IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

KINGS RIDGE COMMUNITY ASSOCIATION, INC., SEYMOUR HOLZMAN, MAYNARD L. TIRRELL, ROY B. GORDON, WILLIAM CAMPBELL, ROBERT A. FOWLER, DONALD L. POLK, HOWARD W. RANDALL, DONALD W. SANTEE and MARQUETTE L. FLOYD,

CASE NO. 05-CA-2718

Plaintiffs,

vs.

CLASS REPRESENTATION

LENNAR LAND PARTNERS, LENNAR HOMES, INC., LENNAR LAND PARTNERS SUB, INC., LNR LAND PARTNERS SUB INC., KINGS RIDGE L.L.C., E. BING HACKER, MORTGAGE ADVISORS, INC., J. FRANK SURFACE, JR., JOHN DOE DEFENDANTS and UNKNOWN CO-CONSPIRATORS,

Defendants.
_____/

LENNAR AND KINGS RIDGE DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AS TO STATUTE OF LIMITATIONS[1]

The Defendants, LENNAR HOMES, INC. ("Lennar Homes"), and E. BING HACKER ("Mr. Hacker") (collectively, the "Lennar Defendants"), KINGS RIDGE L.L.C., MORTGAGE ADVISORS, INC., and J. FRANK SURFACE, JR., (collectively, the "Kings Ridge Defendants"), by and through their undersigned counsel, and pursuant to Florida Rule of Civil

[1] The majority of documents, transcripts and/or excerpts cited in this memorandum of law were previously submitted to this Court as Appendix Exhibits ("Appx. Ex.") accompanying Lennar and Kings Ridge Defendants' Motion for Partial Summary Judgment as to Statute of Limitations filed on August 2, 2007. In the interest of conserving resources, the Lennar and Kings Ridge Defendants will not resubmit those exhibits. Two additional exhibits are filed simultaneously with this motion as "Exhibit A" and "Exhibit B."

Procedure 1.510 move for partial summary judgment as to all counts because they are barred by the applicable statutes of limitations.

On August 2, 2007, the Lennar and Kings Ridge Defendants filed a Motion for Partial Summary Judgment as to Statute of Limitations. On December 7, 2007, the Court entered an Order denying that motion. In so doing, the Court wrote: "there is a question of whether or not the issues raised by Defendants are ripe for summary judgment because certain discovery matters are still pending and therefore facts are still being developed." Furthermore, the Court wrote: "many factual and legal issues exist and therefore summary judgment is not appropriate." By example, "significant issues regarding [the] chain of title to the subject property were raised and therefore the Court is uncertain at this point who has legal title to the property in question."

Discovery is now complete. What is more, the issues relating to the chain of title have been presented to the Court and await judicial determination pursuant to Defendants' Motion for Summary Judgment as to Title of the Club Facilities. Accordingly, Defendants submit this Renewed Motion for Partial Summary Judgment as to Statute of Limitations.

In the case at bar, the Plaintiffs' claims accrued no later than when an offer was either presented by LLP to Kings Ridge L.L.C. or when Kings Ridge L.L.C. presented an offer to purchase the Kings Ridge clubhouse facilities ("Clubhouse"), which occurred pursuant to all record evidence in this case, no later than July, 2000. However, in no event did Plaintiffs' claims occur later than when LLP conveyed the Clubhouse to King's Ridge, LLC, on August 31, 2000. Plaintiffs filed their initial Complaint on August 30, 2005. Accordingly, Plaintiffs' causes of action for breach of contract ("Five-Year Claims") were conclusively time barred after at the latest, July 2000. Plaintiffs' rescission, breach of fiduciary duty, tortious interference, and civil

conspiracy (collectively, "Four-Year Claims") were conclusively time-barred after July 2000 but no later than August 30, 2004, pursuant to section 95.11(3), Florida Statutes, a four-year statute of limitation. Plaintiffs' specific performance causes of action were conclusively time-barred on July 2000 but no later than August 30, 2001, pursuant to section 95.11(5)(a), Florida Statutes, a one-year statute of limitation.

WHEREFORE, the Lennar and Kings Ridge Defendants respectfully request that this Court enter summary judgment in their favor on these claims.

MEMORANDUM OF LAW

I. STATEMENT OF UNDISPUTED FACTS

A. Introduction

This action was filed by nine named representatives on behalf of a certified class of Kings Ridge Community homeowners ("Class Members") and by the Kings Ridge Community Association, Inc. (the "Association") (collectively, "Plaintiffs"). Plaintiffs' Complaint[2] alleges LLP wrongfully conveyed the Kings Ridge Clubhouse in violation of a "right to acquire" provision contained in the development's declaration of restrictive covenants and that the other Defendants participated in and/or facilitated the wrongful conveyance. Because of the alleged wrongful conveyance, Plaintiffs allege claims for rescission, breach of fiduciary duty, tortious interference, civil conspiracy, and specific performance.

[2]The Plaintiffs served a Motion for Leave to Amend attaching a Second Amended Complaint on May 23, 2008. The Court has yet to rule on that motion.

B. The Kings Ridge Community

In the mid 1990's, Lennar Homes began developing Kings Ridge, a retirement community located in Clermont, Florida. (Am. Compl ¶16[3]) In connection with the development, Lennar Homes, King Ridge Recreation Corporation, Kings Ridge Golf Corporation, and the Association entered into a Community Declaration of Restrictive Covenants ("Declaration")[4]. (Id. at ¶ 18) The Declaration was duly recorded in the Lake County public records on February 16, 1996 at OR Book 1417, Page 225 et seq. (Id. ¶ 17)

C. Relevant Provisions of the Declaration

Related to the right to acquire provision at issue in this case, the original Declaration provided as follows:

> Section 24. Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner[5] grants to the Club Members[6] the rights to acquire the Club Facilities pursuant to the provisions of F.S. 617.31 as it exists as of the date hereof.

(Decl. Art. VI. § 24)

> Section 617.31, Florida Statutes (1997)[7] states in relevant part:
>
> 617.31 Recreational leaseholds; right to acquire; escalation clauses.--
>
> (1) Any lease of recreational or other commonly used facilities serving a community, which lease is entered into by the association or its members before control of the homeowners' association is turned over to the members other than the developer, must provide as follows:
>
> (a) That the facilities may not be offered for sale unless the homeowners' association has the option to purchase the facilities, provided the homeowners'

[3] Appx. Ex. A
[4] Appx. Ex. B.
[5] The Declaration defines Club Owner as: "Kings Ridge Recreation Corporation, its successors and assigns. The Club Owner is an affiliate of Declarant." (Decl. Art. I. § 14)
[6] The Declaration defines Club Member as: "Each Owner who elects, in its contract to purchase a Homesite, to be a member of The Club and bound by the provisions hereof relating thereto." (Decl. Art. I. § 11)
[7] Section 617.31, Florida Statutes was subsequently renumbered to section 720.31, Florida Statutes

association meets the price and terms and conditions of the facility owner by executing a contract with the facility owner within 90 days, unless agreed to otherwise, from the date of mailing of the notice by the facility owner to the homeowners' association. If the facility owner offers the facilities for sale, he or she shall notify the homeowners' association in writing stating the price and the terms and conditions of sale.

(2) If a facility owner receives a bona fide offer to purchase the facilities that he or she intends to consider or make a counteroffer to, his or her only obligations shall be to notify the homeowners' association that he or she has received an offer, to disclose the price and material terms and conditions upon which he or she would consider selling the facilities, and to consider any offer made by the homeowners' association. The facility owner shall be under no obligation to sell to the homeowners' association or to interrupt or delay other negotiations, and he or she shall be free at any time to execute a contract for the sale of the facilities to a party or parties other than the homeowners' association.

(3) (b) As used in subsection (1), the term "offer" means any solicitation by the facility owner directed to the general public.

(Florida Statutes, § 617.31 (1997)) (emphasis added)

Additionally, the Declaration provided that the Declarant possessed a unilateral right to amend the Declaration *at any time* prior to the completion of the community [8] Article II, Section 2 provides in relevant part:

Section 2. Amendment. The Declarant shall have the right, at any time until the Community Completion Date, to amend this Community Declaration as it in its sole discretion, deems appropriate.

(Decl. Art. II § 2)

[8] By virtue of an assignment dated October 31, 1997, Lennar Homes, Inc. assigned all of its rights as Declarant under the Declaration to Lennar Land Partners The assignment is recorded at Official Records Book 1593, Page 242, Public Records, Lake County, Florida. Appx Ex. G

D. The Conveyance of the Clubhouse

On August 31, 2000, LLP conveyed the Clubhouse to Kings Ridge L.L.C. (Am. Compl. ¶ 28) The Sixth Amendment and the Warranty Deed were recorded on October 9, 2000. (Id. ¶ 28, 30)

E. Disclosure of the Conveyance

1. Meeting with Sentry Management

In July or August of 2000, Lennar hosted a meeting attended by, *inter alia*, Sentry Management, Inc.'s ("Sentry") president, James Hart ("Mr. Hart"). (Hart Dep. I at pp. 8-11, 20) From the inception of the Association through the relevant time period, the Association employed Sentry to manage the Association and many of the neighborhood associations. (Hart Dep. I at pp. 4-5[9]; Hacker Dep. pp. 48-49) At the 2000 meeting, Lennar announced, "the Surface group was in the process of purchasing the Kings Ridge clubhouse." (Hart Dep. I at p. 11) Mr. Hart knew that the conveyance would be occurring on or about August 31, 2000 because Sentry would thereafter be collecting fees for Kings Ridge L.L.C. (Hart Dep. II at pp. 22-23)[10] Mr. Hart testified that the conveyance was not a secret; that no one told him to keep it a secret; and that if any resident had approached him with questions about the conveyance, he would have been "open and honest" and shown the relevant documents to the resident. (Hart Dep. I at pp. 33-35)

[9] Appx. Ex. I. James Hart was deposed twice in this case. The designation, "Hart Dep. I," refers to the November 14, 2006 deposition, and "Hart Dep. II" refers to the January 31, 2007 deposition.
[10] Appx. Ex. J.

2. Recordation in the Public Records of Documents related to the Conveyance and Identifying Kings Ridge L.L.C. as the Owner of the Clubhouse

Next, on September 5, 2000, five days after the execution of the conveyance, three documents relating to the conveyance were recorded in the Office of the Clerk of the Lake County Circuit Court. Each document plainly provided that Kings Ridge L.L.C. was the owner of the Clubhouse: (1) Agreement Not to Encumber[11] (providing that Kings Ridge L.L.C. is the owner of real property described as "Clubhouse Site" and that such property is free and clear of all liens and encumbrances); (2) Assignment and Pledge of Lien Rights[12] (providing that Kings Ridge L.L.C. possesses rights as the Club Owner); and (3) Financing Statement[13] (related to Kings Ridge L.L.C.'s right as owner of real property described as "Clubhouse Site").

3. The September 14, 2000 Announcement at the Town Hall Meeting

Thereafter, on September 14, 2000, Mr. Bing Hacker, president of the Clermont Division of Lennar Homes and president of the Association from its date of incorporation until the 2005 community completion date, hosted a Kings Ridge Community Association town hall meeting wherein he publicly announced the sale of the Clubhouse ("Town Meeting"). (Town Meeting Transcript[14]; Hacker Aff. ¶ 3[15]; Hacker Memo attached as Exhibit 12 to Plaintiffs Motion for Class Certification[16]; Hacker Dep. pp. 7-8) Mr. Hacker regularly conducted these monthly town

[11] Appx. Ex. K
[12] Appx. Ex. L
[13] Appx. Ex. M.
[14] Appx. Ex. N
[15] Appx. Ex. O
[16] Appx. Ex. P. In a memo to the Clermont Division Associates, dated September 6, 2000, Mr. Hacker states that the Royal Club was sold to an investor, Community Resource Systems, Inc., and that he would be making an announcement of the sale to the residents at the next scheduled town meeting on Thursday, September 14, 2000. A common name for the Clubhouse is the "Royal Club" (Am. Compl. ¶8; Ash Dep. p. 17), and Mr. Surface is the director and chairman of "Community Resource Systems, Inc.," a corporation that manages recreational facilities and other entities. (Surface Dep. pp. 29-31) (Appx. Ex. Q) A subsidiary of Community Resource Systems, Inc.

hall meetings on the second Thursday of every month and named plaintiff Seymour Holzman attended several of them over the years. (Holzman Dep. pp. 64-65[17]; Hacker Dep. pp. 39, 179-180;)

The Town Meeting was recorded by audio-cassette tape in the ordinary course of business (Hacker Aff. ¶ 5) Mr. Hacker had the audio-cassette tape burned to a compact disc ("CD"). (Id. ¶ 6[18]) At the Town Meeting, on September 14, 2000, Mr. Hacker announced the sale of the Clubhouse to the residents:

> 11 And over the last 45 days, our corporate office
> 12 has made decisions that -- from offers and
> 13 negotiations with an investment group, to sell the
> 14 Kings Ridge clubhouse.
>
> (Town Meeting Transcript p. 10)

Despite the sale, Mr. Hacker advised that the Clubhouse would remain under Lennar's management.

> 22 The investment group and our corporation have come
> 23 to terms and have closed and sold this clubhouse
> 24 I want to make sure you understand that nothing's
> 25 changed. The management that you presently have here,
>
> 1 the involvement of Lennar, the employees that are here
> 2 that are still Lennar employees, the entire management
> 3 of this club is exactly as it has always been and will
> 4 not change.
>
> (Id. p. 11) (emphasis added)

---

manages the Clubhouse at Kings Ridge. (Id. at pp 32-33) In her deposition, Gail Ash associated Community Resource Systems, Inc. with the investment group purchasing the Clubhouse Facilities. (Ash Dep. p. 85)

[17] Appx. Ex. R.

[18] A copy of the CD is entered into evidence as Exhibit 169. Ms. Ash attended the Town Meeting and has testified that the Town Meeting Transcript and CD accurately reflect the meeting (Ash Dep. pp. 56-57, 61)

Further, Mr. Hacker fielded questions from the residents related to the sale of the Clubhouse. (Id. at pp. 14-61) Some of the questions addressed at the Town Meeting included:

(1) whether the new owner or Lennar would be responsible for repairs and maintenance of the Clubhouse-

> 11 MALE SPEAKER: Repairs and maintenance are the
> 12 responsibility of the new owner or Lennar, as the
> 13 manager of this facility?

(Id. at p. 23);

(2) whether Lennar was an employee of the new owner-

> 13 MALE SPEAKER: I just wanted to see if I
> 14 understand this. Is the division of Lennar now an
> 15 employee of the new buyer as an operator of the
> 16 facility owned by somebody else?

(Id. at p. 22);

(3) whether Lennar would continue to cover any shortfall for operational expenses of the Clubhouse-

> 9 FEMALE SPEAKER: Well, my concern is the fact that
> 10 Lennar is going to continue covering that shortfall,
> 11 or are the investors, who are certainly not going to
> 12 dump more money in here than they may already have in
> 13 purchasing, not cover the shortfall. That's my
> 14 concern.
> 15 MR. HACKER: Lennar will continue to pay for the
> 16 deficit. That's our responsibility.

(Id. at pp. 21-22);

(4) what the new owner had to gain from the purchase-

> 13 MALE SPEAKER: Excuse me. I have one question
> 14 over here. What exactly is this investment company
> 15 going to get out of this? I mean, what is their take?

(Id. at pp. 26);

(5) whether the new owner would pay for further expansions-

MALE SPEAKER: Do you intend to expand this

clubhouse in the future?
MR. HACKER: The expansions that I can commit to are those that are stated in the documents as to the expansions at certain times when the community gets to a certain size.
MALE SPEAKER: Well, who's going to pay for that if these investors are in it?

(Id. at pp. 29-30); and

(6) whether the change in Clubhouse ownership would alter community plans for a new pool-

MALE SPEAKER: Some time ago we took a survey for an additional pool.
MR. HACKER: Uh-huh.
MALE SPEAKER: What are the results of that survey? And under the new ownership, is that going to change at all?

(Id. at pp. 35-37)

At the Town Meeting, Ms. Ash, a then resident Club Member and former member of the Association Board of Directors, inquired whether the new owner would cover operational costs of the Clubhouse. (Ash Dep. pp. 17-18, 64[19]; Town Meeting Transcript pp. 19-22) Ms. Ash testified that at the time of the meeting, she understood that the Clubhouse had been sold and she further understood that the Club Members "would still be entitled first refusal to purchase the clubhouse" when Lennar finished the build out at Kings Ridge. (Ash Dep. pp. 56; 67-68)

[19] Appx. Ex. S

In addition, John Maltese ("Mr. Maltese"), also a then resident Club Member, and neighborhood association president, stated that he attended the meeting, and asked a question about the golf club fees. (Maltese Aff. ¶¶ 3-5[20]) Mr. Maltese recalls sitting in the back of the meeting room, and estimates that one-hundred people attended the meeting. (Id. at ¶¶ 6-7) Ms. Ash recalls one-hundred to one-hundred and fifty people attending. (Ash Dep. pp. 59)

Of significant note, is that both Ms. Ash and Mr. Hacker identify named Class Representative Plaintiff Seymour Holzman as attending and speaking during the Town Meeting. (Ash Dep. p. 71; Hacker Aff. ¶ 8).

Ms. Ash served as President of her neighborhood association and was responsible for authoring both the quarterly neighborhood newsletter and the minutes for her neighborhood association meetings. (Id. at pp. 19-23) Ms. Ash testified that she knew that she wrote about the sale of the Clubhouse in her community newsletter and in the minutes of her neighborhood association meeting. (Id. at pp. 29-30)[21]

Ms. Ash testified that from the time of the Town Meeting, the community engaged in ongoing discussions about the sale of the Clubhouse. (Id. at 29-32) When asked who she could specifically recall having discussed the conveyance with, Ms. Ash testified:

> Spoke with many people. This was an issue that concerned many of us, not just presidents of other neighborhoods and vice presidents, but people that were involved in the community [sic] concerned about the community. I spoke to many people. . . . [N]ot only to my residents, but friends I had in the community that had just, you know, as grave concerns as I did. So spoke with many people.
>
> I'd have to run down the presidents and vice presidents from that time, which would have been approximately 2002, 2001, 2000. This was not a one time

[20] Appx Ex I.

[21] Ms. Ash testified that she had shredded all of her documents pertaining to the Clubhouse conveyance, including community newsletters, and disposed of her old computer that contained relevant email. (Ash Dep. at pp. 11-16)

> discussion. This was an issue that we discussed on multiple occasions over the years and our concerns about it. So it would have been multiple presidents and vice presidents as they served their terms.

(Id. at 30-31) (emphasis added)

As an example of this ongoing discussion, Class Representative Plaintiff, Len Tirrell, produced a March 12, 2003 email between himself and Gail Ash in which Mr. Tirrell stated in part: "We need some answers from Lennar. Lennar cannot abrogate the covenants by either selling the Club or by contracting with a management company."[22] At deposition, when asked why Mr. Tirrell needed answers from Lennar, Mr. Tirrell answered: "we had the right of acquiring the club."[23] (Tirrell Dep. p. 48.) Mr. Tirrell testified that his email was a reaction to the rumors he had heard about the conveyance. (Id.)

Mr. Tirrell also testified that he was familiar with searching the Lake County Clerk of the Court website for records pertaining to the Clubhouse. (Id. at 13-17.) In 2002, Mr. Tirrell conducted land record searches for "Lennar" and "Lennar Land Partners" and was able to locate the Clubhouse lot and other recorded documents. (Id. 14-15; 17.) Mr. Tirrell specified that the Notice of Agreement, recorded on May 10, 2001, was a document he discovered online. (Id. at 20-21) In the first paragraph of the Notice of Agreement,[24] Kings Ridge L.L.C. is identified as the owner of the Clubhouse.

4. The Sentry Collections Agreement

On September 20, 2000, Sentry entered into the Collections Agreement, which provided that Kings Ridge L.L.C. was the Club Owner and that Sentry was to disburse the collected

---

[22] Appx. Ex. V.
[23] Appx. Ex. W.
[24] Appx. Ex. X.

Facilities Fees to Kings Ridge L.L.C. (Collections Agreement § 2, ¶ 8; § 3, ¶ 2, attached to Hart I deposition as Joint Exhibit 110[25])

5. Recordation in the Public Records of the Notice of Lien Prohibition Identifying Kings Ridge L.L.C. as the Owner of the Clubhouse

On September 21, 2000, Kings Ridge L.L.C recorded the Notice of Lien Prohibition, which identified Kings Ridge L.L.C. as the owner of the Clubhouse and that Lennar did not have the power to subject such designated property to any liens or other encumbrances. (Notice of Lien Prohibition attached to Len Tirrell deposition at Joint Exhibit 83[26])

6. Recordation in the Public Records of the Sixth Amendment and the Warranty Deed conveying the Clubhouse to Kings Ridge L.L.C.

On October 9, 2000, both the Sixth Amendment and the Warranty Deed evidencing the conveyance were duly recorded in the Office of the Clerk of the Lake County Circuit Court (Am. Compl. at ¶¶ 28, 30)

II. STANDARD OF REVIEW

Florida Rule of Civil Procedure 1.510(c) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where the facts are such that, if established, there could be no recovery, or where the undisputed facts as such would preclude recovery, then the question becomes one of law for the determination of the Court and a proper matter for disposition by summary judgment. Yost v. Miami Transit Co., 66 So. 2d 214, 215 (Fla. 1953). The burden is on the movant to show conclusively the absence of any genuine issues of material

[25] Appx. Ex. Y
[26] Appx. Ex. Z

fact. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). The existence of nonmaterial issues of fact will not preclude the entry of summary judgment. Cristol v. City of Miami Beach, 246 So. 2d 595, 596-97 (Fla. 3d DCA 1971).

When only one conclusion can be drawn from the admitted facts, then the question of liability becomes one of law. Lofton v. McGregor, 14 So. 2d. 574, 575 (Fla. 1943). Courts routinely grant summary judgment where a plaintiff brings untimely claims in violation of the statute of limitations. See, e.g., Berg v. Wagner, 935 So. 2d 100, 102 (Fla. 4th DCA 2006); State Farm Mut. Auto. Ins. Co. v. Brewer, 940 So 2d 1284, 1286 n.2 (Fla. 5th DCA 2006); Ryan v. Lobo De Gonzalez, 841 So. 2d 510, 520 (Fla. 4th DCA 2003); Nehme v. Smithkline Beecham Clinical Labs., Inc., 822 So.2d 519, 522 (Fla. 5th DCA 2002); Carlton v. Germany Hammock Groves, 803 So. 2d 852, 856 (Fla. 4th DCA 2002); Wells v. Florida Dept. of Corrections, 801 So. 2d 970, 970 (Fla. 5th DCA 2001).

III. ARGUMENT

A. The Five-Year Claims for Breach of Contract are Barred by the Statute of Limitations

Pursuant to section 95.11(2)(b), Florida Statutes a five year statute of limitations applies to any action on a written agreement. Further, pursuant to section 617.31, Florida Statutes, any right to acquire Plaintiffs' had to purchase the Club Facilities was triggered when either the Club Facilities was "offered" for sale or when LLP received an offer to purchase the Club Facilities. Given that the transaction finally closed on August 31, 2000, clearly any offer to sell the Club Facilities or to purchase the Club Facilities had to have been made well before the closing date. Indeed, as set forth above, The June 23, 2000 Purchase Term Sheet set forth the material terms

and conditions of the offer including identification of the two separate assets of the Club Facilities and Contract Rights for a total purchase price of $8,375,572. (June 23, 2000 Purchase Term Sheet.)[27] Thereafter, Mr. Surface, Mr. Wright, and Mr. Lester created a July 17, 2000 Purchase Term Sheet that set forth an updated version of the offer to LLP. (Surface Depo. p. 178; July 17, 2000 Purchase Term Sheet.)[28]

As set forth by Plaintiffs in the Complaint at Counts 5 and 6 alleging Breach of Contract, the breach was Lennar Defendants' "failure to provide notice to the Association and Club Members of its intention to sell the Club Property to Kings Ridge." (Am. Compl. ¶¶ 88, 96)

Class representative Mr. Holzman testified this breach occurred 30 to 60 days prior to August 30, 2000:

Q. When was the offer made that you contend the plaintiffs are entitled to match?
A. Well, the closing was August the 30th, so I would assume it would have been somewhere in that 30-day period prior to that, at least 30 to 60 days prior to that.
Q. So if the closing you say was August 30th of 2000. Is that correct?
A. That's when the deeds were signed, yeah.
Q. So the offer you contend the plaintiffs are entitled to match, your testimony is that offer was made 30 to 60 days prior to August 30th of 2000?
A. Somewhere in that range, yeah.
MR. D'ANIELLO: Objection to form.
BY MR. SAMPSON:
Q. Just so we can put dates to that.
A. Well, I was not party to the decision making process, so I don't have the specific dates. I know they started negotiations in April and the conclusion was the end of August, so somewhere in that 4-month period, 5-month period.
Q. The 30 to 60 days you testified to, 30 days prior to August 30th would be July?
A. Somewhere July 30th, yeah.
Q. 60 days would be June?
A. June 30th, yeah.

[27] Appx Ex. 14.
[28] Appx Ex. 15.

(Holzman Depo. Vol. II, pp. 24-25)

Further Mr. Holzman testified:

118:13 **Q. Is it your position that an offer was made by**
14 **someone that triggered the statutory right to acquire?**
15 A. Yes.
16 **Q. What offer was that?**
17 A. The deal between Lennar and Frank Surface, whether
18 it was Community Resource Systems, Inc., Mortgage Advisors,
19 Inc., or whatever of the host of companies that Frank
20 Surface owns and operates.
21 **Q. And what particular offer was made by whom?**
22 A. The offer was made by Frank Surface. He said he
23 was looking for a piece of property at one time and Lennar
24 said we didn't have anything now. Lennar called him back
25 later and said we have something, let's do a deal.
119: 1 **Q. So the record is clear, your statement is that**
2 **Mr. Surface made the offer?**
3 A. No. Mr. Surface said I'm looking for additional
4 properties. Lennar came back and said we have a property
5 for sale. Make an offer. And that's when they started the
6 negotiations in April of 2000.
7 **Q. When was the offer made that you contend triggered**
8 **the right to acquire under the statute?**
9 A. March or April of 2000.

(Holzman Depo. Vol. II, pp 118-119). Further, named class representative Mr. Tirrell testified the right to acquire was breached even earlier, in the Spring of 2000:

171:19
20 **Q. Your contention in this case that Lennar was**
21 **obligated to notify the club members of terms of an**
22 **offer?**
23 A. It was the obligation of Lennar to notify the club
24 members that an offer had either been extended or received
25 for the sale of the clubhouse because we had the right of
172: 1 first refusal. We were to be given an opportunity to match
2 the offer. I believe it was within 90 days and that was
3 never done.
4 **Q. So the offer that was extended or received, I want**
5 **you to focus on that testimony, when was that offer**
6 **extended?**
7 A. I am not positive. I believe was sometime in the
8 spring of 2000.
9

(Tirrell Depo. Vol. II, pp. 171-172)

B. The Four-Year Claims and Specific Performance Claim are Barred by the Statute of Limitations

1 The Four-Year Statute of Limitations pursuant to Fla. Stat. § 95.11(3) applies to Plaintiffs' Four Year Claims

Florida Statute § 95.11(3), a four-year statute of limitation, governs the following claims asserted by Plaintiff:

a. Breach of Fiduciary Duty:

Berg v. Wagner, 935 So. 2d 100, 102 (Fla. 4th DCA 2006) (recognizing that breach of fiduciary duty claims are subject to a four-year statute of limitations pursuant to Fla. Stat. § 95.11(3)(o)(p)); accord Halkey-Roberts Corp. v. Mackal, 641 So. 2d 445, 447 (Fla. 2d DCA 1994).

b. Tortious Interference:

Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp., 831 So. 2d 204, 208 (Fla. 4th DCA 2002) (recognizing that tortious interference claims are governed by a four-year statute of limitations pursuant to Fla. Stat. § 95.11(3); accord Yusuf Mohamad Excavation, Inc. v. Ringhaver Equip., Co., 793 So. 2d 1127, 1128 (Fla. 5th DCA 2001); Morsani v. Major League Baseball, 739 So. 2d 610, 613 (Fla. 2d DCA 1999).

c. Civil Conspiracy:

Young v. Ball, 835 So. 2d 385, 386 (Fla. 2d DCA 2003) (recognizing that civil conspiracy claims are governed by a four-year statute of limitations pursuant to 95.11(3)); see also Davis v. Monahan, 832 So. 2d 708, 712 (Fla. 2002) (reinstating the trial court's order of summary

judgment dismissing a civil conspiracy claim barred by Florida's four-year statute of limitations)

d. Rescission:

Fla. Stat. § 95.11(3)(l); Allie v. Ionata, 417 So. 2d 1077, 1079 (Fla. 5th DCA 1982) (recognizing that rescission claims are governed by a four-year statute of limitations pursuant to Fla. Stat. § 95.11(3)).

2. According to the Allegations of the Complaint, Each of Plaintiffs' Four Year Claims Accrued no Later than at the Time of Conveyance[29]

"[A] cause of action accrues or begins to run when the last element of the cause of action occurs." Davis, 832 So. 2d at 709; Fla. Stat. § 95.031(1). The Florida Supreme Court and other Florida appellate courts, including the Fifth DCA, have made clear that the Four-Year Claims accrued at the *occurrence* of the alleged wrong, and that Plaintiffs' allegations of delayed discovery of the wrong do not affect the date of accrual Davis, 832 So. 2d at 709, 711 (holding that breach of fiduciary duty and civil conspiracy claims accrued on the date that the tortious acts occurred, not when plaintiff later discovered the alleged misappropriations); Young, 835 So. 2d at 386 (holding that civil conspiracy claim accrued when defendant forged a mortgage loan application, not when plaintiff later discovered the conspiracy); Yusuf Mohamad Excavation, Inc. v. Ringhaver Equip., Co., 793 So. 2d 1127, 1128 (Fla. 5th DCA 2001) (holding that tortious interference claim accrued at the time that the alleged conduct occurred; refusing to delay the accrual date); Allie v. Ionata, 417 So. 2d 1077, 1078-79 (Fla. 5th DCA 1982) (holding that rescission claim accrued when land contracts were breached (at time of execution of the

[29] Arguably, as set forth above, the alleged breach occurred even earlier than the time of conveyance as the Complaint states that a breach occurred by the Lennar Defendants' "failure to provide notice to the Association and Club Members of its intention to sell the Club Property to Kings Ridge " (Am. Compl. ¶¶ 88, 96)

contracts)—not when plaintiff later discovered that defendant had over-inflated the purchase price)

The alleged wrongful conduct upon which Plaintiffs have sued is the conveyance of the Clubhouse as follows:

a. Breach of Fiduciary Duty:

The Lennar Defendants "breached their fiduciary duties . . . by allowing the Club to be *transferred* to Kings Ridge . . . ." Am. Compl. ¶¶ 109, 127

b. Tortious Interference:

"The Kings Ridge Defendants intentionally procured the breach of the contractual rights set forth in the Declaration by concluding a *sale and purchase* of the Club Property." Am. Compl. ¶¶ 139, 148.

c. Civil Conspiracy:

The Lennar Defendants acted "in pursuit of the conspiracy by procuring and facilitating *the sale* of the Club Property between Lennar Partners and Kings Ridge." (emphasis added). Am. Compl. ¶¶ 176, 187.

d. Rescission:

"[T]he Club Deeds should be cancelled and/or rescinded as the *transfers* occurred in violation of the rights . . . to acquire the Club Property." Am. Compl. ¶¶ 62, 67.

The complained-of conveyance occurred on August 31, 2000. (Am. Compl. ¶ 28) As such, each of the Plaintiffs' Four-Year Claims (breach of fiduciary duty, tortuous interference, civil conspiracy and rescission) was time-barred after August 31, 2004. Because Plaintiffs did

not file the initial Complaint until August 30, 2005, those claims are barred under section 95.11(3), Florida Statutes.

3. Plaintiffs' Specific Performance Claim is Barred by the One-Year Statute of Limitation Pursuant to Fla. Stat. § 95.11(5)(a)

Plaintiffs seek "specific performance of the original Right to Acquire provision of the Declaration to convey the Club Property" to the Association and Club Members. (Am. Compl. ¶¶ 195, 200). Section 95.11(5)(a), a one-year statute of limitation, governs such claims of specific performance of a contract. Ferola v. Blue Reef Holding Corp., Inc., 719 So. 2d 389, 389 (Fla. 4th DCA 1998) (holding that § 95.11(5)(a) barred owners' specific performance claim against developer alleging violation of declaration of covenants); accord Central Nat. Bank v. Central Bancorp., Inc., 411 So. 2d 358, 362 (Fla. 3d DCA 1982).

4. According to the Allegations of the Complaint, Plaintiffs' Claim for Specific Performance Accrued at the time of Conveyance

Claims for specific performance of a contract accrue at the time of breach. Central Nat. Bank, 411 So. 2d at 362. According to Plaintiffs' allegations, the alleged breach of the Declaration occurred upon the conveyance of the Clubhouse that occurred on August 31, 2000. (Am. Compl. ¶ 28). As such, Plaintiffs' specific performance claims were time-barred after August 31, 2001. Because Plaintiffs did not file the initial Complaint until August 30, 2005, those claims are barred under Fla. Stat. § 95.11(5)(a).

C. The Avoidance Doctrines do Not Apply to this Case

In certain rare situations, a limitations period may be tolled or otherwise delayed as the result of conduct on behalf of the Defendant. For example, the doctrines of delayed discovery, fraudulent concealment, equitable tolling, and equitable estoppel have been employed by courts

in the past to relieve plaintiffs from the running of a statute of limitations that would otherwise bar their claims. However, in the instant matter, none of these doctrines operates to toll or otherwise excuse Plaintiffs' delay in bringing their claims because: (1) the critical elements such as active concealment are nonexistent; (2) Plaintiffs have waived their right to assert an avoidance; and (3) the doctrine(s) have been abrogated by statute or no longer recognized by the courts; or (4) the doctrine(s) are not substantively available to the Plaintiffs.

1. **Neither the Lennar nor Kings Ridge Defendants Concealed the Conveyance**

In the instant case, in an attempt to avoid the clear untimeliness of their claims, Plaintiffs have attempted to allege the Lennar and Kings Ridge Defendants concealed or kept secret the conveyance of the Clubhouse. (Am. Compl. ¶¶ 42, 47, 177, 181, 182, 188, 192, 193). However, there has been no evidence obtained throughout discovery in the instant matter to substantiate these allegations. In fact, the plain evidence proves unequivocally otherwise. Plaintiffs attempt to argue that they were intentionally kept in the dark about the Clubhouse sale or that the Lennar and Kings Ridge Defendants concealed the sale, is nonsensical given the clear evidence to the contrary in the instant case.

The undisputed facts show that the Lennar and Kings Ridge Defendants did not conceal or keep secret the conveyance of the Clubhouse. Instead, the Lennar and Kings Ridge Defendants affirmatively conveyed relevant information before and after the conveyance in at least three ways: (1) to the Association and homeowners at the September 14, 2000 Town Meeting; (2) as a matter of public record through five separate recordings related to the conveyance, including the October 9, 2000 recording of the Warranty Deed; and (3) to the Association through its agent, Sentry, prior to the conveyance. The Plaintiffs ignorance of these

easily discoverable facts should not postpone the operation of the statute of limitations. MacMurray v. Board of Regents, 362 So. 2d 969, 971 (Fla. 1st DCA 1978) (plaintiffs' malpractice suit, filed in 1976, seeking recovery from hospital for negligent misrepresentation of x-rays was barred by statute of limitations where plaintiff's husband, a physician, acquired possession of x-rays from hospital in November, 1973 and plaintiff knew in December, 1973 of existence of Hodgkin's disease); Haskins v. City of Fort Lauderdale, 898 So. 2d 1120, 1123 (Fla. 4th DCA 2005) (plaintiffs' invasion of privacy suit, filed in 2001, seeking recovery from City of Fort Lauderdale for illegal search or her bag in 1996, was barred by statute of limitation even though court in criminal case did not conclude that search was illegal until 1997 when it entered an order suppressing evidence in criminal case); Chidiac v. Cadillac Gage Company, 541 So. 2d 650 (Fla. 3d DCA 1989) (statute of limitations on agent's claim for commissions arising from sales of vehicles began to run when agent had actual notice that sales had occurred, though agent claimed that buyer and co-agent had concealed fact that commissions had actually been paid to co-agent at that time); Dovenmuehle, Inc. v. Lawyers Title Insurance Corporation, 478 So. 2d 423, 424-25 (Fla. 4th DCA 1985) (statute of limitations on mortgage lender's breach of contract action against title company for recovery of funds which title company erroneously disbursed at closing was not tolled where lender's vice-president and counsel were both present at closing and made no objections to any of the disbursements even though they both had access to closing statement); Klose v. Zicorp, Inc., 2005 WL 5517401 (Fla. Cir. Ct. Nov. 18, 2005) (statute of limitations barred negligence and trespass claims filed in May of 2005 notwithstanding plaintiffs' contention that they did not become aware of a causal link between property damage and contractor's work until June or July of 2001).

a. The September 14, 2000 Association Town Meeting

Mr. Hacker, in his role as Association President, announced the sale of the Clubhouse at the Town Meeting on September 14, 2000, a mere two weeks after the conveyance. Indeed, as set forth above, Mr. Hacker candidly responded to numerous questions from the residents regarding the sale and the potential impact on the Kings Ridge communities The Town Meeting was well attended; the testimony of those in attendance estimated 100-150 residents were present at the meeting, including the Plaintiff Ray Gordon (Ash Dep. p. 59; Maltese Aff. at ¶¶6-7) Ms. Ash explicitly recalled Mr. Hacker announcing at the Town Meeting the sale of the Clubhouse. (Ash Dep. p. 56) If the Lennar and Kings Ridge Defendants intended to keep the sale of the Clubhouse a secret or otherwise conceal it, why would Mr. Hacker, then divisional president for Lennar and President of the Association, announce the sale at a public meeting scheduled for the benefit of Kings Ridge residents and attended by at least 100-150 of them?

b The Recording of Documents Relating to the Conveyance

On September 5, 2005, just five days after the conveyance, three documents relating to Kings Ridge L.L.C.'s financing and purchasing of the Clubhouse were recorded (Agreement Not to Encumber, Assignment and Pledge of Lien Rights, and Financing Statement) These documents plainly identify Kings Ridge L.L.C. as the owner of the Clubhouse. The decision to enter into such financing and the agreements related thereto hardly portray a purchaser bent on trying to keep the conveyance a secret.

In the same month, the Notice of Lien Prohibition, which identified Kings Ridge L.L.C. as the owner of real property to the "Clubhouse Site," was recorded Thus, prior to the recording of the Warranty Deed, at least four documents were recorded in the Office of the Clerk of the

Lake County Circuit Court indicating that Kings Ridge L.L.C. was the owner of the Clubhouse. As more fully addressed in the next subsection, the recording of these four documents (hereafter, "September Recordings") shows that the conveyance was no secret! They provided the Association and class members with actual, constructive, or imputed knowledge of the conveyance.

c. The Recording of the Warranty Deed on October 9, 2000

In addition to the September Recordings, it is undisputed that thirty-nine days after the conveyance (October 9, 2000), the Warranty Deed evidencing the conveyance was duly recorded in the Office of the Clerk of the Lake County Circuit Court. (Am. Comp. ¶ 28)

Section 28.222(3)(a) provides that the circuit court shall record in the Official Records the following kinds of instruments upon payment of necessary service charges:

> (a) **Deeds**, leases, bills of sale, **agreements**, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and **other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it**; extensions, **assignments**, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments

Fla. Stat. § 28.222(3)(a) (emphasis added). Further, Section 695.11, Florida Statutes, provides that upon the recording of the above instruments, "all persons" shall be on notice of such documents:

> All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the 'Official Records' as provided for under 28.222 . . . shall be deemed to have been . . . officially recorded . . . and at such time **shall be notice to all persons**.

Fla. Stat. § 695.11 (emphasis added)

Pursuant to the plain language of the statute, the Association and class members had constructive notice[30] of the September Recordings and the Warranty Deed. George Mackay & Co. v. Marion Hardware Co., 131 So. 396, 397 (Fla. 1930) (applying the statutory precursor to section 695.11; holding that recording in the Office of the Clerk of the Circuit Court provides "constructive notice to the public, and all persons composing the public"); Bakalarz v. Luskin, 560 So. 2d 283, 286 (Fla. 4th DCA 1990) ("695.11 provides that an instrument is deemed to be recorded from the time of filing. Once recorded there is constructive notice of its contents.").

Moreover, class members purchasing after the conveyance have implied actual knowledge of the recorded conveyance. The Florida Supreme Court has stated that any homeowner purchasing land is imputed with knowledge of (a) the public records pertaining to the land and (b) inquiries suggested by the record. Zaucha v. Town of Medley, 66 So. 2d 238, 240 (Fla. 1953) ("[T]he record is constructive notice to . . . subsequent purchasers not only of its own existence and contents, but of such other facts as those concerned with it would have learned from the record, if it had been examined, and inquiries suggested by it, duly prosecuted, would have disclosed"); accord Prime West v. Camargo, 906 So. 2d 1112, 1114 (Fla. 3d DCA 2005); Leffler v. Smith, 388 So. 2d 261, 263 (Fla. 5th DCA 1980); see also M/I Schottenstein Homes, Inc., v. Azam, 813 So. 2d 91, 95 (Fla. 2002) ("Knowledge of clearly revealed information from recorded documents contained in the records constituting a parcel's chain of title is properly imputed to a purchasing party.").

[30] Florida recognizes three types of notice by which a party will be held to have had knowledge of a particular fact: actual notice, implied actual notice, and constructive notice. McCausland v. Davis, 204 So. 2d 334, 334-36 (Fla. 2d DCA 1967); see also Sapp v. Warner, 141 So. 124, 127 (Fla. 1932). Actual notice is actual knowledge of the fact in question. Id. Implied actual notice is a factual inference applied to persons who duty of inquiry and had a means of acquiring such knowledge. Id.; Sapp, 141 So. at 127 ("The principle . . . is that a person has no right to shut his eyes or ears to avoid information, and then say he has no notice."). Constructive notice is the legal inference that imputes notice under, for example, a recording statute. Sapp, 141 So. at 127.

Due to the public recording of the September Recordings and the Warranty Deed, no doubt exists that the Lennar and Kings Ridge Defendants did not keep the conveyance a secret. The pertinent documents were publicly recorded, ensuring they were wide-open for the world to see.

d. The Association's Management Agent

At the July or August 2000 meeting, Lennar announced to Sentry that the conveyance was in process. (Hart Dep. I at 8-11; 20) Sentry knew that the conveyance would occur on about August 31, 2000 because it was expecting to collect fees for the new club owner. (Hart Dep. II at 22-23) Further, on September 20, 2000, Sentry entered into the Collections Agreement, which provides that Kings Ridge L.L.C. was the Club Owner and that Sentry was to disburse the collected Facilities Fees to Kings Ridge L.L.C.. (Collections Agreement § 2, ¶ 8; § 3, ¶ 2) It is well established that "[w]hatever knowledge an agent acquires within the scope of his authority is imputed to his or her principal." Davies v. Owens-Illinois, Inc., 632 So. 2d 1065, 1066 (Fla. 3d DCA 1994); Anderson v. Walthal, 468 So. 2d 291, 294 (1st DCA 1985) ("[K]nowledge of, or notice to, an agent is imputed to the principal when it is received by the agent while acting within the course and scope of his employment, and when it is in reference to matters over which the agent's authority extends."). Hence, the Lennar and Kings Ridge Defendants were not successfully concealing the conveyance. The Association, through its management agent, Sentry, knew of the conveyance.

In light of the Town Meeting, public recordings, and the actual knowledge by the Association's management agent, as a matter of law, neither the Lennar nor Kings Ridge Defendants concealed the conveyance of the Clubhouse from the residents at Kings Ridge.

Furthermore, the avoidance doctrines (delayed discovery, fraudulent concealment, equitable tolling, and equitable estoppel) are not available to Plaintiffs in the instant case.

2. **Plaintiffs have Waived their Right to Raise an Avoidance**

Additionally, pursuant to Florida Rules of Civil Procedure, Plaintiffs are not permitted to raise an avoidance because they failed to assert the avoidance in a Reply to the Answer. Florida Rule of Civil Procedure 1.100(a) requires that an opposing party seeking to avoid an affirmative defense "**shall** file a reply containing the avoidance." (emphasis added) See also Fla. R. Civ. P. 1.110(d) ("In pleading to a preceding pleading a party shall set forth affirmatively . . . any . . . matter constituting an avoidance.") In its Answer[31], the Lennar and Kings Ridge Defendants raised the statute of limitations affirmative defense to all counts. (Answer ¶ 222) The Plaintiffs had twenty days to file a Reply if they sought to avoid the statute of limitations affirmative defense. Fla. R. Civ. P. 1.140.

Because Plaintiffs did not file a Reply, they are not permitted to raise an avoidance. City of Brooksville v. Hernando County, 424 So. 2d 846, 848 (Fla. 5th DCA 1982) (holding that where the answer raised statute of limitations affirmative defense, and no reply was filed, an estoppel avoidance "was not an issue properly before the trial court" at the partial summary judgment stage of litigation); see also Dober v. Worrell, 401 So. 2d 1322, 1324 (Fla. 1981) (stating that a party seeking to avoid the statute of limitations defense "has the burden of . . . pleading" the avoidance and that Rule 1.100(a) is "explicit" in its requirement to file a reply). While Plaintiffs filed a Motion to Strike the affirmative defenses pursuant to Rule 1.140(b), such a motion functions to *toll* the time for a responsive pleading—it in no way replaces the

[31] Appx. Ex. 1.

requirement for a Reply. Fla. R. Civ. P. 1.140(a)(2); see also Fla R. Civ. P. 1 140(a) Committee Notes, 1972 Amendment ("A motion to strike an insufficient legal defense will now be available under subdivision (b) and continue to toll the time for responsive pleading.") The Court denied Plaintiffs' Motion to Strike on September 27, 2006.

Plaintiffs thereafter sought leave to amend to file a reply, which this Court denied. (See Court's Order Denying Plaintiffs' Motion for Leave to File Reply to Affirmative Defenses dated February 28, 2008). In light of the above, this Court need not consider any avoidances that Plaintiffs now attempt to raise in response to this motion.

3. **The Avoidance Doctrines are Otherwise not Available to Plaintiffs in the Instant Case**

As a matter of law, the Lennar and Kings Ridge Defendants did not conceal the conveyance, thus Plaintiffs may not assert Defendants' conduct warrants the application of an avoidance doctrine to excuse the untimely filing of their claims. Further, Plaintiffs failed to assert the right to an avoidance of the statute of limitations as required by the applicable Florida Rules of Civil Procedure. Finally, even if the facts of this case warranted the application of the avoidance doctrines, the Court may not rely on the avoidance doctrines to toll or otherwise delay the statute of limitations.

a. The Delayed Discovery Doctrine is Not Available in the Instant Case

The delayed discovery doctrine "provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action." Hearndon v. Graham, 767 So. 2d 1179, 1184 (Fla. 2000)

In the case at bar, however, the statutes of limitation do not provide for the delayed discovery doctrine. To be sure, neither section 95.031 nor section 95.11, Florida Statutes provides for delayed accrual of any of the claims raised by Plaintiffs. Courts accordingly have refused to delay the accrual of breach of fiduciary duty, civil conspiracy and tortious interference claims:

- **Breach of Fiduciary Duty and Civil Conspiracy**: Davis, 832 So. 2d at 711-12. (holding that the delayed discovery doctrine did not apply to breach of fiduciary duty and civil conspiracy claims); Young v. Ball, 835 So. 2d 385, 386 (2d DCA 2003) (holding that the delayed discovery doctrine did not apply to civil conspiracy claim); Halkey-Roberts Corp., 641 So. 2d at 447 (holding that delayed discovery doctrine did not apply to breach of fiduciary duty claim).
- **Tortious Interference**: Yusuf, 793 So. 2d at 1128 (holding that delayed discovery doctrine did not apply to tortious interference claim) (cited approvingly by Davis, 832 So. 2d at 711).

Despite diligent effort, the undersigned could not identify any case in Florida specifically addressing the applicability of the delayed discovery doctrine to the rescission and specific performance claims. However, it remains clear that sections 95.031 and 95.11, Florida Statutes do not provide for their delayed accrual [32]

---

[32] This is unlike numerous other subdivisions of Chapter 95 that expressly provide that knowledge or notice triggers the statute of limitations. See, e.g., Fla. Stat. § 95.11(3)(c) ("when the action involves a latent [construction] defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence"); Fla. Stat. § 95.11(4)(a) (in "[a]n action for professional malpractice" the statute of limitations "shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence"); Fla. Stat. § 95 11(4)(b) (in "[a]n action for medical malpractice" the statute of limitations runs "from the time the incident is discovered, or should have been discovered with the exercise of due diligence"); Fla. Stat. § 95.11(4)(e) (in "[a]n action founded upon a violation of any provision of chapter 517" the statute of limitations runs "from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence"); Fla. Stat. § 95.11(4)(f) (in "[a]n action for personal injury caused by contact with or exposure to

If the Florida legislature intended to establish an exception to the running of the statute of limitations on the claims Plaintiffs raise it could have done so as it did for actions involving construction defects, professional malpractice, medical malpractice, fraud, and products liability. It did not. As such, the delayed discovery doctrine is statutorily unavailable. See Davis v. Monahan, 832 So. 2d 708, 712 (Fla. 2002) (holding that breach of fiduciary duty and civil conspiracy claims accrued on the date that the tortious acts occurred, not when plaintiff later discovered the alleged misappropriations); Yusuf, 793 So. 2d at 1128 (holding that tortious interference claim accrued at the time the alleged conduct occurred; refusing to delay the accrual date); Allie v. Ionata, 417 So. 2d 1077, 1078-79 (Fla. 5th DCA 1982) (holding that rescission claim accrued when land contracts were breached (at time of execution of the contracts) not when plaintiff later discovered that defendant had over inflated the purchase price).

Indeed, following the principle of expression unius est exclusion alterius, Plaintiffs' argument that notice triggers the statutes of limitations on their claims is untenable. "[W]here the legislature creates specific exceptions to the language of a statute, [the court] may . . . infer that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally." Florida Legal Services, Inc. v. State of Florida, Department of Labor and Employment Security, 381 So. 2d 1120, 1122 (Fla. 1st DCA 1979).

---

phenoxy herbicides . . . the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence"); Fla. Stat. § 95.11(7) (in "[a]n action founded on alleged abuse . . . or incest" the statute of limitations begins to run "from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later"); Fla. Stat. §95.031(2) (the statute of limitations for actions for fraud and products liability claims begin running from the time the cause of actions are discovered or should have been discovered with the exercise of due diligence).

b. The Doctrine of Fraudulent Concealment is Inapplicable in the Instant Case

The doctrine of fraudulent concealment has been recognized to toll the statute of limitations when a defendant successfully and fraudulently conceals the existence of a cause of action. Butler University v. Bahssin, 892 So. 2d 1087, 1092 n.3 (Fla. 2d DCA 2004). However, because the doctrine functions to toll[33] the statute of limitations, it is no longer a viable avoidance doctrine.

In 1974, the Florida Legislature enacted Florida Statute section 95.051, which outlines specific instances which toll the running of the statute of limitations. Putnam Berkley Group, Inc. v. Dinin, 734 So. 2d 532, 534 (Fla. 4th DCA 1999). In pertinent part, the statute provides: "No disability or other reason shall toll the running of any statute of limitations except those specified in this section . . ." Accordingly, "the only acts or circumstances that will toll a limitations period are those enumerated in section 95.051 . . ." Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997)

Florida Statute section 95.051 makes no mention of the doctrine of fraudulent concealment. For that reason, Florida courts have repeatedly concluded that fraudulent concealment is not available to plaintiffs to toll the statute of limitations. See, e.g., Boca Raton Community Hospital, Inc. v. Great-West Healthcare of Florida, 2008 WL 728538, *8 (S.D. Fla. Mar. 17, 2008) ("Florida recognizes neither the discovery rule nor fraudulent concealment as a vehicle for tolling the five year limitations period for actions predicated on obligations imposed

[33] The term, "accrual," pertains to the existence of a cause of action, which then triggers the running of the statute of limitations. On the other hand, "tolling" focuses directly on limitation periods and interrupting the running thereof. Hearndon, 767 So. 2d at 1185. To say it another way, "the term 'toll' is synonymous with 'suspend.'" Morsani, 790 So. 2d at 1076

by contract"); Pacific Harbor Capital, Inc. v. Barnett Bank, 2000 WL 33992234, *11 (M.D. Fla. 2000) ("[Plaintiff] argues that the statute of limitations is tolled by the doctrine[] of fraudulent concealment . . . The doctrine of fraudulent concealment is no longer available"); Allapattah Services, Inc. v. Exxon Corporation, 188 F.R.D. 667, 672 (S.D. Fla. 1999) (accord). Stated another way, "Florida . . . [p]laintiffs cannot avoid [a] statutory time-bar on [the] ground[] of fraudulent concealment." Allapattah, 188 F.R.D. at 675 n. 15.

The 1997 decision rendered by the Florida Supreme Court in Fulton County Administrator v. Sullivan, 1997 WL 589312, 22 Fla. L. Weekly S578a (Fla. Sept. 25, 1997), withdrawn and superseded by 753 So. 2d 549 (Fla. 1999) is instructive on this point.[34]

In *Sullivan*, the Florida Supreme Court was presented with a certified question of law arising out of a wrongful death action: "Are statutes of limitations for civil actions tolled by the fraudulent concealment of the identity of the defendant?" *Id* at 1. Answering the question in the negative, the Supreme Court wrote:

> [I]n 1974, the legislature enacted section 95.051 . . . in which it enumerated several bases for tolling the statute of limitations . . . Notably absent from this list was fraudulent concealment . . . While section 95.11(4)(b) provided a tolling provision for fraudulent concealment . . . in medical malpractice actions, there was no similar tolling provision for wrongful death . . . Moreover, [] section 95.051(2) . . . state[s], "No disability or other reason shall toll the running of the statute of limitations except those specified in this section . . ." This exclusivity provision is applicable to this action . . .

[34]In 1999, the Florida Supreme Court withdrew its 1997 opinion in Sullivan finding that the Georgia statute of limitations governed the dispute instead of the Florida statute of limitations. See Fulton County Administrator v. Sullivan, 753 So. 2d 549, 551 (Fla. 1999). In withdrawing the decision, the Supreme Court did not comment on the merits of the opinion. See id. A true and accurate copy of the Florida Supreme Court opinion is attached hereto as **EXHIBIT B**.

> When interpreting a statute, legislative intent is gleaned primarily from the plain language of the statute. When construing statutes of limitations, generally courts will not write in exceptions when the legislature has refused to do so.
>
> Given these rules of construction, we find that 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. The statute specifically precludes application of any tolling provision not specifically provided for by the legislature. In the face of such clear legislative direction, we are compelled to hold that fraudulent concealment of the identity of a tortfeasor in actions such as the one before us today will not toll the statute of limitations.

Id. (internal citations omitted); (emphasis added).

Although the Sullivan opinion was later withdrawn for reasons unrelated to the merits of the decision, "it provides a strong indication that the Florida Supreme Court would hold that in light of § 95.051, the doctrine of fraudulent concealment is no longer available" to toll the statute of limitations. Pacific Harbor Capital, Inc. v. Barnett Bank, N.A., 2000 WL 33992234 (M.D. Fla. Mar. 31, 2000). Further, in Federal Insurance Company v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119 (Fla. 1998), the Florida Supreme Court quoted Sullivan with approval noting that "when construing statutes of limitations, courts generally will not write in exceptions when the legislature has not." Id. at 1112. The Court held that pursuant to Florida Statute § 95.11(2)(b), the statute of limitations for an action on a performance bond is not tolled by virtue of the discovery doctrine. See id. In that regard, the Court wrote:

> [S]ection 95.11(2)(b) . . . makes no reference to a discovery rule for latent defects. Using the principle of statutory construction *expressio unius est exclusion alterius*, we conclude that the absence of such express language in section 95.11(2)(b) . . . is clear evidence that the legislature did not intend to provide a discovery rule in section 95.11(2)(b). . . To conclude otherwise would require us to write into section 95.11(2)(b) . . . a discovery rule when the

> legislature has not. . . Any change in this result is a matter for legislative consideration.

Id. at 1122 (internal citations omitted).

Following Sullivan and its progeny, the doctrine of fraudulent concealment is unavailable. Had the Florida legislature intended to apply the doctrine of fraudulent concealment to actions for specific performance, it could have articulated that exception. It did not. In light of the foregoing, under Florida Statute section 95.11(5)(a), the statute of limitation on a specific performance claim runs from the date of the purported breach (in this case August of 2000) and not the date when plaintiffs obtain knowledge of or notice of the breach.

Although the doctrine of fraudulent concealment is a tolling doctrine, it has also been used to *delay the accrual* of a cause of action until a plaintiff discovered the fraud or should have discovered the fraud. However, to the extent courts have used the doctrine to delay the accrual of the cause of action, they were effectively applying either: (a) the delayed discovery doctrine;[35] or (b) equitable estoppel.[36] Therefore, because neither the delayed discovery doctrine nor equitable estoppel is applicable in the instant case, the doctrine of fraudulent concealment is also legally unavailable to toll or otherwise delay the accrual of the statute of limitations in this case.

Even if the common law doctrine of fraudulent concealment was statutorily available, it would not substantively apply to the facts of this case. The doctrine requires a plaintiff to

---

[35] In Nardone, 333 So. 2d at 39, the Florida Supreme Court applied the doctrine of fraudulent concealment to delay the accrual of a cause of action. However, in Hearndon, 767 So. 2d at 1184, the Florida Supreme Court categorized Nardone as a case that applied the delayed discovery doctrine.

[36] In S.A.P. v. Fla. Dep't of Health and Rehabilitative Servs., 704 So. 2d 583, 585 (Fla. 1st DCA 1997), the First DCA held that the facts alleged in the Complaint were sufficient to delay the accrual of the sexual abuse claim pursuant to the "equitable principle of fraudulent concealment." Upon review, however, the Florida Supreme Court addressed whether the "equitable principle of fraudulent concealment" delayed the accrual of the sexual abuse claim by *applying* the doctrine of equitable estoppel. Fla. Dep't of Health and Rehabilitative Servs. v. S.A.P., 835 So. 2d at 1094.

establish that the defendant: (1) successfully concealed the cause of action; and (2) employed fraudulent means to achieve that concealment. S.A.P., 704 So. 2d at 585; Doe v. Cutter Biological, 813 F. Supp. 1547, 1555-56 (M.D. Fla. 1993). The law requires *successful concealment*. Given the September 14, 2000 meeting, it is clear that the Lennar and Kings Ridge Defendants did not successfully keep the conveyance a secret; instead, they did the opposite: they affirmatively acted to make the homeowners aware. Additionally, there are no allegations that Lennar or Kings Ridge Defendants ever engaged in any "fraudulent" acts.

c. Equitable Tolling Does Not Apply

The doctrine of equitable tolling has been used to toll the statute of limitations when "the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dep't of Admin., 523 So. 2d 1132, 1133-34 (Fla. 1988). Like the doctrine of fraudulent concealment discussed above, the Florida Legislature did not include the doctrine of equitable tolling among the specifically enumerated tolling instances in section 95.051(1), Florida Statutes. Accordingly, section 95.051(2), Florida Statutes precludes the use of equitable tolling in this case. See Hearndon, 767 So. 2d at 1185 (recognizing that the Florida Legislature enumerated specific grounds for tolling in section 95.051(1), Florida Statutes and precluded the application of tolling for reasons not provided therein; receding from cases that had tolled the statute of limitations); see also Morsani, 790 So. 2d at 1075 (recognizing that "[s]ection 95.051 delineates an exclusive list of conditions that can 'toll' the running of the statute of limitations").

Further, the Florida Supreme Court has applied the equitable tolling doctrine only in the administrative law context. See generally Machules, 523 So. 2d 1132 (Fla. 1988). Relying on

Florida Supreme Court precedent, the Fourth District Court of Appeal has declined to extend it further. See HCA Health Servs. of Fla., Inc. v. Hillman, 906 So. 2d 1094, 1098 (Fla. 2d DCA 2004) (declining to expand Machules beyond the administrative law context; recognizing the clear indication of the Florida Legislature in section 95.051(2), Florida Statutes to preclude any tolling provision not explicitly listed in section 95.051(1), Florida Statutes; relying in part on Hearndon and Morsani).

Finally, neither Plaintiffs' allegations nor the undisputed facts portray the Lennar or Kings Ridge Defendants as affirmatively misleading or lulling Plaintiffs into foregoing their right to file a Complaint. Nor do Plaintiffs complain of any extraordinary circumstances preventing them from timely filing the Complaint.

d. Equitable Estoppel Does Not Apply

Unlike the above doctrines, the doctrine of equitable estoppel is a valid avoidance that has not been abrogated by statute. See Morsani, 790 So. 2d at 1077 (explaining that section 95.051, Florida Statutes does not abrogate equitable estoppel because the doctrine "does not 'toll' anything," instead it "operates on the party" to estop or bar the party from asserting the defense). The Florida Supreme Court has most recently defined equitable estoppel as follows:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is *absolutely precluded*, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in *good faith relied upon such conduct* and has been led thereby *to change his position for the worse*, and who on his part acquires some corresponding right, either of property, or of contract or of remedy.
>
> The doctrine of estoppel is applicable in all cases where one, *by word, act or conduct, willfully caused* another to believe in the existence of a certain state of things, and *thereby induces him to act on this belief* injuriously to himself, or to alter his own previous condition to his injury.

S.A.P, 835 So.2d at 1096-97, 1099 (citations and quotations omitted.)

Thus, for equitable estoppel to be applicable to this case, Plaintiffs must show: (1) that the Defendants "willfully" acted by "word, act, or conduct;" (2) that the Plaintiffs "in good faith relied upon" such conduct; and (3) that such reliance "absolutely precluded" Plaintiffs from filing the Complaint within the applicable statute of limitations Id.

First, it cannot be maintained that Defendants willfully acted by word, act, or conduct to preclude the Plaintiffs from filing suit. In Delco Oil, Inc. v. Pannu, 856 So. 2d 1070 (Fla. 5th DCA 2003), the defendant was alleged to have breached the agreement by representing that he had title to property and thereafter purported to convey title to the plaintiff when, in fact, defendant never had title. Id. at 1071. The plaintiff argued that the defendant's misrepresentation was designed to lull plaintiff into not filing suit. Id. at 1073. The Fifth District disagreed and held: "[I]mportantly, there is no evidence in the record that [defendant] engaged in any conduct indicating an *intent* to lull [plaintiff] into a disadvantageous legal position or preventing [plaintiff] from filing this lawsuit within the applicable five year statute of limitations." Id. (emphasis added)

The doctrine of equitable estoppel is invoked only when it is clear the defendant intentionally and affirmatively lulls, such as by promises of correction or other action, a plaintiff into inaction for the duration of the limitations period. See, e.g., S.A.P., 835 So. 2d at 1093-99 (Department of Health and Rehabilitative Services actively concealing abuse of three-year-old child, obstructing law enforcement investigation of abuse, and falsifying relevant records to ensure that persons examining records would be misled into believing Department had appropriately discharged its supervision duties); Morsani, 739 So. 2d at 616 (majority owner of

baseball club issuing empty promises to minority owner of one day obtaining majority ownership until one day after statute of limitations had run on tortious interference claim); San Pedro v. San Pedro, 910 So. 2d 426, 429 (Fla. 4th DCA 2005) (abusive husband urging spouse to forbear from raising complaint in fear of losing job); Glantzis v. State Auto. Mut. Insur. Co., 573 So 2d 1049, 1051 (Fla. 4th DCA 1991) (defendant accepting to arbitrate and later withdrawing from arbitration as soon as statute of limitations had run).

This is not such a case. Plaintiffs do not allege one deliberate communication by the Lennar or Kings Ridge Defendants intended to, or that did, lull Plaintiffs into forbearing suit.[37] In fact, just the opposite, on September 14, 2000, a mere two weeks after the sale, the Lennar and Kings Ridge Defendants announced the Clubhouse sale to an audience of more than 100 Kings Ridge homeowners. Further, at the Motion to Dismiss hearing, the following dialogue between the Court and Plaintiffs' counsel took place:

> MR. ANTHONY: Well, what's alleged in the Complaint is no one was told anything until late 2004, early 2005, that's what's alleged in the Complaint.
>
> THE COURT: So were they told nothing or were they told something that was wrong? For example, if someone said, who owns the club facilities; were they told Lennar, were they told Kings Ridge L.L.C. or whatever the name of it is?
>
> MR. ANTHONY: Yeah, we don't allege that. We just allege that we were not told anything not that we were told the wrong thing.

(Motion to Dismiss Hearing Transcript, Feb. 8, 2006, at pp. 41-42) (emphasis added)[38].

---

[37] The closest the Complaint comes to alleging communication between the Lennar Defendants and the homeowners is the allegation that Lennar Partners sales associates were advised that nothing had changed with respect to the Club Facilities management and the rights of homeowners (Am. Compl. ¶ 47). The Complaint does not allege that the Lennar or Kings Ridge Defendants provided homeowners with any misinformation.

[38] Appx. Ex. 2.

Even if Plaintiffs had alleged some form of misinformation, that would be insufficient. The allegation must be one of an affirmative and deliberate act intended to delay Plaintiffs from filing suit, otherwise there are no grounds for equitable estoppel. Schlakman v. Burger King, 432 So. 2d 724, 724 (Fla. 3d DCA 1983) (holding that where there was no showing of "deliberate conduct" by the defendant intended to delay the plaintiff from filing suit, defendant was not estopped from asserting the defense of statute of limitations).

Second, in addition to a showing of deliberate, intentional, and willful conduct on the part of Defendants, Plaintiffs must establish that they relied in good faith upon such conduct. S.A.P, 835 So 2d at 1097; Delco Oil, Inc., 856 So. 2d at 1073. Specifically, the Plaintiffs must show that they "recognized a basis for a suit," but instead of filing suit, relied in good faith on Defendants' conduct to not bring suit. Brooks Tropicals, Inc. v. Acosta, No. 3D06-250, 2007 WL 1135697 at *4 (Fla. 3d DCA April 18, 2007) In Brooks, the plaintiff and defendant agreed on a proportionate method to distribute settlement funds. Id. at *2-4. The defendant allegedly breached the agreement by disproportionately distributing the funds and later concealing the method of such distribution. Id. at *4. Plaintiff argued that defendant's concealment was grounds for equitable estoppel. Id. The Third District disagreed and stated in part: (1) that plaintiff had testified "that he felt he could contact" defendant and others at any time with questions regarding the settlement; (2) that plaintiff was in no way kept from accessing available records regarding the settlement; and (3) that despite thinking there was something wrong with the settlement, plaintiff did not act upon it. Id. at *4-5.

Just as in Brooks, Plaintiffs cannot maintain that they relied in good faith upon any alleged concealment given that the Association President announced the Clubhouse sale at the

Town Meeting, made himself available to all questions relating to the sale, and answered all questions relating to the sale. Moreover, had there been any uncertainty on the part of Plaintiffs as to who the owner of the Clubhouse was, the public records were at all times accessible to them. In fact, Mr. Tirrell testified that as early as 2002 he had performed searches of the public records pertaining to the Clubhouse.[39] At least one document he obtained evidenced Kings Ridge L.L.C. as the owner of the Clubhouse.[40] Given these undisputed facts, Plaintiffs cannot be said to have in good faith relied upon any alleged concealment or misrepresentation by the Lennar or Kings Ridge Defendants.

Third, no form of affirmative inducement could have absolutely precluded the Plaintiffs from filing suit for the entirety of the limitations period for the Four-Year Claims or specific performance claim. Even if Plaintiffs succeed in establishing that they were unaware of the sale at the time it occurred, later discovery of the conveyance within the limitations period renders equitable estoppel inapplicable. See, e.g., Delco Oil, Inc., 856 So. 2d at 1073 (holding that where plaintiff discovered breach after it occurred but still within the limitations period, equitable estoppel was not a viable excuse for tardiness to file). As early as September 2000, the Association President announced at the Town Meeting that the Clubhouse had been sold. At no time was that announcement coupled with a plea by anyone, much less the Lennar or Kings Ridge Defendants, to forego lawsuits related to the conveyance. Given the testimony of Ms. Ash and Mr. Tirrell, it is clear that subsequent to the Town Meeting, but within the limitations period,

---

[39] Supra, pp. 12-13.
[40] Id.

many of the residents had ongoing discussions amongst themselves concerning the Clubhouse sale.[41]

D. Even if an Avoidance Doctrine Applied, the Plaintiffs' Specific Performance Claims Would Still be Time-Barred

In initially denying Defendants' motion for summary judgment, this Court relied on affidavits submitted by Plaintiffs declaring that they were ignorant of the sale of the Clubhouse until as late as 2005. In addition, this Court relied on the affidavit of Scott Rost, an attorney retained by the Kings Ridge Presidents Council, who conducted a title search on the Clubhouse site and erroneously concluded that the owner of the site in May of 2004 was Lennar Land Partners. These affidavits are insufficient to raise a genuine issue of material fact with respect to Plaintiffs' specific performance claims.

In the first place, it is a well settled principle in Florida that plaintiffs have "no right to shut [their] eyes or ears to avoid information, and then say that [they] [have] no notice; [] it will not suffice the law to remain willfully ignorant of a thing readily ascertainable . . . when the means of knowledge is at hand." Tarin v. Sniezek, 942 So. 2d 458, 461 (Fla. 4th DCA 2006).

In the instant case, Plaintiffs had information that would have led a reasonable person to assert their rights in 2000 or 2001 when notice of the sale of the Clubhouse was disclosed to their agent Sentry; disclosed at a town hall meeting attended by 100 or perhaps 150 club members including Plaintiff, Roy Gordon; disclosed at a Kings Ridge Community Association, Inc. meeting on February 22, 2001; and disclosed in the public records of Lake County, Florida. Nevertheless, Plaintiffs waited until August 30, 2005 to raise their specific performance claims

[41] Supra, pp. 11-12.

asserting that they did not have notice until recently. This willful ignorance is not sufficient to create a genuine issue of material fact on Plaintiffs' specific performance claims.

Along the same lines, Plaintiffs' reliance on allegedly erroneous Lake County Property Appraiser records is insufficient to create a genuine issue of material fact. See generally Affidavit of Maynard Tirrell. The Lake County Property Appraiser allows the public to conduct property record searches online. However, before engaging in such a search, the public must accept and agree to the following disclaimer:

> The Lake County Property Appraiser's web site should not be relied upon by anyone as a determination of the ownership of property, or market value. No warranties, expressed or implied, are provided for the accuracy of the data herein, its use, or its interpretation. Although this information is periodically updated, the information provided may not reflect the most current records on file with the Lake County Property Appraiser's Office . . .

http://www.lakecopropappr.com/property-disclaimer.aspx?to=%2fproperty-search.aspx, a true and accurate copy of which is attached hereto as **EXHIBIT A** (emphasis added).

Such a disclaimer is sufficient to put Plaintiffs on notice that further investigation of the status of the property was required. Carr Huml Investors, LLC v. Arizona, 2007 WL 4403981, *14 (D. Ariz. Dec. 11, 2007) (finding, as a matter of law, that plaintiffs had constructive knowledge of restrictions on their land through a disclaimer contained in erroneous public report which put plaintiffs on notice that further investigation of the status of the property might be required notwithstanding representations in public report). Had Plaintiffs conducted a further investigation, they would have discovered that the owner of the Clubhouse was Kings Ridge, L.L.C. and not Lennar Land Partners. See generally Affidavit of Title Examiner, Michael E. Godat, filed in support of Motion for Partial Summary Judgment as to Statute of Limitations.

Thus, any reliance by Plaintiffs on the Lake County Property Appraiser records was unreasonable as a matter of law. See Mac-Gray Services, Inc. v. DeGeorge, 913 So. 2d 630, 634 (Fla. 4th DCA 2005) (purchasers' reliance on oral representations of seller were not reasonable where purchasers agreed they were not relying on seller's expertise or any representations made by the seller in connection with purchase); Velasquez v. College, 738 So. 2d 1007 (Fla. 3d DCA 1999) (plaintiff's reliance on allegedly false statements was unjustifiable in light of clear and unambiguous disclaimer); Federal Deposit Insurance Corporation v. High Tech Medical Systems, Inc., 574 So. 2d 1121 (Fla. 4th DCA 1991) (accounting firm hired by debtor to keep lender informed of debtor's financial condition could not be held liable to lender for fraudulent or negligent misrepresentation in connection with report issued by accounting firm because of express and unambiguous disclaimer contained in report).

In any case, because the affidavits relate to facts and circumstances occurring before Plaintiffs William Campbell and Howard Randall admitted to learning of the sale of the Clubhouse in their capacities as members of the Transition Committing of the Kings Ridge Presidents Council, the affidavits are wholly irrelevant with respect to Plaintiffs' tolling argument and their specific performance claims.

William Campbell and Howard Randall obtained knowledge of the sale of the Clubhouse in late July or early August 2004. See Affidavit of William Campbell, ¶11 at pg. 3; Affidavit Howard Randall, ¶10 at pg. 3. Thus, absent evidence of fraudulent concealment on the part of the Defendants' post July or early August 2004 Plaintiffs should have asserted a cause of action for specific performance in July or early August 2005 (at the latest); not on August 30, 2005.

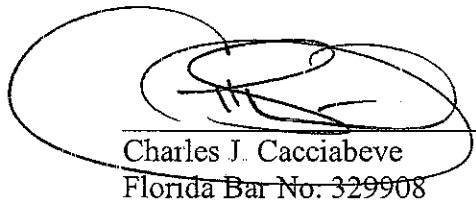
Further, the affidavit of Scott Rost, Esquire relates to a title search that was conducted in April 2004 – three months before William Campbell and Howard Randall admittedly learned of the sale of the Clubhouse. As such, the facts and circumstances set forth in that affidavit are entirely irrelevant.

What is more, since Mr. Rost's affidavit is clearly opposed to the common knowledge and the circumstances in this case it is insufficient to create a genuine issue of material fact for the jury on the issue of statute of limitations. See Watley v. Florida Power & Light Company, 192 So. 2d 27 (Fla. 1st DCA 1966) (testimony of homeowner that current from power company's power line arced five feet, in contradiction to testimony of two electrical experts that such phenomenon was physically impossible, created no genuine issue of material fact since it was contrary to common knowledge and inconsistent with the circumstances); Nurkiewicz v. Vacation Break U.S.A., Inc., 771 So. 2d 1271, 1273 (Fla. 4th DCA 2000) (affidavit of plaintiff's ergonomics expert, who rendered an opinion that a hatch in a galley floor presented an unreasonable risk of injury, created no genuine issue of material fact on negligence or unseaworthiness claims under the Jones Act since it was contrary to common knowledge and inconsistent with the circumstances).

If Plaintiffs are unhappy about the erroneous legal advice they were given they possess remedies. Thus, notwithstanding the affidavit testimony submitted in this matter, Plaintiffs' claims for specific performance are clearly barred by the one year statute of limitation set forth in Florida Statute § 95.11(5)(a).

IV. CONCLUSION

For all of the foregoing reasons, the Lennar and Kings Ridge Defendants respectfully request this Court grant its Motion for Summary Final Judgment as to all Plaintiffs' claims because they are barred by the applicable statute of limitations.



Charles J. Cacciabeve
Florida Bar No. 329908
Charlotte L. Warren
Florida Bar No. 065803
Michael P. Sampson
Florida Bar No. 622559
CARLTON FIELDS, P.A.
CNL Center at City Commons
450 S. Orange Avenue, Suite 500
Orlando, Florida 32801-3336
Telephone: (407) 849-0300
Facsimile: (407) 648-9099
Attorneys for Lennar and
Kings Ridge Defendants

CERTIFICATE OF SERVICE

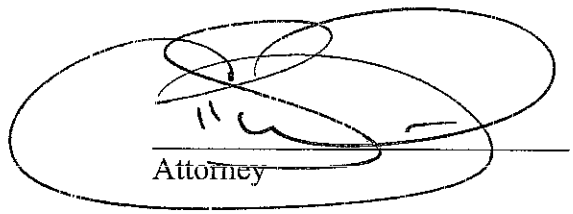
I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via hand delivery this 10th day of June, 2008 to:

Robert W. Anthony
Phil D'Aniello
Ladd H. Fassett
Fassett, Anthony & Taylor, P.A.
1325 West Colonial Drive
Orlando, FL 32804

and by U.S. mail to:

Phillip S. Smith
McLin & Burnsed, P.A.
P. O. Box 491357
Leesburg, FL 34749-1357

Don H. Lester
Lester & Mitchell, P.A.
1035 LaSalle Street
Jacksonville, FL 32207

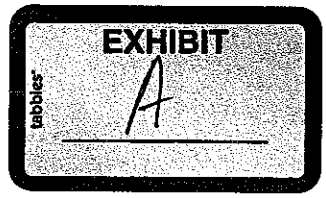


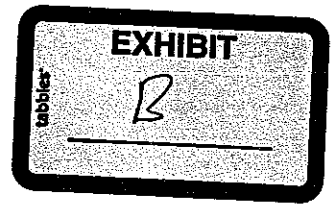
Records Search Terms of Use

The Lake County Property Appraiser's web site should not be relied upon by anyone as a determination of the ownership of property, or market value. No warranties, expressed or implied, are provided for the accuracy of the data herein, its use, or its interpretation. Although this information is periodically updated, the information provided may not reflect the most current records on file with the Lake County Property Appraiser's Office. The assessed values are NOT certified values and therefore are subject to change before being finalized for ad valorem assessment purposes

☐ I understand and accept the above statement.

Continue





22 Fla. L. Weekly S578a

NOT FINAL VERSION OF OPINION
Subsequent Changes at 24 Fla. L. Weekly S557a

Wrongful death -- Limitation of actions -- Tolling -- Fraudulent concealment of the identity of a tortfeasor does not toll the statute of limitations -- Wrongful death action against defendant was barred by statute of limitations where defendant initially denied involvement in murder of decedent, but confessed participation in crime after two-year limitations period for wrongful death actions had run -- Civil procedure -- Appeals -- Appellate court could properly remand case for entry of judgment in defendant's favor where defendant had moved for directed verdict at close of plaintiff's case and at close of all evidence, and, after verdict, moved for new trial but failed to renew motion for directed verdict

THE FULTON COUNTY ADMINISTRATOR, as Administrator of the Estate of LITA McCLINTON SULLIVAN, Petitioner, v. JAMES VINCENT SULLIVAN, Respondent. Supreme Court of Florida. Case No. 87,110. September 25, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 94-2137 (Palm Beach County) Counsel: Richard A. Kupfer, John B. Moores and David W. Boone of Richard A. Kupfer, P.A., West Palm Beach, for Petitioner. Randall Nordlund and Joseph E. Altschul of Gilbride, Heller & Brown, P.A., Miami, for Respondent. Roy D. Wasson, Miami, for Academy of Florida Trial Lawyers, Amicus Curiae.

(WELLS, J.) We have for review a decision certifying the following question to be of great public importance:

> ARE STATUTES OF LIMITATIONS FOR CIVIL ACTIONS TOLLED BY THE FRAUDULENT CONCEALMENT OF THE IDENTITY OF THE DEFENDANT?

Sullivan v. Fulton County Adm'r, 662 So. 2d 706 (Fla. 4th DCA 1995). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. Because we find that section 95.051, Florida Statutes (1985), sets forth the limited circumstances in which the statute of limitations may be tolled and that none of these exceptions include the fraudulent concealment of the identity of the tortfeasor, we answer the certified question in the negative. Albeit for different reasons than expressed below, we approve the district court's decision to the extent that it reversed the judgment against Sullivan.

On January 16, 1987, while respondent James Sullivan and his wife Lita Sullivan were going through divorce proceedings, Ms. Sullivan was killed in Atlanta, Georgia. Throughout the initial police investigation, respondent denied any involvement in the crime and proposed several alternative theories as to who may have killed her. It was not until several years later, in 1990, that respondent confessed his participation in the crime. Based on this information, on December 23, 1991, this wrongful death action was filed against respondent in Florida.

In answering the complaint, respondent raised the affirmative defense that the statute of limitations barred this claim. Petitioner Fulton County (Georgia) Administrator, as administrator of Ms. Sullivan's estate, argued that respondent's fraudulent concealment of his participation in the murder tolled the statutory limitation period. Twice during the trial, once at the close of the plaintiff's case and once at the close of all of the evidence,[1] respondent moved for a directed verdict, claiming among other things that the statute of limitations barred the lawsuit. The trial court denied both motions. After a jury trial, the jury awarded petitioner $3.5 million in compensatory damages and $500,000 in punitive damages. Sullivan then timely moved for a new trial and four months later moved for relief from the judgment under Florida Rule of Civil Procedure 1.540. The motion for new trial was based upon a claimed error in failing to enforce

the statute of limitations. The trial court denied these motions. However, Sullivan did not move to have the verdict set aside and judgment entered in his favor in accordance with the motion for directed verdict made at the close of all of the evidence as required by Florida Rule of Civil Procedure 1.480.

On appeal, the Fourth District reversed the verdict and remanded the cause for entry of judgment in respondent's favor. *Sullivan*. The district court found that Florida courts have recognized that fraudulent concealment of a cause of action will toll the statute of limitations. *Id.* at 707. However, the court felt constrained to reverse the trial court and follow its own precedent in *International Brotherhood of Carpenters & Joiners, Local 1765 v. United Ass'n of Journeymen & Apprentices*, 341 So. 2d 1005 (Fla. 4th DCA 1976), *cert. denied*, 357 So. 2d 186 (Fla. 1978), in which the district court held that fraudulent concealment of the identity of a tortfeasor does not fit within the judicially created tolling exception of concealment of a cause of action. *Sullivan*, 662 So. 2d at 708. The district court below questioned the propriety of this result in light of both recent case law from other jurisdictions holding that fraudulent concealment of one's identity should be treated like fraudulent concealment of a cause of action and the fairness of protecting a tortfeasor from defending a stale claim when the tortfeasor is responsible for the delay. *Id.*
at 708-09. As well, the district court concluded that even though fraudulent concealment was only included as a tolling provision in section 95.11(4)(b), Florida Statutes (1995), the medical malpractice statute of limitations, the doctrine could broadly apply to other causes of actions. *Id.* at 709-10 (citing *Proctor v. Schomberg*, 63 So. 2d 68 (Fla. 1953)). Given its discomfort with the result coupled with the fact that this Court had not yet addressed the issue, the district court certified the foregoing question, asking us to clarify whether fraudulent concealment of the identity of the defendant in a civil action will toll the statute of limitations. *Sullivan*, 662 So. 2d at 710. We agree with the logic and reasoning of Judge Klein's opinion that enforcing the statute of limitations under the facts of this case requires an unjust result.

Nevertheless, we are compelled to answer the certified question in the negative because we find that by enacting section 95.051 in 1975, the legislature specifically set forth the limited circumstances which will toll the statute of limitations. Since fraudulent concealment of the identity of the tortfeasor is not an enumerated circumstance, we find that in this case, to be timely, the wrongful death action should have been filed within two years of the death of the decedent. We are bound by the legislature's enactment, and therefore we approve the decision in this case which reverses the judgment against respondent.

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. *Id.* at 71-72 (quoting 34 Am. Jur. *Limitation of Actions*, § 231 (1941)). 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. *Id.* at 72. 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. *See* §§ 95.05, 95.07, Fla. Stat. (1949).

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. *Id.* at 32. The federal district court granted the defendant's motion for summary judgment on this basis, and on appeal, the United States

Court of Appeals for the Fifth Circuit certified to this Court three questions, one of which specifically addressed the tolling of the statute for fraudulent concealment. *Id.* at 28. 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. *Id.* at 37. 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.[2]

However, in 1974, the legislature enacted section 95.051, Florida Statutes, *see* ch. 74-382, § 4, Laws of Fla., 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. *See* § 95.051(1)(b)-(c), Fla. Stat. (1975). Notably absent from this list was fraudulent concealment of the identity of the actual tortfeasor. While section 95.11(4)(b)[3]
provided a tolling provision for fraudulent concealment of the discovery of the plaintiff's injury in medical malpractice actions,[4]
there was no similar tolling provision for wrongful death causes of action. *Compare* § 95.11(4)(b), Fla. Stat. (1975), *with*
§ 95.11(4)(d), Fla. Stat. (1975). 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, . . . the Florida Probate Code, or the Florida Guardianship Law." This exclusivity provision is applicable to this action. *See* § 95.051(2), Fla. Stat. (1985).

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, Florida Statutes (1985). When interpreting a statute, legislative intent is the polestar by which we are guided. *See Parker v. State*, 406 So. 2d 1089 (Fla. 1981). This intent is gleaned primarily from the plain language of the statute. *See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315 (Fla. 1992). When construing statutes of limitations, generally courts will not write in exceptions when the legislature has refused to do so. *Carey v. Beyer*, 75 So. 2d 217 (Fla. 1954).

Given these rules of construction, we 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. The statute specifically precludes application of any tolling provision not specifically provided for by the legislature. *See* § 95.051(2), Fla. Stat. (1985). In the face of such clear legislative direction, we are compelled to hold that fraudulent concealment of the identity of a tortfeasor in actions such as the one before us today will not toll the statute of limitations. *See Carey; Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) ("We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof."); *Swartzman v. Harlan*, 535 So. 2d 605 (Fla. 2d DCA 1988) (finding that under section 95.051(2), Florida Statutes (1987), the court was not able to create an exception to toll the statute of limitations not specifically enumerated by the legislature); *In re Southeast Banking Corp.*, 855 F. Supp. 353 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1539 (1995) (same).

As a result, we find that in this case the statute of limitations was not tolled by respondent's fraudulent concealment. In Florida, a cause of action for wrongful death accrues on the date of death, *see St. Francis Hosp. v. Thompson*, 159 Fla. 453, 31 So. 2d 710 (1947), and has a two-year statute of limitations period. *See*
§ 95.11(4)(d), Fla. Stat. (1985). The statute of limitations accordingly began to run in this case on January 16, 1987. Since this action was brought outside of this period and petitioner did not demonstrate any reason recognized in Florida for tolling the statute, the district court properly reversed the judgment against respondent. However, the district court based its conclusion on the scope of the fraudulent concealment doctrine rather than the statute of limitations. We therefore disapprove of the reasoning of the district court on this point.

However, as previously stated, we do agree with Judge Klein that the statute of limitations requires an unjust result in cases such as the one presented here. We therefore recommend that the legislature examine this issue and should it agree, enact an amendment to the statute to avoid such an unfair result.

Finally, we address a procedural issue raised by petitioner [5] Petitioner contends that the district court could not direct the trial court to enter judgment in favor of respondent because respondent did not renew his motion for directed verdict strictly in accord with Florida Rule of Civil Procedure 1.480. Petitioner points to the federal courts' interpretation of Federal Rule of Civil Procedure 50(b), *see Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48 (1952); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), and argues that we should follow these decisions and hold that a party who fails to renew a motion for directed verdict and only files a motion for new trial is not entitled to a judgment entered in a party's favor. Rather, with the case in such a posture, petitioner argues that an appellate court may only grant the party a new trial. We do not agree; instead, we agree with Justice Frankfurter's dissent in *Johnson* that such an application of the rule does not facilitate the proper administration of justice.[6]

Respondent's motion for new trial was based upon his statutory limitation defense. It is correct that technically, in addition to the motion for new trial, respondent should have filed a motion renewing his earlier motion for directed verdict in compliance with Florida Rule of Civil Procedure 1.480. However, when a motion for new trial encompasses the same legal basis upon which a motion for directed verdict was made during the trial and at the close of all the evidence, our courts should look to the substance of the motion and rule on the basis of the legal issue raised in the motion. Therefore, we reject petitioner's claim that the district court, after reversing the final judgment, was powerless to direct the entry of judgment in respondent's favor.

Accordingly, we answer the certified question in the negative and for the reasons stated in this opinion, approve the district court's decision to reverse the judgment against respondent.

It is so ordered. (OVERTON and HARDING, JJ., concur. GRIMES, J., concurs with an opinion, in which OVERTON, J., concurs. ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J. and SHAW, J., concurs.)

-- -- -- --

(GRIMES, J., concurring.) I cannot agree that a motion for new trial meets the requirements of the motion contemplated by Florida Rule of Civil Procedure 1.480(b). Rule 1.480(b), which tracked the language of Federal Rule 50(b) until it was slightly reworded in 1991, reads as follows:

> (b) Reservation of Decision on Motion. When a motion for a directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the return of a verdict, a party who has timely moved for a directed verdict may serve a motion to set aside the verdict and any judgment entered thereon and to enter judgment in accordance with the motion for a directed verdict. If a verdict was not returned, a party who has timely moved for a directed verdict may serve a motion for judgment in accordance with the motion for a directed verdict within 10 days after discharge of the jury.

A motion for new trial is entirely different from a motion to have a verdict and any judgment entered thereon set aside and to have judgment entered in accordance with a motion for directed verdict. Even if both motions are premised upon the same grounds, the relief they seek is entirely different.

I cannot quarrel with the substance of Justice Frankfurter's dissent in *Johnson v. New York, New*

Haven & Hartford R.R., 344 U.S. 48 (1952), quoted in footnote 6 of the majority opinion. However, that case was entirely different from the instant case. In *Johnson*, the defendant filed not only a motion for new trial but also filed a motion to set aside the verdict. What Justice Frankfurter was complaining about was that the majority opinion did not give effect to the motion to set aside the verdict because it did not also contain a request to have a judgment entered in accordance with the motion for directed verdict. In the instant case, there was no motion to set aside the verdict. The motion for new trial was clearly outside the scope of the motion required by rule 1.480(b).

Notwithstanding, I reluctantly concur in the decision because Sullivan raised a statute of limitations argument in his motion for new trial. Based upon the majority's indisputably correct analysis of the limitations issue, this would mean that Johnson's motion for new trial would have to be granted. Thereafter, upon a motion for summary judgment, the trial judge would be bound to enter a judgment for Sullivan based upon the rationale of this opinion. Because the Fulton County Administrator could not get around the statute of limitations defense, there would be no point in requiring the parties to undergo such useless activity. (OVERTON, J., concurs.)

-- -- -- --

(ANSTEAD, J., dissenting.) The majority holds that by enacting section 95.051 the legislature has silently done away with this Court's fraudulent concealment doctrine in all areas except medical malpractice. However, a legitimate question not addressed is why this action has taken over twenty years to be acknowledged, if indeed it is so apparent. Common sense would seem to dictate that the enactment of a statute of limitations would not automatically "abolish" the sound and judicially erected equitable doctrine of fraudulent concealment as an affirmative avoidance to that technical defense. In my view, the medical malpractice statutory scheme simply reflects a legislative adoption of the soundness and fairness of the discovery rule, and its corollary, the fraudulent concealment doctrine, qualified by reasonable limitations on the time for commencing such suits. Logically, inclusion of a provision for fraudulent concealment within the medical malpractice statute indicates the legislature's affirmance of the rationale of our decision recognizing the doctrine in *Proctor*.[7]

The majority opinion also fails to note the case law outside of the medical malpractice arena where the doctrine of fraudulent concealment has been employed. As noted in *Proctor*, numerous examples of the application of the doctrine include:

> [A]ctions by clients for the misappropriation of moneys collected, . . . for the conversion of personal property, by an owner for the recovery of lost or stolen property, to recover for the unlawful underground mining of ore belonging to another, against the liability of promoters of a corporation to account to the corporation for illegal acts or profits, by a chattel mortgagee for the fraudulent concealment and removal of the property, by a shipper to recover for unjust discrimination by a common carrier, and in other particular actions.

63 So. 2d at 72 (quoting 34 Am.Jur. *Limitations of Actions* § 231 (1941)). Only recently, the First District recognized and reaffirmed the viability of the doctrine of fraudulent concealment in *S.A.P. v. State Department of Health & Rehabilitative Services*, 22 Fla. L. Weekly D2095 (Fla. 1st DCA Sept. 3, 1997).

In *S.A.P.*, the appellant alleged that when she was a four-year-old foster care child supervised by HRS, she suffered physical abuse and was subjected to malnourishment due to HRS's negligent failure to supervise and monitor her foster care placement and to take her away from her foster care parent. Moreover, the appellant claimed that HRS actively concealed the facts concerning the negligence and that her assigned case worker falsified records so it appeared that she had conducted monthly supervision visits with appellant and her sister. *Id.* at D2095-96. The trial court dismissed appellant's complaint with prejudice based on the running of the statute of limitations found

in section 768 28(12), Florida Statutes (1993).

On appeal, the First District recognized the general rule that "fraudulent concealment constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery of the concealment by the owner of the cause of action." *Id.* at D2096. Therefore, "[t]o establish fraudulent concealment sufficient to toll the statute, the plaintiff must show both successful concealment of the cause of action and a fraudulent means to achieve that concealment." *Id.* (citing *Nardone v. Reynolds*, 333 So. 2d 25, 37 (Fla. 1976)). The First District concluded that appellant had met her burden in stating a cause of action for negligence; that appellant had properly invoked the equitable principle of fraudulent concealment; and that HRS's statute of limitations defense did not "affirmatively appear on the face of the complaint " *S.A.P.*, 22 Fla. L Weekly at D2096

Further support for the proposition that the medical malpractice statute of limitations' mention of fraudulent concealment was not intended to grant an additional right is found in *Berisford v. Jack Eckerd Corp.*, 667 So. 2d 809 (Fla. 4th DCA 1995). In *Berisford*, the plaintiff alleged that his deceased wife's liver failure was caused by a pharmacy which had refilled prescriptions without authorization from her physician. He further contended that the pharmacy engaged in fraudulent concealment during discovery by presenting a certification of authorization for each refill.

On appeal, the Fourth District noted that although there is "no specific reference to fraudulent concealment in any subsection of the provisions concerning statutes of limitations" other than medical malpractice, the doctrine still applies to a wide variety of cases. *Id.* at 810. Relying on our decision in *University of Miami v. Bogorff*, 583 So. 2d 1000, 1003 (Fla. 1991), the district court concluded that the reference to fraud, concealment, or intentional misrepresentation within the medical malpractice statute of limitations was intended to create a statute of repose to limit the ability of plaintiffs to maintain an action even if the fraud went undiscovered. 667 So. 2d at 810-11.

Similarly, in *Vargas v. Glades General Hospital*, 566 So. 2d 282 (Fla. 4th DCA 1990), the Fourth District held that even though the waiver of sovereign immunity should be strictly construed, fraudulent concealment would toll the running of the statute of limitations contained in section 768.28 despite the lack of a specific statutory provision for fraudulent concealment. *Id.* at 284. As the district court observed:

> [T]o disallow the doctrine of equitable tolling of the statute of limitations for fraudulent concealment in cases of state agencies would defeat the legislative purpose of allowing citizens who have been injured by tortious state conduct to recover damages.
>
> Fraudulent concealment as an exception to the statute of limitations has as its philosophy that "courts will not protect defendants who are directly responsible for the delays of filing because of their own willful acts." *Nardone* [*v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976)]. *It is a doctrine to prevent the court from participating in the fraud of the defendant.* Such a doctrine applies to all who come to the court for redress. And consistent with the provision of the waiver statute to make the state liable "to the same extent as a private individual under like circumstances . . ." the state is treated in the same manner as a private individual in applying the equitable doctrine of tolling. For these reasons, we hold that the statute of limitations contained in section 768.28(11), Florida Statutes, may be tolled by fraudulent concealment of the facts necessary to put the injured party on notice of the negligent act or the resulting injury.

Id.
at 285 (emphasis added). The Fourth District also noted that "statutes should . . . be construed in light of [their] manifest purpose." *Id.*
at 284. An analysis of the policy behind the medical malpractice statute of limitations and the tolling

provision statute demonstrates that the legislature is aware of competing purposes and has fashioned a statutory scheme which balances these purposes. The purpose of the medical malpractice statute of limitations and statute of repose is to reduce the cost of malpractice insurance premiums, *Carr v. Broward County*, 541 So. 2d 92, 94 (Fla. 1989), not provide a safe haven for wrongdoers who fraudulently conceal their identities. *See Goodlet v. Steckler*, 586 So. 2d 74, 77 (Fla. 2d DCA 1991) (Lehan, J., concurring) (acknowledging that in some medical malpractice actions the circumstances may be analyzed "from the standpoint of the doctrine of fraudulent concealment under which the statute of limitations may be tolled, or its triggering prevented, by the concealment of defendant's involvement with an incident of malpractice").

Conversely, the logical purpose behind the statute of limitations tolling provision is to facilitate the administration of justice. There has been no suggestion that fraud or concealment is more rampant in the medical field than elsewhere, thus necessitating an exclusion from the general rule of section 95.051, or that medical malpractice plaintiffs are in some way more deserving of favored treatment than other types of plaintiffs.[8] Accordingly, given the Wrongful Death Act's remedial purpose,[9] the continuing vitality of the fraudulent concealment doctrine should not be in question merely because the legislature did not specifically include it in the list of tolling provisions. Therefore, proper interpretation of the medical malpractice statute implicitly recognizes the continuing viability of the fraudulent concealment doctrine.

As in Florida, the Texas Wrongful Death Act is purely a statutory creation. However, that has not prevented Texas from deciding that the *equitable* principle of fraudulent concealment still applies to toll its statutorily created wrongful death act. *See, e.g., Cox v. Upjohn Co.*, 913 S.W.2d 225 (Tex. App. 1995); *Allen v. American Petrofina, Inc.*, 837 S.W.2d 415 (Tex. App. 1992), *rev'd in part on other grounds*, 887 S.W.2d 829 (Tex. 1994); *Borderlon v. Peck*, 661 S.W.2d 907, 909 (Tex. 1983) (holding that Texas' medical malpractice statute did not abolish "fraudulent concealment as an equitable estoppel to the affirmative defense of limitations").

In *Cox*, the court was faced with interpreting Texas' wrongful death statute[10] which has an absolute two-year bar. Like the majority's analysis, the appellees contended that the inclusion of a specific fraud provision for tolling a statute of limitations in a related chapter[11] meant the legislature must have considered the doctrine and found it inappropriate to include in the wrongful death statute. The Texas Court of Appeals disagreed, instead finding:

> Unlike the discovery rule, the doctrine of fraudulent concealment does not establish when a cause of action *accrues*. Rather, it is an equitable doctrine whereby a "defendant who conceals his wrongful conduct, either by failing to disclose it when under a duty to disclose or by lying about his conduct, is *estopped* to assert the statute of limitations."

Cox, 913 S.W.2d at 230 (quoting *Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex. App. 1991) (alteration in original). The *Cox* court also extensively surveyed the status of fraudulent concealment in wrongful death actions among various jurisdictions. That review revealed that some states have statutory provisions providing for extended statutes of limitations where fraudulent concealment is involved;[12] others have less defined accrual rules in their wrongful death statutes and have determined that if the facts support fraudulent concealment, it may be applied to estop the defendant from asserting the statute of limitations;[13] and still others, such as Florida, have defined causes of action for wrongful death as accruing at the death of the injured party[14] and provide that fraudulent concealment may toll or extend the statute of limitations.[15] A minority of jurisdictions have rejected these approaches.[16]

Had this case been brought in Georgia, the situs of Lita Sullivan's murder, the plaintiff would unquestionably have been able to set aside Sullivan's defense. Section 9-3-96, Georgia Code Annotated (1982), provides that where there is "fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." This section was made applicable to the five-year statute of repose by *Hill v. Fordham*, 367 S.E.2d 128, 132 (Ga. Ct. App. 1988) (reasoning that "[t]he sun never sets on fraud"). Thus, Georgia is among the majority of other jurisdictions having found that fraudulent concealment will toll the statute of limitations for wrongful death.

CONCLUSION

In all the cases above, the common element is that deception by the defendant will not be tolerated. The courts, either through a *Berisford*
analysis, estoppel, or "exception" rationales have prevented the use of the statute of limitations as a technical defense to affirmative wrongdoing. While the majority feels constrained to apply a plain meaning analysis, such an interpretation is clearly inappropriate in this case as it leads to an illogical and unconscionable result. Moreover, that type of "plain meaning" analysis is inconsistent with our historical method of statutory interpretation. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (reaffirming that "a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion").

Fraudulent concealment is defined as "[t]he employment of artifice planned to prevent inquiry or escape investigation and to mislead or hinder the acquisition of information disclosing a right of action; acts relied on must be of an affirmative character and fraudulent." *Black's Law Dictionary* at 662 (6th ed. 1990). Equitable is defined as "[j]ust; conformable to the principles of justice and right." *Id.*
at 537. Throughout American legal history, courts have consistently used their inherent equitable powers in employing the doctrine of fraudulent concealment to defeat a party's attempt to frustrate justice through a technical defense.[17]
Obviously, courts and juries must apply this doctrine cautiously and good reason must be clearly established to avoid a statute of limitations defense However, in certain situations the equitable doctrine of fraudulent concealment should be available despite the laudable public policy rationale underlying statutes of limitation.[18]
This case exemplifies, writ large, why that doctrine must remain a viable tool through which a court administers justice. (KOGAN, C.J. and SHAW, J., concur.)

-- -- -- --

[1]In this motion, respondent renewed his earlier motion for directed verdict.

[2]The applicable statute of limitations in *Nardone* was the 1971 statute. *Id.* at 32.

[3]Section 95.11(4)(b), Florida Statues (1975), provided in pertinent part:

> In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

[4]The legislature has since provided two tolling provisions in the medical malpractice statute

concerning the presuit investigation period. *See* §§ 766.104(2), 766.106(4), Fla. Stat. (1995); *Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993).

[5]Given our jurisdiction on the basis of the certified question, we have jurisdiction over all of the issues raised in this case. *Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994).

[6]Justice Frankfurter wrote:

> The Federal Rules of Civil Procedure are the product of the progress of centuries from the medieval court-room contest -- a thinly disguised version of trial by combat -- to modern litigation "Procedure is the means; full, equal and exact enforcement of substantive law is the end." Pound, The Etiquette of Justice, 3 Proceedings Neb. St. Bar Assn. 231 (1909). This basic consideration underlies the Rules; with it in mind we construed Rule 50(b) in the Montgomery Ward case.
>
> It has been said of the great Baron Parke: "His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation." Sir James Parke, 15 D.N.B. 226
>
> Baron Parke despaired prematurely. If he had waited another hundred years this Court today would have vindicated his belief that judges must be imprisoned in technicalities of their own devising, that obedience to lifeless formality is the way to justice.

Johnson, 344 U.S. at 62 (Frankfurter, J., dissenting).

[7]The legislative history of section 95.11(4)(b) does not provide guidance on this issue as no staff analyses have been retained by the Florida State Archives.

[8]In the 1996 session, the legislature saw fit to include within the medical malpractice statute of limitations a provision creating an exemption from bar under both the statute of limitations and the statute of repose for a minor until he reaches his eighth birthday. *See* § 95.11(4)(b), Fla. Stat. (Supp. 1996).

[9]*See* § 768.17, Fla. Stat. (1995) ("It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-768.27 are remedial and shall be liberally construed "); *Stern v. Miller*, 348 So. 2d 303, 308 (Fla. 1977) (recognizing the that the Wrongful Death Act "is remedial in nature and is to be construed liberally").

[10]Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b) (West 1986).

[11]Tex. Civ. Prac. & Rem. Code Ann. § 16.009 (West 1986) states:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.
>
> . . . .
>
> (e) This section does not bar an action: . . .

> (3) based on wilful misconduct or fraudulent concealment in connection with the performance of the construction or repair.

[12] *See, e.g., Geisz v. Greater Baltimore Med. Ctr.*, 545 A.2d 658 (Md. 1988); *Fowles v. Lingos*, 569 N.E.2d 416 (Mass. App. Ct. 1991); *Smile v. Lawson*, 435 S.W.2d 325 (Mo. 1968) (en banc); *Howell v. Murphy*, 844 S.W 2d 42 (Mo. Ct. App. 1992, *Krueger v. St. Joseph's Hosp.*, 305 N.W.2d 18 (N.D. 1981); *Merrill v. Reville*, 380 A.2d 96 (Vt. 1977).

[13] *See, e.g., Baker v. Beech Aircraft Corp.*, 114 Cal. Rptr. 171 (Ct. App. 1974); *Molineux v. Reed,* 532 A.2d 792 (Pa. 1987).

[14] *See Walker v. Beech Aircraft Corp.*, 320 So. 2d 418 (Fla. 3d DCA 1975) (cause of action runs from date of death not discovery of cause of death)

[15] *See, e.g., Palmer v. Borg-Warner Corp.*, 838 P.2d 1243 (Alaska 1992); *Anson v. American Motors Corp.*, 747 P.2d 581 (Ariz. Ct. App. 1987).; *First Interstate Bank v. Piper Aircraft Corp.*, 744 P.2d 1197 (Colo. 1987); *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Muller v. Thaut*, 430 N.W.2d 884 (Neb. 1988); *Miller v. Romero*, 413 S E 2d 178 (W. Va. 1991).

[16] *See, e.g., Perry v. Staver*, 473 P.2d 380, 383 (N.M. Ct. App. 1970) (Wrongful death cause of action is a statutorily created right. "Estoppel cannot be successfully asserted to lengthen the existence of such a statutorily created right of recovery."); *Shover v. Cordis Corp.*, 574 N.E.2d 457 (Ohio 1991). Ohio courts have consistently held that fraudulent concealment will not enlarge the time for bringing an action under the statute of limitations. Fraud may only toll the statute of limitations where fraud is the gist of the action. In *Shover*, the court did indicate that the plaintiff could bring an action for fraud which had a longer statute of limitations than found in the wrongful death statute.

[17] In much the same way, a court may always refuse to enforce a grossly unfair contract under the equitable doctrine of unconscionability. *See* § U.C.C. § 2-302 cmts. 1-2 (1987).

[18] As stated by the United States Supreme Court in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1943):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

* * *