). The defendants also squarely conceded that the defense of equitable estoppel was not a "tolling" defense of the type addressed in §95.051, Fla. Stat.: "Contrary to plaintiffs' claim, defendants acknowledge that estoppel may apply notwithstanding the (otherwise) exclusive list of tolling circumstances set forth in §95.051 of the Florida Statutes; . . ." (R. 1212, n. 7).

Notwithstanding this concession, the trial court suggested at one of the several lengthy hearings on the motion that the settled law on the point may have been changed by a decision filed a month earlier by this Court -- that *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999), appeared to bar use of an equitable estoppel defense to a statute of limitations defense (T. 81-85). This issue was then briefed and argued at some length, during which the defendants changed their position on the point and aligned themselves with the trial court's suggestion (e. g., R. 1262-72). The defendants' motion for summary judgment was thereafter granted in part and denied in part (R. 1273-93).

As to Count I, the trial court rejected the defendants' contention that there was no factual support for the plaintiffs' equitable estoppel defense. At page 7 of their brief, the defendants assert that "the trial court had no occasion to address" the evidence on this defense and "found it unnecessary to reach a conclusion" about it. This is inaccurate. In its written order (drafted by defendants' counsel), the trial court

explicitly noted, “At a hearing held on October 29, 1997, the Court found that disputed issues of material fact exist with regard to equitable estoppel, i. e., whether defendants ‘misled or lulled [Plaintiffs] into inaction . . . in some extraordinary way’” (R. 1281). We will detail the evidence supporting that ruling in our argument under Issue B.

Notwithstanding its ruling that the defense was factually supported by the evidence, the trial court concluded that, as a matter of law, an equitable estoppel defense could no longer be asserted against a statute of limitations defense after *Fulton County Administrator* (R. 1275-82). It therefore granted the defendants' motion and entered judgment against the plaintiffs on Count I:

1. On the basis of Fulton County Administrator v. Sullivan, 22 Fla. L. Weekly S578 (Fla. Sept. 29, 1997), defendants' motion for summary judgment based on the statute of limitations is GRANTED with regard to Count I of the Third Amended Complaint, and with regard to so much of Count IV as relates to the same subject matter as Count I, i. e., the Minnesota Twins transaction. Therefore, as to those counts, plaintiffs shall take nothing by this action and defendants shall go hence without day.

(R. 1290-91). The motion was denied as to Counts II and III (R. 1291). The motion was granted as to Count IV, and judgment was entered against the plaintiffs on that count as well (*id.*).

A timely appeal followed to the District Court of Appeal, Second District (R. 1294-1316). In our "Statement of Judicial Acts to be Reviewed," we advised the defendants and the district court that the issue on appeal would be limited to "the trial court's conclusion that *Fulton County Administrator v. Sullivan* . . . invalidates the

plaintiffs' equitable estoppel defense to the defendants' statute of limitations defense as a matter of law, and its consequent entry of summary judgment in the defendants' favor on Count I of the Third Amended Complaint" (R. 1321). We did not quarrel with the trial court's disposition of the anti-trust violations alleged in Count IV. The district court thereafter concluded that the trial court misunderstood and misapplied *Fulton County Administrator*; it reversed the summary final judgment as to Count I, and certified the issue to this Court for resolution. *Morsani v. Major League Baseball*, 739 So.2d 610 (Fla. 2d DCA 1999).

The defendants then filed multiple post-decision motions in the district court. Before they were ruled upon, the defendants removed the case to federal court. The district court denied the motions nevertheless, and the defendants then invoked the discretionary review jurisdiction of this Court; and, as the Court's file will reflect, the briefing schedule was stayed pending resolution of the plaintiffs' motion to remand the case to the state courts. Recently, the federal court concluded that the defendants' removal was improper, and it remanded the case to the state courts -- and this Court's jurisdiction to proceed (finally) is therefore no longer in doubt.

We mention these things because the defendants have complained (at page 31 of their brief) that the tortious misconduct alleged in Count I occurred (in their words) "almost 16 years ago." Most respectfully, the instant suit was filed in 1992 (*see* R. 1273). The nearly eight-year delay that followed has been caused entirely by the procedural maneuvering of the defendants and their persistent efforts to avoid meeting the plaintiffs on the merits of their claims. First, they obtained a dismissal of the action in its entirety which the plaintiffs were forced to appeal, and which the district court

unanimously reversed. Next, they obtained a summary judgment on Count I which the plaintiffs were forced to appeal, and which the district court unanimously reversed. Next, they removed the case to federal court, a maneuver which the plaintiffs were forced to challenge, and the removal was declared improper. Most respectfully, if the claim alleged in Count I is “stale” at this point in time, as the defendants insist over and over again in their brief, it is the *defendants* who have made it so by their persistent maneuvering in an effort to avoid a trial of its merits -- and we respectfully urge the Court to keep that point in mind as it proceeds.

II. ISSUES PRESENTED FOR REVIEW

A single legal question has been certified to the Court, which we rephrase as follows:

A. DOES SECTION 95.051, FLORIDA STATUTES (1993), PROHIBIT ASSERTION OF AN EQUITABLE ESTOPPEL DEFENSE TO A STATUTE OF LIMITATIONS DEFENSE?

Apparently concerned that the district court’s negative answer to this question will be approved by this Court, the defendants have advanced a “right for the wrong reason argument,” contending that the trial court and the district court erred in concluding that a genuine issue of material fact was presented on the plaintiffs’ equitable estoppel defense. Although the Court has the power to decide this issue, it is not required to do so. If it chooses to go beyond answering the certified question, a second issue is presented for review:

B. DID THE TRIAL COURT AND DISTRICT COURT ERR IN CONCLUDING THAT A GENUINE ISSUE OF

MATERIAL FACT WAS PRESENTED ON THE PLAINTIFFS' EQUITABLE ESTOPPEL DEFENSE?

III. SUMMARY OF THE ARGUMENT

A. The doctrine of equitable estoppel has co-existed peaceably with statutes of limitations for more than 150 years. And because our argument will of necessity have to survey the rather extensive jurisprudence developed on the subject in that century and a half, it cannot easily be summarized in a page or two. Suffice it to say that our argument will be constructed upon a simple, perfectly logical syllogism: §95.051, Fla. Stat., arguably abolishes *tolling* defenses, except those explicitly recognized therein; the 150-year old defense of equitable estoppel is *not* a tolling defense; and §95.051 therefore does not abolish the defense of equitable estoppel. We will support the major and minor premises of this syllogism with abundant authority in the argument which follows, and we will urge the Court to answer the certified question in the negative and approve the district court's decision.

B. The defendants have advanced a "right for the wrong reason" argument concerning the "sufficiency of the evidence" which we think the Court is unlikely to reach. And because a recitation of the factual evidence supporting the plaintiffs' equitable estoppel defense is not susceptible to ready summarization in any event, we will spare the Court the details here. Suffice it to say that the defendants' argument concerning the acknowledged lack of a *formal commitment* to award a franchise to the plaintiffs is a straw man. Numerous informal promises, assurances, and less than subtle threats were made to induce the plaintiffs to forbear from filing suit to recover

the enormous damages that the defendants' tortious conduct caused them, and all four of the judges who passed upon the sufficiency of the evidence below therefore correctly concluded that material issues of fact exist on the plaintiffs' equitable estoppel defense.

IV. ARGUMENT

A. THE DISTRICT COURT CORRECTLY CONCLUDED THAT §95.051, FLA. STAT. (1993), DOES NOT PROHIBIT A PLAINTIFF FROM ASSERTING AN EQUITABLE ESTOPPEL DEFENSE TO A STATUTE OF LIMITATIONS DEFENSE.

We are faced at the outset with an interesting conundrum. The trial court's ruling was based upon its interpretation of this Court's initial majority opinion in *Fulton County Administrator v. Sullivan*, 22 Fla. L. Weekly S578 (Fla. Sept. 25, 1997), *withdrawn*, 24 Fla. L. Weekly S557 (Fla. Nov. 24, 1999). The district court's disagreement with the trial court was based upon a different reading of that opinion, and the issue presented here was certified to this Court for an explanation of the reach of that opinion. In the interim, that opinion was withdrawn. And in the opinion substituted in its place, the Court expressly "decline[d] to answer the certified question as to Florida law concerning statutes of limitations" -- the question that was answered in the initial majority opinion, now withdrawn. *Fulton County Administrator v. Sullivan*, 24 Fla. L. Weekly S557, S557-58 (Fla. Nov. 24, 1999). If that were the only development relevant to the issue presently before the Court, it would seem that our argument could be written on a clean slate, without the need to tilt at the windmill

represented by the withdrawn opinion.

Unfortunately, this Court issued another decision while it was debating whether it should actually decide the certified question presented in *Fulton County Administrator: Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So.2d 1119 (Fla. 1998). And in that decision, perhaps because of the constraints of the doctrine of *stare decisis*, it followed the initial majority opinion in *Fulton County Administrator*. It is here that the conundrum is presented. Does the reference in *Federal Insurance Co.* to the Court's initial majority opinion in *Fulton County Administrator* breathe life into its ghost despite its subsequent exorcism, or is *Federal Insurance Co.* no longer viable now that its underpinnings have been removed and the question expressly left open in this Court? We do not know the answer to that question. And because we do not know the answer, we have little choice but to assume (as the defendants have) that the ghost of the initial majority opinion in *Fulton County Administrator* still haunts the Southern Reporter.

Our argument will be tailored accordingly. First, we will present the essentials of the argument we made below, which was accepted by a unanimous panel of the district court. We will then address the semantic muddle with which the defendants have attempted to confuse the Court into abolishing a 150-year old fixture of Florida law.

1. Our position.

a. Our position on the certified question is simple and straightforward. The doctrine of equitable estoppel has a *very* long history and a venerable pedigree. It

was a fixture of the English common law. *See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234, 79 S. Ct. 760, 3 L. Ed.2d 770, 773 (1959) (the doctrine of equitable estoppel, and its availability as a defense to a statute of limitations defense, is a “principle of law . . . older than the country itself”). And the doctrine was inherited by Florida and given statutory recognition in 1829 by what is now §2.01, Fla. Stat.: “The doctrine of estoppel is a part of the common law of the state adopted by statute, section 87(71), Comp. Gen. Laws” *New York Life Ins. Co. v. Oates*, 122 Fla. 540, 166 So. 269, 276 (1935).

The doctrine has been recognized and applied in numerous contexts by this Court since the inception of statehood, more than 150 years ago. *See, e. g., Camp v. Moseley*, 2 Fla. 171 (1848); *Collins v. Mitchell*, 5 Fla. 364 (1853); *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391 (1889); *New York Life Ins. Co. v. Oates*, 141 Fla. 164, 192 So. 637 (1939); *Steen v. Scott*, 144 Fla. 702, 198 So. 489 (1940); *State ex rel. Watson v. Gray*, 48 So.2d 84 (Fla. 1950); *Miami Gardens, Inc. v. Conway*, 102 So.2d 622 (Fla. 1958); *Noble v. Yorke*, 490 So.2d 29 (Fla. 1986); *Branca v. City of Miramar*, 634 So.2d 604 (Fla. 1994). There are, of course, many dozens more -- but these should be sufficient to make the point. And, of course, the doctrine can be asserted against all manner of claims and defenses; it is not merely an “exception” to the statute of limitations, as the defendants insist.

The doctrine of equitable estoppel has also been recognized by this Court as a valid defense in the particular context presented here, as a defense to a limitations-period defense. *See Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9 (Fla. 1965). Notwithstanding this *very* long line of authority, the trial court concluded that,

as a matter of law, the doctrine of equitable estoppel was no longer available to the plaintiffs to avoid the defendants' statute of limitations defense. It purported to derive this conclusion from this Court's initial majority opinion in *Fulton County Administrator*, now withdrawn, which holds that the running of a statute of limitations can be *tolled* only by those events explicitly listed in §95.051, Fla. Stat., and by no others.

Most respectfully, the trial court misunderstood and misapplied that opinion. In the instant case, the plaintiffs are not contending that the statute of limitations was *tolled* by the defendants' conduct and therefore had not run when suit was filed. They are contending instead that, although their suit was filed after the statute of limitations had run, the defendants are equitably estopped by their conduct to assert the bar of the expired statute to the plaintiffs' claims. The initial majority opinion in *Fulton County Administrator* addresses the defense which the plaintiffs are *not* asserting here. It does not address in any way the equitable doctrine upon which the plaintiffs *are* relying here. The two concepts are entirely different -- and we submit that the difference between a *tolling* defense and an equitable estoppel defense is thoroughly settled in the jurisprudence of this nation.

A cogent explanation of the distinction can be found in *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978), in which the court held that a statute of limitations which permitted no *tolling* could nevertheless be avoided by an equitable estoppel defense:

Though we might well agree with the district court that the unequivocal language of 15 U.S.C § 1711 presents an insurmountable barrier to the *tolling* of the three-year limitations period contained therein, we cannot agree that

the "In no event" terms in which the three-year limitations period is expressed forecloses possible application of the separate and distinct doctrine of equitable estoppel. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the language of the statute of limitations itself, and thus it is not surprising that several district courts have held that the three-year limitations period of 15 U.S.C. § 1711 is not subject to being tolled. [Citations omitted]. Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only 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. Its application is wholly independent of the limitations 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. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed.

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959), is instructive in this regard. In that case, the Supreme Court was confronted with a federal statute of limitations that was just as unequivocal as the one before us now. Yet, notwithstanding the fact that the Federal Employers' Liability Act provided that

"No action shall be maintained under this

chapter unless commenced within three years
from the day the cause of action accrued,"

the Court held that the doctrine of equitable estoppel applied in suits brought under the statute. In so holding, the court reasoned that the principle that no man may take advantage of his own wrongdoing was so deeply rooted in and integral to our jurisprudence that it should be implied in the interstices of every federal cause of action absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel. *Id.* at 232-34, 79 S. Ct. 760. The court found no such intent in even the unequivocal language of the statute, and in this respect *Glus* is controlling here.

There are a number of decisions from well-respected courts which explain the considerable difference between the two concepts in exactly the same way. *See, e. g., Cange v. Stotler & Co.*, 913 F.2d 1204, 1209 (7th Cir. 1990); *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 586 (7th Cir. 1987); *Cook v. Deltona Corp.*, 753 F.2d 1552, 1562-63 (11th Cir. 1985); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *Barton v. Peterson*, 733 F. Supp. 1482, 1490-91 (N.D. Ga. 1990).

In Florida, there are numerous decisions which hold that a defendant may be equitably estopped by its conduct to assert a statute of limitations defense. For our purposes here, we collect only those decisions rendered *after* the 1974 enactment of §95.051, which contains the limited *tolling* provisions addressed in the initial majority opinion in *Fulton County Administrator*. Because the two concepts are entirely different, not one of these decisions even refers to the statute. *See Barnett Bank of*

Palm Beach County v. Estate of Read, 493 So.2d 447, 449 (Fla. 1986) ("[A]s the facts of this case demonstrate, justice requires us to hold that §733.702 is a statute of limitations. Valid grounds, such as estoppel or fraud, may exist that would and should excuse untimely claims."); *Cape Cave Corp. v. Lowe*, 411 So.2d 887 (Fla. 2d DCA), *review denied*, 418 So.2d 1280 (Fla. 1982); *Baptist Hospital of Miami, Inc. v. Carter*, 658 So.2d 560 (Fla. 3d DCA 1995); *Jaszay v. H.B. Corp.*, 598 So.2d 112 (Fla. 4th DCA 1992); *Olenek v. Bennett*, 537 So.2d 160 (Fla. 5th DCA 1989); *Martin v. Monroe County*, 518 So.2d 934 (Fla. 3d DCA 1987), *review denied*, 528 So.2d 1182 (Fla. 1988); *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA), *cert. denied*, 378 So.2d 342 (Fla. 1979); *J.A. Cantor Associates, Inc. v. Brenner*, 363 So.2d 204 (Fla. 3d DCA 1978).

These decisions provide fairly compelling evidence, we believe, that the *tolling* statute addressed in the initial majority opinion in *Fulton County Administrator* has no relevance to the entirely different defense of equitable estoppel. Indeed, one of them plainly recognizes that the concept of *tolling* is both separate and distinct from the defense of equitable estoppel, and that an equitable estoppel defense can be maintained even when no tolling provision is available to defeat a statute of limitations defense. *See Baptist Hospital of Miami, Inc. v. Carter, supra* (holding that the two-year statute of limitations for the filing of a claim against an estate was not susceptible to a tolling defense, but that the defense of equitable estoppel could nevertheless be asserted to avoid the estate's statute of limitations defense). *See also Glantzis v. State Automobile Mutual Ins. Co.*, 573 So.2d 1049 (Fla. 4th DCA 1991) (concluding that the plaintiffs had two separate and distinct defenses to the

defendant's statute of limitations defense -- a tolling defense under §95.051, and a separate equitable estoppel defense).

Moreover, at least one district court of appeal has explicitly addressed the effect of §95.051 upon the continued viability of the defense of equitable estoppel in the context presented here, and has concluded that the two concepts are different and that the statute has no bearing on the defense:

While continuing negotiations regarding settlement do not "toll" the running of a statute of limitations, such negotiations, if infected with an element of deception, may create an estoppel. . . . This is true even subsequent to the 1975 [sic] enactment of subsection (2) of section 95.051, which states that "no disability or other reason shall toll the running of any statute of limitations except those specified in this section" *See Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337 (Fla. 3d DCA 1979). . . .

City of Brooksville v. Hernando County, 424 So.2d 846, 848 (Fla. 5th DCA 1982).

This decision has not been disapproved by this Court, and there is not a word in the initial majority opinion in *Fulton County Administrator* which even arguably suggests that it was wrongly decided.

The remaining decision which requires discussion is *Alachua County v. Cheshire*, 603 So.2d 1334, 1337 (Fla. 1st DCA 1992), which holds that a statute of limitations defense asserted by a governmental entity can be avoided by the defense of equitable estoppel:

The equitable estoppel doctrine has frequently been employed to bar inequitable reliance on a statute of limitations. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959). 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. *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). Like the application of equitable estoppel in federal courts, the application of equitable tolling has been applied in Florida when a plaintiff has been misled or lulled into inaction and has in some extraordinary way been prevented from asserting his rights. *Machules v. Department of Administration*, 523 So.2d 1132, 1134 (Fla. 1988).

In this case, officials of the federal government made repeated oral and written representations to Cheshire that he should file his claim with GSA, that the recipient of the property would pay the valid liens, and that his lien was "valid," according to the government fact sheet. Cheshire reasonably relied upon these representations. Clearly, the government's conduct induced Cheshire into forbearing suit within the applicable limitations period. *Bomba v. W.L. Belvidere*, 579 F.2d at 1070.

If this passage had not contained the phrase "equitable tolling," there could be no question that the decision fully supports the plaintiffs' position here. The plaintiffs' position is not undercut by the reference, however, because there is nothing in the passage which even arguably suggests that the defense of equitable tolling and the defense of equitable estoppel are the same defense. In fact, when the decisions cited in the passage are examined, it is perfectly clear that the district court did not mean to suggest any such thing. The case of *Bomba v. W.L. Belvidere, Inc.*, *supra*, is twice cited in the passage (and cited a third time in the decision). This is the case with which we began our discussion -- the one which carefully explains the difference

between tolling and estoppel, and which holds that the defense of equitable estoppel will lie even where the statute of limitations permits no tolling defenses. It is therefore impossible that the district court could have understood or meant to suggest that the two defenses were one and the same.

This conclusion is reinforced by the citation to *Machules v. Department of Administration*, 523 So.2d 1132 (Fla. 1988), in which this Court approved use of an equitable tolling defense in administrative proceedings. An examination of *Machules* will reveal that this Court, like the *Bomba* court, also distinguished between the defenses of equitable tolling and equitable estoppel, observing that the first focuses on the reasonableness of the claimant's conduct, and the latter focuses on the defendant's conduct. 523 So.2d at 1134.^{2/} Because every decision cited in the passage makes the distinction between the two defenses perfectly clear, it is, once again, simply

^{2/} See *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997):

In arguing that the doctrine of equitable tolling may not be invoked in this case because it has not engaged in any misconduct which led Hanna to defer filing suit in a timely fashion, AT&T appears to be confusing, as apparently do many litigants and courts, the doctrines of equitable tolling and equitable estoppel. Equitable estoppel does require an allegation of misconduct on the part of the party against whom it is made, but equitable tolling does not require any misconduct on the part of the defendant. . . .

For additional decisions explaining the difference between equitable tolling and equitable estoppel, see *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328-29 (8th Cir. 1995); *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990); *Smith v. City of Chicago Heights*, 951 F.2d 834, 838-42 (7th Cir. 1992).

impossible that the district court could have understood or meant to suggest that the two entirely different defenses were one and the same.

By its reference to the "equitable tolling" doctrine approved in *Machules*, all that the district court was saying in *Alachua County v. Chesire* was this: since the Supreme Court has approved use of the doctrine of equitable tolling against the government, we have no difficulty in approving use of the different defense of equitable estoppel against the government as well. The decision plainly does not equate the two distinct defenses in any way. And the decision therefore provides no support at all for any notion that the majority's strict reading of §95.051's *tolling* provisions in the now-withdrawn opinion in *Fulton County Administrator* abolishes the separate and distinct defense of equitable estoppel as well.

Most respectfully, the initial majority opinion in *Fulton County Administrator* addresses a defense upon which the plaintiffs are *not* relying here. It does not address in any way the distinctly different defense upon which the plaintiffs *are* relying here. Florida law plainly recognizes the defense of equitable estoppel, which prevents defendants from asserting that an untolled statute of limitations has run where their conduct has induced the plaintiffs to forbear from filing suit within the limitations period -- and the initial majority opinion in *Fulton County Administrator* does not even arguably suggest otherwise. We therefore respectfully submit that that now-withdrawn opinion has no bearing on the issue presently before the Court -- and that the defendants' initial concession that §95.051 has no relevance to the plaintiffs' defense (made in the trial court, and now repudiated here) was well advised.

b. The trial court ultimately concluded otherwise, of course, and it remains for us to address its reasoning (or more accurately perhaps, the defendants' reading of the initial majority opinion in *Fulton County Administrator*, since defendants' counsel drafted the order). According to the trial court, "there is no legally significant distinction between fraudulent concealment, which the Supreme Court rejected as a basis for avoiding the statute of limitations in Fulton County, and equitable estoppel, on which plaintiffs rely here." We disagree. Fraudulent concealment, unlike equitable estoppel, is a species of "delayed discovery" -- and "delayed discovery," when recognized as a ground for avoiding a statute of limitations defense, is treated in Florida as a ground for *tolling* the running of the statute of limitations. The Court will find a thorough and thoughtful explanation of this in Judge Van Nortwick's recent opinion in *Hearndon v. Graham*, 710 So.2d 87 (Fla. 1st DCA 1998).

The Court will also find an explanation of this in the initial majority opinion in *Fulton County Administrator* itself, in the majority's own analysis of the problem:

We begin our analysis by tracing the evolution of the fraudulent-concealment doctrine as announced by this Court and the legislature's statements on *tolling* provisions for the statute of limitations. The fraudulent-concealment doctrine was first recognized by this Court in *Proctor v. Schomberg*, 63 So.2d 68 (Fla. 1953). In *Proctor*, we found that a person who wrongfully conceals material facts and prevents the discovery of either the wrong or the fact that a cause of action has accrued against the person should not be able to take advantage of the person's wrong and assert the statute of limitations as a bar to the action. . . . Under this rule, the statute of limitations would begin to run from the date the action was discovered or from the date on which, through the exercise of ordinary diligence,

it might have been discovered. At the time of our decision in *Proctor*, the legislature had only expressly set forth limited circumstances which would *toll* the statute of limitations, and these circumstances did not address any *tolling* provisions or exclude the possibility of judicially recognized *tolling* provisions for fraudulent concealment. . . .

We continued to recognize the viability of this court-fashioned rule in *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976). In *Nardone*, a medical malpractice action, the defendants answered the complaint by asserting the affirmative defense that the four-year statute of limitations barred the bringing of a cause of action in 1971 for a wrong which occurred in 1965. . . . In answering these questions in *Nardone*, we reiterated the rule that defendant's successful fraudulent concealment of a cause of action which prevented the plaintiff from discovering the cause of action would *toll* the statute of limitations until the facts of such concealment could be discovered through reasonable diligence. . . . Similar to *Proctor*, our analysis of the statutes in *Nardone* was not affected by any legislative statement on the *tolling* of the statute of limitations for fraudulent concealment.

However, in 1974, the legislature enacted section 95.051, Florida Statutes . . . in which it enumerated several bases for *tolling* the statute of limitations, including defendant's use of a false name or concealment in Florida to avoid service of process Notably absent from this list was fraudulent concealment of the identity of the actual tortfeasor. While section 95.11(4)(b) provided a *tolling* provision for fraudulent concealment of the discovery of the plaintiff's injury in medical malpractice actions, there was no similar *tolling* provision for wrongful death causes of action. . . . Moreover, in section 95.051(2), the legislature stated, "No disability or other reason shall *toll* the running

of any statute of limitations except those specified in this section" This exclusivity provision is applicable to this action.

Thus, the issue presented by the certified question is the continued viability of our court-made *tolling* provision for fraudulent concealment in the face of section 95.051. . . .

. . . [W]e find the plain language of section 95.051 does not provide for the *tolling* of the statute of limitations in cases in which the tortfeasor fraudulently conceals his or her identity. . . .

Fulton County Administrator, supra, 22 Fla. L. Weekly at S579 (emphasis supplied).

Most respectfully, the majority plainly declined to recognize any *tolling* defense not recognized by §95.051; its opinion nowhere addressed the continued viability of the altogether different defense of equitable estoppel. And as we have already demonstrated, there most certainly is a thoroughly-settled, legally-significant distinction between a *tolling* defense and an equitable estoppel defense -- a point which ought to be repeated here for the emphasis it deserves:

. . . Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the language of the statute of limitations itself Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only 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. Its application is wholly independent of the limitations 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. . . .

Bomba v. W. L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978). In short, the trial court's conclusion that there is no legally significant distinction between the two defenses was plainly wrong.

The trial court also read Justice Anstead's dissenting opinion to state that fraudulent concealment creates an equitable estoppel defense; and with this reading of the opinion as a predicate, it reasoned that the majority's rejection of the dissent necessarily meant that there was no legally significant distinction between a tolling defense and an equitable estoppel defense. Most respectfully, Justice Anstead's dissenting opinion says no such thing, and it therefore deserves to be parsed briefly for what it does say. It begins by surveying prior Florida decisions holding that fraudulent concealment *tolls* the running of a statute of limitations, and it concludes that §95.051 should not be read to abolish that well-recognized *tolling* doctrine. It then turns to decisions from *other* jurisdictions which recognize fraudulent concealment as a defense to a statute of limitations, noting that some jurisdictions (like Texas) treat it as an equitable estoppel defense, and that the majority of jurisdictions treat it as a tolling defense. It then goes on to opine that, under whatever label the concept is given, it is a firm fixture in the jurisprudence of the nation, and that the inherent equitable powers of the Court were broad enough to recognize the concept as a

defense to a statute of limitations, §95.051 notwithstanding.

In short, there is nothing in Justice Anstead's dissent which even arguably suggests that Florida has ever treated fraudulent concealment as anything but a *tolling* defense, and the fact that *Texas* may treat it as an equitable estoppel defense does not change Florida's treatment of it as a *tolling* defense in any way. Nor is there anything in the dissent which even remotely suggests that there is no legally significant distinction between a tolling defense and an equitable estoppel defense. The majority opinion also nowhere addresses the doctrine of equitable estoppel. It concludes simply that, in Florida, fraudulent concealment is a *tolling* defense, and because it is not listed as a recognized tolling defense in §95.051, it is not available to postpone the running of a statute of limitations in Florida. We therefore respectfully submit that the initial majority opinion in *Fulton County Administrator* does not address the entirely different defense at issue in this case -- and that it provides no reason for this Court to hold, as the trial court did, that §95.051 abolished a defense which is “older than the country itself”; which arrived in Florida in 1829 with the state's statutory adoption of the English common law; and which has been rigorously and consistently applied ever since.

c. Most respectfully, the doctrine of equitable estoppel is a fixture of the common law, and its displacement by statute cannot be lightly inferred:

Statutes in derogation of the common law are to be construed strictly They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly

pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. . . .

Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977).
Accord Merrill Crossings Associates v. McDonald, 705 So.2d 560 (Fla. 1997);
Kitchen v. K-Mart Corp., 697 So.2d 1200 (Fla. 1997). A similar rule of construction exists, of course, where statutes of limitations are concerned: “. . . [W]e must also keep in mind the pertinent rules of construction applicable to statutes of limitations . . . Thus, ambiguity, if there is any, should be construed in favor of the plaintiffs.”
Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184, 1187 (Fla. 1992).

The title of §95.051, Fla. Stat., is "When limitations *tolled*" (emphasis supplied). The statute then lists several circumstances in which "the running of the time under any statute of limitations . . . is *tolled* . . ." (emphasis supplied). And the statute then provides that "[n]o disability or other reason shall *toll* the running of any statute of limitations except those specified in this section . . ." (emphasis supplied). The statute therefore plainly addresses only *tolling* defenses. The word "estoppel" is nowhere to be found in it. And once it is understood that an equitable estoppel defense and a tolling defense are two entirely different things, as they plainly are, then the settled rules of construction quoted above simply *require* a conclusion that the statute does not abolish the common law defense of equitable estoppel in the context presented here. The same rule of construction should also inform this Court's reading of the initial majority opinion in *Fulton County Administrator*; if the opinion did not

clearly and unequivocally abolish the defense of equitable estoppel -- and it plainly did not -- then it should not be read as abolishing the long-recognized 150-year old defense.

It is also worth noting that, in its initial opinion in *Fulton County Administrator*, the majority explicitly acknowledged that its reading of §95.051 led to an obviously "unjust result" in need of an immediate fix by the legislature. 22 Fla. L. Weekly at S579. That "unjust result" may (or may not) have been required by the plain language of the statute where *tolling* defenses are concerned, but surely that injustice should not be compounded in the instant case by reading the statute to abolish an entirely different defense which has been in existence for more than 150 years, and which is not even mentioned in the statute.

The point can be made another way. There is another 150-year old common law defense to all manner of claims and defenses, including statutes of limitations defenses -- the defense of waiver. The defense of waiver is a fraternal twin of the defense of estoppel, and like the defense of estoppel, its availability as a defense to a statute of limitations defense has long been recognized in Florida.^{3/} See, e. g., *Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So.2d 46 (Fla. 1988); *Aboandandolo v. Vonella*, 88 So.2d 282 (Fla. 1956); *Akin v. City of Miami*, 65

^{3/} That the two defenses are fraternal twins is amply illustrated by the fact that both of them are combined into a single article in *Florida Jurisprudence*. See 22 Fla. Jur.2d, *Estoppel & Waiver*. Similarly, in 35 Fla. Jur.2d, *Limitations and Laches*, tolling defenses are treated in §§89-100, and the separate and distinct defenses of estoppel and waiver are treated separately (under the general heading "Estoppel and Waiver") in §§114-15.

So.2d 54 (Fla. 1953); *Hood v. Hood*, 392 So.2d 924 (Fla. 2d DCA 1980); *Pritchett v. Kerr*, 354 So.2d 972 (Fla. 1st DCA 1978). Indeed, this Court has recently held that, in order to obtain a dismissal for *forum non conveniens*, a defendant must agree to waive any statute of limitations which may have expired on the plaintiff's claim, so the continued viability of the defense of waiver in the context presented here is not open to debate. See *Kinney System, Inc. v. Continental Insurance Co.*, 674 So.2d 86 (Fla. 1996).

Waiver, like estoppel, does not *toll* the statute of limitations; it is assertable as a defense, like the defense of estoppel, only after a statute of limitations has expired, and for reasons relating to conduct by the defendant which is inconsistent with reliance upon a statute of limitations defense. For the defendants to contend that §95.051 abolishes all "exceptions" to the statute of limitations not specified therein, including the defense of equitable estoppel, they must logically insist that §95.051 abolishes the long-settled defense of waiver as well -- and the slippery slope and dangerous slide that faces acceptance of such an argument should be enough to convince any court to avoid the precipitous first step suggested by the contention.^{4/}

^{4/} In a lengthy footnote, the defendants dismiss this argument with a wave of the hand. They argue that waiver and estoppel are not fraternal twins -- that, unlike estoppel, waiver is merely a "procedural doctrine" which arises only under Rule 1.140(h), Fla. R. Civ. P., when a defendant fails to plead the statute of limitations as an affirmative defense. Most respectfully, the defendants are plainly extemporizing here, and their argument is simply wrong. Waiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right; litigants can waive various claims and defenses, including limitations defenses, in *numerous* ways; and the failure to *plead* a claim or defense is simply *one* of those ways. See *Fletcher v. Dozier*, 314 So.2d 241 (Fla.

Most respectfully, §95.051 plainly and unambiguously abolishes only *tolling* defenses, and it does not abolish the separate and distinct, and altogether different, defenses of waiver and estoppel. Neither §95.051 nor the initial majority opinion in *Fulton County Administrator* required the “unjust result” reached by the trial court below, and we respectfully submit that the district court correctly concluded that the

1st DCA 1975); 22 Fla. Jur.2d, *Estoppel & Waiver*, §§111-121 (and numerous decisions collected therein); 54 C.J.S., *Limitations of Actions*, §§22-23 (and numerous decisions collected therein). And after this Court’s decision in *Kinney System, Inc. v. Continental Insurance Co.*, *supra*, that point ought to be beyond debate.

Agreements to waive a statute of limitations have also become essential under today’s comparative negligence regime, as interpreted by this Court in *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993). Plaintiffs will frequently choose for good reasons not to sue persons and entities only tangentially related to a claim in suit, yet they face the prospect that the named defendants will name the non-parties as tortfeasors in an “apportionment defense” after the statute of limitations has run, when they can no longer be joined as defendants in the suit. Because the possibility exists that such a non-party will ultimately be named and found liable in part for the plaintiff’s damages at the insistence of the defendants, plaintiffs’ attorneys have little choice but to sue everyone that the named defendants might later name as “non-party defendants,” whether they believe they have a legitimate claim against them or not -- at the risk of suffering an adverse award of attorney’s fees for filing a frivolous lawsuit, and at great cost to those defendants.

This is one of the more nonsensical results of the legislature’s ill-conceived enactment of §768.81, Fla. Stat. (as interpreted by this Court in *Fabre*), and it has become both customary and prudent to finesse the problem by agreeing with the potential “non-party defendants” not to sue them unless the defendants name them in their “apportionment defense,” in exchange for a waiver of the “non-party defendants” statutes of limitations defenses in the event they ultimately have to be joined as parties to the suit. For obvious reasons, these types of agreements clearly deserve the protection of this Court, and the defendants’ suggestion that a statute of limitations cannot be waived except by failure to plead it should be given the short shrift that it plainly deserves.

trial court misunderstood and misapplied both the statute and the opinion, and thereby erred in entering summary judgment in the defendants' favor on Count I of the plaintiffs' Third Amended Complaint. And that was the sum and substance of the argument that we presented to the district court -- and that is our position here.

2. The defendants' position.

The defendants' response to our position is constructed upon three persistent themes. First, they argue that statutes of limitations serve important purposes and should therefore be rigorously enforced. To this we reply simply that the doctrine of equitable estoppel serves important purposes as well, which is why it has been recognized in the law of Florida for over 150 years. The two concepts have co-existed peaceably throughout that lengthy period of time, and no good reason suggests itself why they cannot continue to do so for time immemorial. Most respectfully, this aspect of the defendants' response is really no argument at all.

Second, the defendants argue that the distinction we have drawn between tolling defenses and the defenses of estoppel and waiver is (in their various characterizations of it) "artificial," "dubious," "illusory," "irrational," and a "semantic distinction without a difference." Of course, the defendants did not think so when they initially conceded the existence of the settled distinction in the trial court: "... defendants acknowledge that estoppel may apply notwithstanding the (otherwise) exclusive list of tolling circumstances set forth in §95.051 of the Florida Statutes; ..." (R. 1212, n. 7). But then, as the facts alleged in the plaintiffs' Third Amended Complaint demonstrate in spades, consistency is not the defendants' strong suit.

The argument also impugns the intelligence and integrity of numerous courts that have recognized that the two types of defenses are separate and distinct, dependent upon different types of facts, and serving altogether different purposes -- like the Florida appellate courts (including this Court) referenced at pages 14-17, *supra*; like the federal appellate courts referenced at pages 12-13, 17, *supra*; and, indeed, the highest Court in the nation: “We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. . . .” *Zipes v. Trans World Airways, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed.2d 234, 243 (1982). *See also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959). Most respectfully, unless all of these courts are simply stupid, this aspect of the defendants’ response is also no response at all.

Third, the defendants engage in an elaborate game of semantics with the Court. They insist that §95.051 abolishes not only “tolling” defenses but all “exceptions” for avoiding the statute of limitations (except those “exceptions” explicitly recognized therein). There are at least two things substantially wrong with this argument. First, the defendants’ expansive reading of §95.051 is insupportable. The word “exception” does not appear in the statute. In effect, the defendants have rewritten the statute, substituting the broader word “exception” wherever the narrower word “toll” (or one of its variants) appears. As noted previously, the title of §95.051 is “When limitations *tolled*” (emphasis supplied). The statute then lists several circumstances in which “the running of the time under any statute of limitations . . . is *tolled*” (emphasis

supplied). And the statute then provides that “[n]o disability or other reason shall *toll* the running of any statute of limitations except those specified in this section” (emphasis supplied). We repeat, the word “exception” appears nowhere in the statute.

The statute therefore addresses only *tolling* defenses -- those which “toll the running of any statute of limitations.” And given the settled rule of construction that statutes in derogation of the common law must be narrowly read and strictly construed, and will not be interpreted to displace the common law any further than its explicit terms require, there is no way in which §95.051 can legitimately be read to abolish all “exceptions” for avoiding the statute of limitations, including those which do *not* “toll the running of any statute of limitations,” as the defendants claim. The statute plainly addresses only *tolling* defenses -- and once it is understood that an equitable estoppel defense and a tolling defense are two entirely different things, as they plainly are, then this settled rule of construction simply *requires* a conclusion that the statute does not abolish the 150-year old common law defense of equitable estoppel in the context presented here.

Moreover, even if the defendants’ expansive reading of §95.051 were supportable, the fact remains that the defense of equitable estoppel is not an “exception” to the statute of limitations. As we have taken some pains to make clear, the doctrine of equitable estoppel can be asserted as a defense to all manner of claims and defenses. In addition, only *tolling* defenses serve to delay or suspend the running of a statute of limitations. In contrast, the defense of equitable estoppel comes into play only after the limitations period has run, and it addresses itself to the circum-

stances in which a party will be estopped from asserting an expired statute of limitations as a defense because his conduct has induced another into forbearing suit within the limitations period. The defense has nothing to do with discouraging claimants from filing stale claims; its purpose is to prevent defendants from profiting from their own misconduct -- and it is therefore not an “exception” to the statute of limitations at all. The defendants’ expansive reading of §95.051, even if correct, therefore fails altogether to finesse the defense of equitable estoppel.

Neither do any of the several decisions upon which the defendants rely support their third argument. To be sure, some of them contain the word “exceptions.” As always, however, context is important. In each case, the word appears in the context of the court’s discussion of a *tolling* exception. In *Federal Insurance Co. v. Southwest Florida Retirement Center, Inc.*, 707 So.2d 1119 (Fla. 1998), for example, this Court addressed the propriety of reading a “discovery rule” into a statute of limitations which did not contain one. Because a “discovery rule” prevents a statute of limitations from beginning to run until the cause of action is discovered, it is plainly a *tolling* defense, as Judge Blue rather explicitly stated in the dissenting opinion with which this Court explicitly agreed in *Federal Insurance*:

Judge Blue wrote in his dissent:

The majority opinion makes the claim against the bonding company actionable more than ten years after completion of the bonded construction. It does this by explaining that the cause of action does not accrue until the latent defect is discovered and only then does the five-year statute of limitations begin to

run. This analysis purely and simply attaches a *tolling* period to the statute of limitations applicable to the bond. It is the *tolling* provision in section 95.11(3)(c) which permits a cause of action beyond the four-year limitations period in this section. To make the latent defects actionable against the bonding company requires imposing a *tolling* period within section 95.11(2)(b), which *School Board of Volusia County* and this court have held is a legislative determination

. . . .

. . . On this issue we agree with Judge Blue’s dissent and quash the majority’s decision

Federal Insurance Co., supra, 707 So.2d at 1120-21 (emphasis supplied).

Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer v. Flanagan, 629 So.2d 113 (Fla. 1993), also addresses the propriety of reading a “discovery rule” into a statute of limitations which does not contain one. *Hearndon v. Graham*, 710 So.2d 87 (Fla. 1st DCA 1998), also addresses the propriety of reading a “discovery rule” into a statute of limitations which does not contain one. *Putnam Berkley Group, Inc. v. Dinin*, 734 So.2d 532 (Fla. 4th DCA 1999), also addresses the propriety of reading a “discovery rule” into a statute of limitations which does not contain one. And *Dobbs v. Sea Isle Hotel*, 56 So.2d 341 (Fla. 1952), simply declines to read a particular “tolling” defense into a statute of limitations which does not contain one. In short, because the defense of equitable estoppel is *not* a “tolling” defense, these decisions add nothing to the debate here.

Our position here is simple and straight forward, and can be condensed into a simple, perfectly logical syllogism: §95.051, Fla. Stat., arguably abolishes *tolling* defenses, except those explicitly recognized therein; the defense of equitable estoppel is *not* a tolling defense; and §95.051 therefore does not abolish the defense of equitable estoppel. Most respectfully, §95.051 abolishes only *tolling* defenses, not “exceptions” to the statute of limitations, and it does not abolish the separate and distinct, and altogether different, defenses of estoppel and waiver (which are not “exceptions” to statutes of limitations in any event). The major and minor premises of our syllogism, we respectfully submit, are plainly correct; and the validity of its conclusion -- that §95.051 does not abolish the 150-year old defense of equitable estoppel -- ought to be beyond debate. The certified question should be answered in the negative, and the district court’s decision should be approved.

B. THE LOWER COURTS DID NOT ERR IN CONCLUDING THAT MATERIAL ISSUES OF FACT EXISTED ON THE PLAINTIFFS' EQUITABLE ESTOPPEL DEFENSE.

Apparently uncomfortable with their position on the one ground which they succeeded in selling the trial court, the defendants advance a "right for the wrong reason" argument in an effort to salvage their summary judgment here. They argue that even if the trial court erred in concluding that the plaintiffs' equitable estoppel defense was barred as a matter of law, it also erred in concluding that a material issue of fact existed on the defense -- and they ask the Court to declare the trial court twice in error, and uphold their summary judgment in the end.

The Court may wish to limit its consideration of the case to the legal question certified to it for resolution. In its discretion, however, it has the power to examine the entire record and pass upon the sufficiency of the evidence to support the denial of the defendants' motion for summary judgment on this ground. Since four judges have already examined the record in depth and have concluded that a material issue of fact exists on the plaintiffs' equitable estoppel defense, we doubt that the Court will see any need to reach the issue. But because the possibility exists that it might, we will respond to the defendants' argument, albeit briefly.

The defendants recognize what they must -- that in order to prevail on this alternative position, they must convince this Court that the record construed in every light most favorable to the plaintiffs *conclusively* disproves any factual basis for the defense, and that they cannot prevail if the "slightest doubt" remains in that regard. *See, e. g., Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977); *Dettloff v. Abraham Chevrolet, Inc.*, 534 So.2d 745 (Fla. 2d DCA 1988), *review denied*, 542 So.2d 1332 (Fla. 1989); *Knight v. Roberts RV Resort*, 671 So.2d 298 (Fla. 2d DCA 1996). Of course, the constitutional right to a jury trial of the facts demands no less.

The defendants' argument is constructed upon a single theme -- that there is documentary evidence in the record proving that the plaintiffs had not been formally promised a future franchise and had no formal commitment for one. The documentary evidence supporting the argument exists, but the argument itself is a straw man -- a point which ought to be evident from the face of the plaintiffs' Third Amended Complaint alone. Surely, if the plaintiffs had been formally promised a future

franchise and had a formal commitment for one, they would have sued the defendants for breach of contract. They did not. They sued the defendants for three separate instances of tortious interference with contracts and advantageous business relationships they had developed to further their prospects for landing a franchise -- claims which the district court declared actionable when it reversed the dismissal of the plaintiffs' initial complaint in the first appeal. The lack of formal promises and commitments is therefore of no import. The plaintiffs' defense of equitable estoppel is bottomed upon entirely different facts.

As the number of defendants named in the Third Amended Complaint makes clear, Major League Baseball is an enormous enterprise with numerous players; and as the Constitutions of the American League and the National League make clear, obtaining a franchise in either league is an enormously complicated task requiring the final assent of numerous organizations. The end point of the process, obtaining a formal commitment to a future franchise, is therefore simply that -- an end point, and an extremely difficult end point, requiring a great deal of preliminary groundwork and maneuvering, to reach. In addition, like any enterprise of comparable size, Major League Baseball has major players and minor players, and it has a public face and a private face -- and a considerable amount of the process goes on behind the scenes, and has no formal face at all. It is in this complex practical context that the plaintiffs' equitable estoppel defense arises and must be judged -- and the viability of the defense simply does not turn on the fact that, because of the defendants' tortious interference with their business relationships, the plaintiffs never reached the formal end point of their pursuit.

The evidence supporting the plaintiffs' equitable estoppel defense is collected and discussed in some detail in the "Plaintiffs' Supplemental Memorandum in Response to Defendants' Motion for Summary Judgment," and supported by the lengthy evidentiary appendix attached thereto (R. 1161 *et seq.*). For the convenience of the Court, we have excerpted the relevant pages of the memorandum (which contain appropriate references to the supporting appendix) and included them in an appendix to this brief, together with two affidavits which were supplied with the memorandum. We refer the Court to the brief's appendix for the details. For our purposes here, we will simply paraphrase and summarize what the evidence reflects.

The evidence reflects, as the Third Amended Complaint alleges, that the plaintiffs spent nearly \$3,000,000.00 in their efforts to obtain the Minnesota Twins franchise for the Tampa Bay area, and that they entered into a written contract with H. Gabriel Murphy for the purchase of his 42.14% minority interest in the Twins. The purchase price of this minority interest was \$11,500,000.00. These undertakings were based on the representations of Baseball's major players that the plaintiffs' purchase of the Twins, and their relocation to the Tampa Bay area, would be approved. Unfortunately, a local investor, Karl Pohlada, intervened in an effort to keep the Twins in Minnesota, and Baseball changed its mind. Commissioner Kuhn forbid the plaintiffs from pursuing further negotiations for the purchase of the rest of the Twins' stock, and demanded that the plaintiffs assign their contract with Murphy to Pohlada. At the time the assignment was demanded, the value of the minority interest purchased by the plaintiffs had increased from \$11,500,000.00 to \$25,000,000.00.

The plaintiffs balked at the demand and sought payment for the \$13,500,000.00

increase in the value of the contract, as well as reimbursement of the nearly \$3,000,000.00 previously expended, as a condition to assigning the contract. Baseball responded with promises, assurances, and threats. The plaintiffs were told, "Do you want baseball for Tampa, or do you want to make money?" In other words, if you cooperate, you will get baseball for Tampa; if you do not cooperate, you won't. The plaintiffs were also told that, if they cooperated with Baseball and assigned the contract to Pohlad for their "transactional expenses" of \$225,000.00, they would become an "absolute front runner," "the top of the list," for the next available franchise. They were also told that they could accede to Baseball's demands and "down the road you'll get a franchise, or you could make a profit on the transaction and give up forever any chance of ever having a franchise."

In addition, one of the plaintiffs' officers advised one of Baseball's major players, Jerry Reinsdorf, that "you guys have an awful lot of legal liability to us for tortious interference," and Mr. Reinsdorf responded, "Yeah, I agree with you . . . But it doesn't matter because you guys are going to get an expansion team in a year or two and everybody is going to be happy, so it is irrelevant." One of the plaintiffs' principals was also told by the President of the American League, "You're doing the right thing, your market's great, you all are great and I'm confident you are going to be rewarded with a baseball team." Baseball also demanded that the plaintiffs not bring suit over the aborted Twins transaction -- that, "if we wanted a baseball team, we couldn't take legal action," that "the only way we could have a baseball team was if we played ball with them."

Because of these promises and threats, the plaintiffs forbore bringing their

lawsuit -- something they would not have done if they had not been assured that there was a baseball franchise in their future. The plaintiffs delayed their suit further when it appeared that Baseball would make good on its promises in 1988. When the plaintiffs were pursuing purchase of the Texas Rangers, the new Baseball Commissioner, Peter Ueberroth, told them to "go ahead, complete the acquisition with Mr. Chiles. You will receive the ownership. You should go ahead and apply for relocation at the same time, and it was very probable that you would be approved for relocation." Of course, filing suit over the Minnesota Twins transaction would have destroyed any chance the plaintiffs had of purchasing and relocating the Texas Rangers, so suit was withheld. Unfortunately, the Texas Rangers transaction was then derailed by baseball as well. (This aspect of the controversy is the subject of Count II of the plaintiffs' Third Amended Complaint, which remains pending below). The plaintiffs were told once again, "Do not sue or you will never get major league baseball."

Still believing that they were "on the top of the list" and that Baseball would make good on its repeated informal promises and commitments, the plaintiffs applied for an expansion team, which was scheduled to begin play in 1993. In 1990, baseball announced its "short list" of prospective expansion-team owners. Because the defendants had also interfered with the plaintiffs' ability to obtain an expansion team, the plaintiffs were not on the list. (This aspect of the controversy is the subject of Count III of the plaintiffs' Third Amended Complaint, which also remains pending below.) At this point, it became obvious to the plaintiffs that the informal assurances which Baseball had given them in order to forestall their lawsuit were never going to

be honored, and the plaintiffs therefore filed suit shortly thereafter.

Most respectfully, it is a perfectly fair inference from these facts that the plaintiffs were induced to forbear bringing suit for the substantial damages they suffered in the Minnesota Twins transaction by numerous informal assurances from Baseball's major players that they were a front runner for a future franchise, and that their cooperation in withholding suit would ultimately bear that fruit. To be sure, they had no formal promise or formal commitment to a future franchise -- but they are not required to prove such a thing to support their defense of equitable estoppel; all that they need to show is inequitable conduct by the defendants:

The equitable estoppel doctrine has frequently been employed to bar inequitable reliance on a statute of limitations. [Citation omitted]. 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. . . .

Alachua County v. Cheshire, 603 So.2d 1334, 1337 (Fla. 1st DCA 1992). *See also Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 79 S. Ct. 760, 3 L. Ed.2d 770 (1959); *Tillman v. City of Pompano Beach*, 100 So.2d 53, 65 A.L.R.2d 1273 (Fla. 1958); *Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9 (Fla. 1965).

Surely the behind-the-scenes, informal conduct of Baseball's major players meets that test -- and the fact that the plaintiffs never obtained a *formal* commitment for a franchise, despite the numerous informal assurances that a franchise would be forthcoming in exchange for their cooperation in withholding suit, is simply not enough to take that question away from a jury as a matter of law. The constitutional right to

a jury trial of the facts demands no less. We therefore respectfully submit that the defendants' "right for the wrong reason" argument is without merit -- and that the lower courts did not err in concluding that material issues of fact exist on the plaintiffs' equitable estoppel defense.

V. CONCLUSION

It is respectfully submitted that the certified question should be answered in the negative, and that the district court's decision should be approved.

Respectfully submitted,

CUNNINGHAM CLARK & GREIWE,
P.A.

100 Ashley Drive South

Suite 100

Tampa, Fla. 33602

-and-

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.

25 West Flagler Street, Suite 800

Miami, Florida 33130

(305) 358-2800

By: _____

JOEL D. EATON

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of March, 2000, to: John W. Foster, Sr., Esq., Baker & Hostetler LLP, Post Office Box 112, Orlando, Fla. 32802; and Robert E. Banker, Esq., Fowler White Gillen, et al., Post Office Box 1438, Tampa, Fla. 33601.

By: _____
JOEL D. EATON