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Case No. SC 93906

IN THE SUPREME COURT OF MISSOURI

SALLY BOLAND, SHERRI LYNN HARPER, DAVID C. GANN, JENNIRAE LITTRELL, NATURAL DAUGHTER OF DECEDENT CLARENCE BAILEY WARNER, HELEN PITTMAN, NATURAL SISTER OF DECEDENT SHIRLEY R. ELLER,
Appellants,

v.

SAINT LUKE'S HEALTH SYSTEM, INC., SAINT LUKE'S HOSPITAL OF CHILLICOTHE F/K/A THE GRAND RIVER HEALTH SYSTEM CORPORATION D/B/A HEDRICK MEDICAL CENTER, AND COMMUNITY HEALTH GROUP,
Respondents.

SUBSTITUTE BRIEF OF APPELLANTS

Consolidated Appeals from the Circuit Court of Livingston County, Missouri
The Honorable Thomas N. Chapman, Circuit Judge
Circuit Court Case Nos. 10LV-CC00150, 10LV-CC00151, and 11LV-CC00004
and
The Honorable Jason A. Kanoy, Circuit Judge
Circuit Court Case Nos. 10LV-CC00111 and 10LV-CC00112

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JURISDICTIONAL STATEMENT

This is an appeal from judgments in a wrongful death action entered in the Circuit Court of Livingston County, Missouri in favor of Defendants, Saint Luke's Health System, Inc., Saint Luke's Hospital of Chillicothe, fka, The Grand River Health System Corporation, dba, Hedrick Medical Center, and Community Health Group and against Plaintiffs. Plaintiffs then timely filed notices of appeal to the Missouri Court of Appeals, Western District. That Court decided the issues in favor of Appellants on November 26, 2013. After the Court of Appeals denied a motion for rehearing and application for transfer, Respondents filed their "Joint Application for Transfer Per Rule 83.04" to this Court. On March 25, 2014, this Court sustained the Joint Application and ordered transfer. Jurisdiction vests in this Court by virtue of Article V, § 10 of the Missouri Constitution.

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STATEMENT OF FACTS

These consolidated appeals arise from Respondents' wrongful conduct in permitting an employee to injure and kill a number of hospital patients while ignoring warnings from other staff, public officials, and law enforcement and instead engaging in coordinated and purposeful conduct to hide and conceal Respondents' tortious conduct from Appellant and others. These consolidated appeals arise from entries of Judgment on the Pleadings, thus the facts and averments as alleged in the various Petitions[1] are admitted as true for the purposes of the Motions for Judgment on the Pleadings. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. *en banc*. 2000).

Specifically, the trial court in the *Pittman* and *Littrell* appeals assumed, for the purposes of its judgment on the pleadings, the following facts to be true:

(1) On March 9, 2002, an employee of Hedrick Medical Center wrongfully caused the death of Shirley R. Eller (Pittman appeal); on April 15, 2002, an employee of Hedrick Medical Center wrongfully caused the death of Clarence Bailey Warner (Littrell appeal);

(2) Plaintiffs, Boland, Pittman, and Littrell, commenced their suits on July 14, 2010. Plaintiffs, Gann and Harper, commenced their suits on October 4, 2010;

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[1] Boland LF 9-28; Gann LF 9-28; Harper LF 9-28, Littrell LF 9-28, 52-71; Pittman LF 10-29, 52-70.

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(3) Hedrick Medical Center fraudulently concealed the acts of its employee and attempted to prevent the Plaintiffs from ascertaining the cause of death until more than three years after decedents' deaths.

Pittman LF 149; Littrell LF 139.

The Deaths

Charles O'Hara (Boland appeal) was admitted to the Hedrick Medical Center for evaluation of a high temperature, vomiting and agitation on February 3, 2002. Boland LF 11. At approximately 1:26 a.m. on February 4, 2002, Mr. O'Hara coded and died. Boland LF 11-12. Upon information and belief, a Hedrick Medical Center employee, respiratory therapist Jennifer Hall, Boland LF 14, administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Mr. O'Hara that resulted in his death. Boland LF 11, 14. Succinylcholine is a muscle relaxant that paralyzes the respiratory muscles. Boland LF 11-12. Succinylcholine is normally used in a hospital to allow the insertion of a breathing tube into the throat of a patient who is still conscious. *Ibid.* In higher doses, succinylcholine will result in paralysis and the victim slowly suffocates to death. Boland LF 12.

Shirley Eller (Pittman appeal) was being treated at Hedrick Medical Center at the time of her death on March 9, 2002. Pittman LF 54. Upon information and belief, Jennifer Hall administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Ms. Eller that resulted in her death. Pittman LF 56-57.

David Harper was only 37 years old when he died in the middle of the night, just hours before his scheduled discharge on March 22, 2002. Harper LF 11. Upon information

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and belief Jennifer Hall administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Mr. Harper that resulted in his death. *Ibid.* Harper LF 14.

Coval Gann had been watching a basketball game with his son, David, just hours before he coded and died at approximately 10:30 p.m. on March 30, 2002. Gann LF 11. Upon information and belief, Jennifer Hall administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Mr. Gann that resulted in his death. *Ibid.* Gann LF 14.

Clarence Warner (Littrell Appeal) was being treated at Hedrick Medical Center at the time of his death on April 15, 2002. Littrell LF 54. Upon information and belief, Jennifer Hall administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Mr. Warner that resulted in his death. Littrell LF 56-57.

The Cover Up

In 2002, Hedrick's facility in Chillicothe, Missouri had experienced a number of suspicious deaths, each of which involved Jennifer Hall, a Hedrick employee who had access to the lethal drugs. Boland LF 12, 14.[2] The number of deaths spiked dramatically at the Hedrick facility between January 2002 and May 2002. Boland LF 14. Though Hedrick's doctors, nurses, and administrators knew of the suspicious deaths, Hedrick engaged in an organized scheme to systematically conceal any indication of the spike in fatalities at the hospital as well as their suspicious nature. Boland LF 12.

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[2] For this portion of the statement of facts, Appellants cite to the Boland Legal File, though these facts are substantially similar for all five consolidated appeals.

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Respondents intentionally and fraudulently concealed all indications of their tortious conduct in at least the following manners:

- Threatened and coerced employees of Respondent Hedrick to conceal information concerning the actions of their employee, Jennifer Hall, described above;
- Failed to request that autopsies be performed so as to conceal the true causes of the patients' deaths when they knew that there were a number of suspicious deaths that were occurring;
- Informed and/or instructed employees of Hedrick to notify patient's families that the cause of death of Decedent and others were of "natural" causes instead of at the hands of Jennifer Hall;
- Disbanded committees put in place by Defendant Hedrick to evaluate codes and determine preventative measures;
- Failed to inform pertinent individuals and relevant medical committees that had authority to act about Jennifer Hall's intentional and/or negligent battery of patients;
- Failed to investigate and/or monitor the activities of Jennifer Hall when requested to do so by law enforcement; and/or
- Discarded and/or failed to preserve crucial material evidence contained in Jennifer Hall's locker pertaining to her intentional and/or negligent battery committed as described above.

Boland LF 14-15.

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Dr. Cal Greenlaw, M.D. is a physician in Chillicothe, Missouri who had admitting privileges at Hedrick Medical Center during the relevant time frame. Boland LF 106. While working in the emergency room on February 18, 2002, Dr. Greenlaw treated a patient who suddenly coded due to a cardiovascular collapse. *Ibid.* Though Dr. Greenlaw could not identify a valid medical basis for the patient's unusual blood sugar / insulin events, the patient's blood sugar levels kept bottoming out to zero. *Ibid.*

Dr. Greenlaw worked with the patient "throughout the night trying everything possible to save her life." *Ibid.* He checked to see if the patient had accidentally been injected with insulin, though his investigation revealed nothing. *Ibid.* At this point, Dr. Greenlaw suspected "that someone had put insulin in her IV bags as there was no other valid medical basis for her body to be releasing that much insulin on a continual basis." Boland LF 107.

Dr. Greenlaw was told by a nurse in the ICU of two other suspicious codes and resulting deaths before the incident he experienced on February 18, 2002. *Ibid.* Dr. Greenlaw "immediately became suspicious that someone in the industry was attempting to kill patients." *Ibid.* Dr. Greenlaw contacted Livingston County Coroner, Scott Lindley, who contacted the county prosecutor. *Ibid.*

At a meeting of Hedrick personnel on March 12, 2002, Dr. Greenlaw voiced his "concerns to hospital administration that there was someone on staff at Hedrick who was attempting to kill and sometimes succeeding in killing patients." *Ibid.* Following the meeting, Dr. Greenlaw heard Hedrick's director of nurses, Julie Jones, say, "We don't have a problem here and if anyone breathes a word of this you'll be fired." Boland LF 107-08.

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On March 26, 2002, Dr. Greenlaw met with Jim Johnson, Administrator of Hedrick Medical Center. Boland LF 85. Dr. Greenlaw told Johnson that he suspected Jennifer Hall, a respiratory therapist, of killing patients. *Ibid.* Johnson said, "No, we don't have a problem. We can't let this get out or it will affect our admissions." *Ibid.* After the meeting, Johnson instructed Hedrick nurses they would be fired if they were seen talking or even walking with Dr. Greenlaw. *Ibid.*

Despite Dr. Greenlaw's warnings to hospital administration, suspicious deaths kept occurring at the Hedrick facility. Boland LF 109. Dr. Greenlaw gathered evidence on 9 code blues and 9 additional code blues resulting in death from February 2002 through May 2002 which were suspicious and which occurred while Jennifer Hall was on duty. *Ibid.* Overall, Dr. Greenlaw is aware of 18 code blues and nine suspicious deaths at the Hedrick facility from February 3, 2002 through May 17, 2002. Boland LF 110.

Aleta Boyd, RN, is a Registered Nurse and worked at Hedrick Medical Center for 17 years. Boland LF 82. In 2002, Ms. Boyd worked as Hedrick's risk manager for internal events, which included events such as patient falls, infection rates, and medication errors. *Ibid.* During the first week of March 2002, Ms. Boyd "became aware that there was a drastic increase in code blue events and deaths during the month of February." *Ibid.* After speaking with nurses and the pharmacist to rule out nursing error in the administration of insulin, Ms. Boyd "became suspicious that patients were intentionally being injected with insulin or some other drug causing them to have these insulin events." *Ibid.* Ms. Boyd appointed fellow nurses, Cheryl Fields and Kathi Lake, to start an internal investigation in early March 2002 and report their findings to Ms. Boyd. *Ibid.*

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Ms. Boyd reported her findings to Julie Jones, director of nurses, in March 2002. LF 83. Boyd told Jones she "believed Jennifer Hall was harming our patients as she was the common denominator in all of the events." *Ibid.* Boyd informed Jones she "wanted to alert other nurses to be on the lookout for suspicious behavior of any employees." *Ibid.* However, Jones instructed Boyd to not speak with other nurses about the matter; "not to involve anyone else and to keep this matter confidential and 'in my office.'" *Ibid.*

In addition to Jones, nurse Boyd also alerted Jim Johnson, hospital administrator, in March 2002. Johnson insinuated that Boyd's concerns were unfounded. *Ibid.* Boyd "got the distinct impression from both Jim Johnson and Julie Jones that if [she] got very aggressive in [her] investigation of this matter that [she] would no longer be employed at Hedrick Medical Center." *Ibid.*

From March 2002 through May 2002, Boyd continued to receive "event and/or incident reports" of code blue events and deaths. *Ibid.* Boyd reported to hospital administration the "very apparent trend of suspicious codes and deaths." Boland LF 83-84. After reporting her findings to administration, Julie Jones told Boyd she "was not to tell anyone else, including other nurses, staff and/or patients, of [Boyd's] suspicions regarding Jennifer Hall." Boland LF 84. Boyd felt as if her job was threatened if she pushed the issue with administration. *Ibid.*

Boyd met again with Jim Johnson and Julie Jones in May 2002, along with two other nurses. *Ibid.* Boyd showed Johnson and Jones records of approximately 15 patients who either coded or died under suspicious circumstances. *Ibid.* Jennifer Hall was listed in each patient's record. *Ibid.*

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The nurses indicated a desire to inform the media if hospital administration failed to act to stop Jennifer Hall and the suspicious deaths at the hospital. *Ibid.* However, Jones' initial reaction was, "Oh my God, I can just see Channel 5 or Channel 2 showing up at our door." *Ibid.*

Patient Fern Franco died under suspicious circumstances in May 2002. Boland LF 85. Approximately two days later Jennifer Hall was suspended and later fired. *Ibid.* After her suspension, a partially used bottle of insulin was found in Jennifer Hall's locker. *Ibid.* "As a respiratory therapist, Jennifer Hall had no legitimate reason to have insulin or any other drugs in her possession. Further, as a respiratory therapist, Jennifer Hall had no legitimate reason to administer or inject patients with medication." *Ibid.* There were no additional suspicious or unusual codes or deaths after Jennifer Hall was fired from Hedrick Medical Center. *Ibid.*

Dr. John Shershow, M.D., is a physician and served as a surveyor and senior teaching faculty for the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) from 1989-2003. Boland LF 89, 93. The Joint Commission is the primary accreditation and certification entity used by more than 19,000 health organizations and programs in the United States. Boland LF 89. The Joint Commission defines a "sentinel event" as "an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof." *Ibid.* Health care providers are required to report sentinel events to patients and/or patients' families. *Ibid.*

Dr. Shershow identified a number of "sentinel" events that occurred at Hedrick Medical Center during 2002, including:

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- Charles O'Hara coded and died on February 4, 2002 [* Appellant in this case]
- Irvin Rounkles coded on February 12, 2002
- Shirley Eller coded and died on March 9, 2002 [* Appellant in this case]
- David Harper coded and died on March 22, 2002 [* Appellant in this case]
- Sarah Romeiser coded on March 27, 2002
- Coval Gann coded and died on March 30, 2002 [* Appellant in this case]
- Clarence Warner coded and died on April 14, 2002 [* Appellant in this cae]
- Fern Franco coded and died on May 18, 2002

Boland LF 90.

Despite their duty to do so, Respondents failed to notify the families of the patients – including Appellant – of Respondents' suspicion that these patients were intentionally harmed or murdered by Respondents' own employee. Boland LF 91.

Respondents' purpose in affirmatively concealing evidence of these – and other – sentinel events "was to conceal from plaintiffs the existence of a claim…." *Ibid.* Because Respondents intentionally and fraudulently concealed all indications of their tortious conduct, Appellants were not able to ascertain whether she had a cause of action against Respondents until shortly before the filing of their Petitions. Boland LF 12.

Procedural History

Defendants filed Motions for Judgment on the Pleadings in the Circuit Court. Three of the cases were pending before Judge Thomas N. Chapman and the other two were before Judge Jason A. Kanoy. Judge Chapman granted Defendants' Motions in the

Boland (LF 125-131), Harper (LF 126-132), and Gann (LF 126-132) cases on June 21, 2012. Judge Kanoy granted Defendants' Motions in the Littrell (LF 129-131) and Pittman (LF 139-141) cases on July 13, 2012. Plaintiffs appealed those Judgments to the Missouri Court of Appeals where the causes were consolidated. The Western District reversed the trial courts' Judgments on November 26, 2013. Subsequently this Court ordered transfer on March 25, 2014.

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POINT RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' WRONGFUL DEATH CLAIMS ON THE PLEADINGS BECAUSE APPELLANTS' CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS IN THAT RESPONDENTS INTENTIONALLY AND FRAUDULENTLY CONCEALED THE TORTIOUS NATURE OF DECEDENT'S DEATH CAUSED BY ADMINISTRATION OF A LETHAL OVERDOSE OF SUCCINYLCHOLINE, INSULIN, OR OTHER MEDICATIONS AND INTENTIONALLY AND FRAUDULENTLY CONCEALED THE SUSPICIOUS DEATHS OF NUMEROUS PATIENTS AT RESPONDENTS' FACILITY THAT OCCURRED FROM JANUARY 2002 TO MAY 2002 AND, DUE TO SUCH INTENTIONAL AND FRAUDULENT CONCEALMENT, APPELLANTS WERE DEPRIVED OF ANY EVIDENCE OF RESPONDENTS' TORTIOUS CONDUCT REGARDING DECEDENT'S DEATH.

Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).

O'Grady v. Brown, 654 S.W. 2d 904 (Mo. *en banc.* 1983).

Howell v. Murphy, 844 S.W. 2d 42 (Mo. App. W.D. 1992).

Sherwood v. Sutton, 5 Mason 143, 21 F.Cas 1303 (D.N.H. 1828)

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ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' WRONGFUL DEATH CLAIMS ON THE PLEADINGS BECAUSE APPELLANTS' CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS IN THAT RESPONDENTS INTENTIONALLY AND FRAUDULENTLY CONCEALED THE TORTIOUS NATURE OF DECEDENT'S DEATH CAUSED BY ADMINISTRATION OF A LETHAL OVERDOSE OF SUCCINYLCHOLINE, INSULIN, OR OTHER MEDICATION AND INTENTIONALLY AND FRAUDULENTLY CONCEALED THE SUSPICIOUS DEATHS OF NUMEROUS PATIENTS AT RESPONDENTS' FACILITY THAT OCCURRED FROM JANUARY 2002 TO MAY 2002 AND, DUE TO SUCH INTENTIONAL AND FRAUDULENT CONCEALMENT, APPELLANTS WERE DEPRIVED OF ANY EVIDENCE OF RESPONDENTS' TORTIOUS CONDUCT REGARDING DECEDENTS' DEATHS.

The ultimate question presented in this appeal is whether a defendant may defeat a wrongful death claim through intentional and fraudulent concealment of tortious conduct beyond the three-year statute of limitation.[3] Such a result is untenable and, as the Western

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[3] Respondents' sole basis for bringing its motion for judgment on the pleadings and the trial court's sole basis for entering judgment on the pleadings rested on the statute of limitations. See LF pp. 50-51, 125-131.

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District of the Court of Appeals has written, "is shocking to the conscience." *Howell v. Murphy*, 844 S.W.2d 42, 46 (Mo. App. 1992).

For the reasons set out in the Court of Appeals' opinion below, the Wrongful Death Statute of Limitations did not bar Plaintiffs' causes of action because they did not accrue due to Defendants' fraud which prevented them from becoming aware of the circumstances surrounding the deaths of their decedents. The Court of Appeals' approach is supported by prior Missouri case law and decisions from other states.

Alternatively, the statute of limitations was equitably tolled by Defendants' concealment, the statute of limitations did not run, or Defendants are equitably estopped from asserting the affirmative defense, and it is proper to toll the wrongful death statute of limitations due to Defendants' own fraudulent concealment of the tortious acts. While Missouri's wrongful death statute[4] is a legislative creation, it need *not* be "'strictly construed' because it is 'in derogation of the common law.'" *O'Grady v. Brown*, 654 S.W.2d 904, 907 (Mo. *en banc.* 1983). The wrongful death statute "[does] not take away any common law right; [it] was designed to mend the fabric of the common law, not to weaken it." *Ibid.* at 908. Thus, the wrongful death statute *must* be applied "with a view to promoting the apparent object of legislative enactment." *Ibid.*

This Court is free interpret the statute and its associated statute of limitation so as to effect the intended purposes of the statute as "[i]t has always been the duty of the common law court to perceive the import of major legislative innovations and to interweave the new

[4] R.S. Mo. § 537.080 (2000).

legislative policies with the inherited body of common law principles." *Ibid.* Moreover, "it is significant that the legislature has continued to incorporate common law principles of liability into the statute as the basis of entitlement to an action for wrongful death. This patently indicates that the legislature did not intend to occupy this field of law entirely, leaving no room for judicial development of wrongful death remedies. Instead, the drafters expected the statutory cause of action to keep pace with developments in the common law." *Ibid.* at 911.

Standard of Review

On appeal from a trial court's grant of motion for judgment on the pleadings, this Court reviews the allegations of the petition "to determine whether the facts pleaded therein are sufficient as a matter of law." *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. *en banc*. 2000). "The party moving for judgment on the pleadings admits, for the purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Ibid.* In this manner, the standard of review is similar to that for a motion to dismiss and judgment on the pleadings is proper if, and only if, "from the face of the pleadings, the moving party is entitled to a judgment as a matter of law." *Ibid.* If the circuit court dismisses based on the statute of limitations, the Court reviews "whether the face of the petition clearly establishes the affirmative defense" *Dupree v. Zenith Goldline Pharmaceuticals, Inc.,* 63 S.W.3d 220, 221 (Mo. *en banc*. 2002). In that regard the petition "is construed liberally, treating all facts alleged as true and construing allegations favorably to the plaintiff."

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The Common Law and Statutory Construction

Before turning directly to the argument, it is important to discuss the common law as it existed in 1855 when Missouri adopted its first adopted its Wrongful Death Act.

In 1816 the Missouri territorial legislature adopted a "Reception Statute" which provided as follows:

> The common law of England, which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the First, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law, usage, or custom to the contrary notwithstanding. . . .

1 TERR.LAWS, p. 436, § 1. In 1825, after Missouri became a state, the General Assembly enacted a new Reception Statute that was nearly identical to the 1816 act, R.S.1825, p. 491, § 1. The 1825 law remained substantively the same until 1917, when the legislature amended the Reception Statute to its present form, adding the highlighted language below:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not

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> local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, *but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.*

L.1917, p. 324. This version of the Reception Statute remains in force today, now codified as R.S.Mo. §1.010 (2000).

The adoption of the Reception Statute profoundly influenced the development of Missouri law, including its *statutory* law. As the Court of Appeals stated in *Goad-Ballinger Post 69 v. McNeill*, 716 S.W.2d 300, 304 (Mo.App.W.D. 1986), "The corpus of the common law *as well as its maxims and principles* are adopted into our jurisprudence by §1.010, . . . and are given force as the rule of action and decision in this state." (Citations omitted; emphasis added.) Indeed, the rules by which statutes are interpreted and construed derive directly from the common law and its maxims. As this Court noted in *Johnson v. Fluetsch*, 176 Mo. 452, 75 S.W. 1005, 1009 (Mo. 1903):

> Statutes are read and construed in the light of the common law. "Rules of interpretation and construction are derived from the common law, and, since that

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> law constitutes the foundation, and, primarily, the body and soul, of our jurisprudence, every statutory enactment is construed by its light, and with reference to its cognate principles."

(Citations omitted.) *Accord: Hannibal Trust Co. v. Elzea*, 315 Mo. 485, 286 S.W. 371, 378 (1926) (statutes are to be "construed as a part of a general and uniform system of jurisprudence," including the common law). When the legislature adopts a statute, it is presumed to have been aware of the existing common law at the time of its adoption, *James v. Farrington*, 844 S.W.2d 517, 520 (Mo.App.W.D. 1992); *State v. Thomas*, 351 Mo. 804, 174 S.W.2d 337, 340 (1943). Courts look not only to the common law of their own state, "but also to the common law in other jurisdictions, to uncover the defects, trends, and policies relating to a statute's subject matter." 2B SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 50:2 (7th ed. 2013). The First Edition of SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §289, at 373 (1891), summarizes the principles as follows:

> Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. *They supplement or change it*, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them it expounds them. If the statutes are in derogation of it, it yields and bides its time; if they are

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> cumulative, it still continues. Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles.

(Emphasis added.) The Seventh Edition of the same treatise notes that legislative enactments are usually (of necessity) more concise than the common law, which limits the "legislature's ability to provide specifically for numerous situations which might arise." 2B SUTHERLAND STATUTES, *supra*, § 50:2 (2013). The common law overcomes this shortcoming by "judicial constructions which modify and synchronize statute law with common law rules and maxims." *Ibid.* *Accord*, *Conrad v. Bowers*, 533 S.W.2d 614, 622 (Mo.App. 1975) (statutes are to be construed "to effect the modification and synchronization of statute law with common-law rules and maxims").

The working of these rules is demonstrated by Judge Waller Washington Graves' wonderful opinion in *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641, 642 (1908), which instantly captures its reader's attention with the pronouncement, "This is an exceedingly interesting case. The question for determination, bluntly stated, is, can a husband who murders his wife inherit the one-half part of her estate under § 2938, Rev. St. 1899?"

George and Lillie Maud Evans married in 1898. Lillie Maud never had children, but George had two daughters from a prior marriage. During the marriage the wife acquired two parcels of real estate in her sole name. On August 15, 1903, George

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committed the cold-blooded murder of Lillie Maud "without lawful provocation or excuse," and three hours later he died by his own hand. Lillie Maud was survived by two sisters; George by his daughters. The fight over the property began.

The daughters sought one-half of Lillie Maud's property by virtue of § 2938, which provided: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one–half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts." The statute plainly and unambiguously gave George the right to one-half of Lillie Maud's property; it provided no exception for husbands who murdered their wives.

The Court started its analysis by considering Missouri's adoption of the body of all the common law by the Reception Law "except where repealed, changed, or modified by statute." 108 S.W. at 643. The Court cited the opinion of the Tennessee Supreme Court in *Box v. Lanier*, 112 Tenn. 393, 79 S.W. 1042, 1045 (1903), where that court said:

> [T]here are certain general and fundamental maxims of the common law which control laws as well as contracts. Among these are: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy, and have their foundation in universal law administered in all civilized countries." These maxims embodied in the common law, and constituting an essential part of its warp and woof, are found announced

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> both in text-books and in reported cases. Without their recognition and enforcement by the courts, their judgments would excite the indignation of all right-thinking people.

108 S.W. at 643-644. *Perry* also observed that these maxims "have nowhere been superseded by statutes." *Ibid., citing, Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 190 (1889), and they had been a part of Missouri law since the 1816 Reception Statute and through its subsequent revisions, 108 S.W. at 644. The Court then discussed how a statute like § 2938 affects existing common law maxims, citing H. Black, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS, 239 (1st ed. 1896):

> No statute enters a field which was before entirely unoccupied. It either affirms, modifies or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have a thorough understanding of the laws, both common and statutory, which heretofore were applicable to the same subject. *Whether the statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law.*

108 S.W. at 645 (emphasis added). *Perry* also cited Volume I of Chancellor Kent's COMMENTARIES ON AMERICAN LAW 55 (1826), to similar effect: "Statutes are . . . to be

construed in reference to the principles of the common law, for it is not to be presumed the legislature intended to make any innovation upon the common law, further than the case absolutely required." 108 S.W. at 645.[5] (This rule retains its vitality, *State v. Kollenborn*, 304 S.W.2d 855, 862 (Mo. *en banc*. 1957).)

Perry went on to recite two other salient principles of statutory construction: (1) "A statute should be construed with reference to its spirit and reason; and the courts have power to declare that a case which falls within the letter of a statute is not governed by the

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[5] Though not cited by *Perry*, Sir Fortunatus Dwarris amplified Chancellor Kent's COMMENTARIES, adding that, "The law rather infers that the act did *not* intend to make any alteration [to the common law], *other* than what is specified, and *besides* what has been plainly pronounced." (Emphasis in original.) A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 564 (2d ed. 1848). The Second Edition of Dwarris' TREATISE had a notable impact on the development of American Law, and the influence of his scholarship was acknowledged by Justice Story, G. McDonald, THE LANGUAGE OF THE LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 367 (2010). A Lexis search shows that the various editions of Dwarris' TREATISE were cited by counsel or the Courts in 143 published opinions in Missouri, commencing in 1849, *Youse v. Norcum*, 12 Mo. 549. The language cited above was quoted by *Coyle v. Conway*, 35 Mo.App. 490 (1889).

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statute, because it is not within the spirit and reason of the law and the plain intention of the Legislature." 108 S.W. at 646. (2) "[T]he letter of a statute will not be followed when it leads to an absurd conclusion; but, on the contrary, the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it." *Ibid.* Thus, in such cases statutes are limited in their application so as not "to lead to injustice, oppression, or an absurd consequence, the presumption being indulged that the Legislature intended no such anomalous results." *Ibid*. at 648.

In the end the Court concluded that enactment of § 2938 did not repeal the common law maxims that no one shall be permitted to take advantage of his own wrong or acquire property by his own crime because it was not necessary to do so in "a reasonable interpretation of the new law." *Ibid*. at 645. Any other result would lead to injustice, oppression, and an absurd consequence:

> Can it be said that one, by high-handed murder, can not only make himself an heir in fact, when he had but a mere expectancy before, but further shall enjoy the fruits of his own crime? To us this seems abhorrent to all reason, *and reason is the better element of the law.*

Ibid. at 642 (emphasis added). Hence, the common law maxims and application of the spirit of the law could prevent the daughters from recovering for their father's homicidal acts, despite the plain language of the statute.

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Supplementing statutes with the common law is hardly a novel concept. In *Staples v. United States*, 511 U.S. 600 (1994), the defendant was convicted of possession of an unregistered machine gun in violation of the National Firearms Act, 26 U.S.C. § 5861(d). The district court refused to require a finding of *mens rea* as a predicate to convicting the defendant. In an opinion by Justice Clarence Thomas, a strong textualist, the Supreme Court reversed the conviction, even though the Act was silent on whether *mens rea* was required for a conviction, saying that silence on this point does not necessarily suggest that Congress intended to dispense with a *mens rea* element:

> On the contrary, we must construe the statute in light of the background rules of the common law, see *United States v. United States Gypsum Co.*, 438 U.S. 422, 436–437 (1978), in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence."

511 U.S. at 605. In *United States Gypsum*, *supra*, the Court said:

> "[Mere] omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

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438 U.S. at 436-437. Stated another way, it was not necessary to include common law provisions in the language of a statute, absent "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* . . . ." *Staples, supra*, 511 U.S. at 606.

Twenty years before *Perry, supra*, the Kansas City Court of Appeals applied the same reasoning to hold that *scienter* was an indispensable part of a statute that made it illegal to drive cattle infected with Texas fever in Missouri, even though the statute was silent on any element of *scienter*, *Coyle v. Conway*, 35 Mo.App. 490 (1889). Since *scienter* was part of the common law, and since it is not presumed that the legislature intended to change the common law "further than the case absolutely required," 35 Mo.App. at 496, the Court construed the law to require *scienter*. Interestingly, the General Assembly had, in an earlier version of the same law, required that a party "wilfully and knowingly" drive the cattle, and plaintiff argued that the legislature thereby evidenced an intent to impose unconditional liability by deleting that requirement in the statute before the Court. The Court of Appeals disagreed:

> Those words were mere surplusage in the first instance, and were doubtless so looked upon by the legislature when they were omitted in the revision. It did not take those words to make one, who should knowingly drive infected cattle into or through the state, liable in damages. He would have been liable for so doing, without them. Their presence in that statute added nothing to its force.

Ibid. at 497.

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Statutes of Limitations and Concealment

Statutes of limitations are purely creatures of statute. At the common law in most cases, "there was no limit to the time within which an action might be brought. . . ." I H. Wood, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY §2, at 4 (2d ed. 1893). Since statutes of limitations are, well, *statutes*, they are subject to the usual common law rules of statutory construction, SUTHERLAND, *supra*, § 73:5.

In the absence of a statutory provision, the early cases were in disagreement as to whether courts would recognize *any* exceptions to the time limits imposed by such statutes, including an exception for concealment. The earliest American appellate opinion Plaintiffs have been able to locate on the issue was *First Massachusetts Turnpike Corporation v. Fields*, 3 Mass. 201 (1807).[6] In that case the defendants raised the defense of the statute of limitations to an action in assumpsit. The plaintiffs filed a replication alleging that defendants fraudulently concealed their failure to complete work under a contract so that plaintiffs' action did not accrue until they discovered what defendants concealed. Counsel for defendants argued that plaintiffs' position was unsupported by any authority except for

[6] In *Jones v. Conoway*, 4 Yeates 109 (1804), the court reached the same conclusion three years before *First Massachusetts Turnpike*, but it was a published opinion by a general jurisdiction judge in Pennsylvania. Forty-five years after *Jones* was decided, the Pennsylvania Supreme Court approved its holding, *Ferris v. Henderson*, 12 Pa. 49 (1849).

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Lord Mansfield's *dicta* in *Bree v. Holbech*, 3 P.Will. 143 (1781).[7] Nonetheless, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts agreed that this replication was sufficient to raise a bar to the running of the statute of limitations:

> [T]he statute [cannot] be considered as intending to protect any man in the quiet enjoyment of the fruits of a fraudulent execution of a contract, if the action be commenced within six years after the discovery of the fraud. The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. *If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud.* In chancery, where the statute of limitations is pleadable, as well as at law, it is a rule that the statute is no plea to a bill charging a fraud, if the bill be filed within six years after the discovery of the fraud.

Ibid. at 207 (emphasis added). Thus, the court construed the statute in such a way so as to synchronize with the common law maxims that no one should profit from fraud or benefit from wrong.

This set the stage for yet another chapter in the on-going war between Boston and New York. In *Troup v. Executors of Smith*, 20 Johns. 33 (1822), the Supreme Court of

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[7] Defendants were right; it was *dicta*.

Judicature of New York (forerunner of today's Court of Appeals) declined to follow Massachusetts' lead. In that case the plaintiff hired John Smith to survey land in upstate New York. Plaintiff claimed Smith did not perform the survey in a skillful and faithful manner; indeed, he claimed the said survey was "grossly deficient in truth and accuracy." Smith passed on to his just rewards, so plaintiff sued his executors in assumpsit. Defendants pled, *inter alia*, the defense of *actio non accrevit infra sex annos*.[8] The plaintiff replied that the late Smith fraudulently concealed his unskilled survey so that plaintiff could not know he had a claim for assumpsit. Defense counsel, suspiciously named J. C. *Spencer*, demurred to the replications, arguing that it made no difference when plaintiff discovered the fraud because, in an action at law, fraud is not a good replication to a plea of the statute of limitations. Plaintiff relied on *First Massachusetts Turnpike*, *supra*, arguing that "[f]raud constitutes an exception to all general rules, and the party who is guilty of it, is not allowed to shelter himself under the general rule of law."

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[8] The unsophisticated reader (which includes no member of this Court) might mistakenly assume the Executors of the departed John Smith were attempting to interject salacious comments into this 192 year old assumpsit case, but a Google search (for those who did not take Latin in high school) demonstrates the phrase simply meant that Mr. Troup allegedly did not file his action within the time allowed under the six year New York statute of limitations.

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Chief Justice Spencer, writing for the Court, agreed with *Attorney* Spencer on this point.[9] The Court noted that the Massachusetts case cited only English *dicta* in support of its holding. Although New York would permit fraud to trump the statute of limitations in an equity action, since the courts of equity were not bound by the statute, 20 Johns. at 47, the same would not be true in courts of law:

> But courts of law are expressly bound by the statute; it relates to specified actions; and it declares that such actions shall be commenced and sued within six years next after the cause of such actions accrued, and not after: thus, not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. I know of no dispensing power which courts of law possess, arising from any cause whatever; and it seems to me, that where the legislature, in the same statute, gives an extension of time, in cases of the arrest or reversal of judgment, in cases of infancy, coverture of the *feme*, insanity, and imprisonment, and for an absence of the defendant out of the state, when the cause of action accrued, that it would be an assumption of legislative authority to introduce any other proviso. The plaintiff's case may be a very hard one; but that affords no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands.

20 Johns. at 47-48.

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[9] Plaintiffs are confident the identity of names was a coincidence.

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This set the stage for a showdown between the Massachusetts and New York approaches, to be considered by one of the most storied jurists in American history, Justice Joseph Story (no pun intended). In 1828 Justice Story sat as a Circuit Justice for the District of New Hampshire in the case of *Sherwood v. Sutton*, 5 Mason 143, 21 F. Cas. 1303.[10] *Sherwood* was an action for fraud in connection with the sale of a ship.[11] Justice Story set out (with great respect) the respective positions of the Massachusetts and New York courts, and observed that "in this conflict of American decisions, it is the duty of the court to adopt that, which seems built upon the better reason, or at least that which upon an equipoise seems most consonant with public convenience and justice." 21 F. Cas. at 1307. In noting the majority approach, recognizing an exception to the running of the statute of limitations in cases of fraud, he asked:

> What, then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was

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[10] Undoubtedly, this Court is aware that under the Judiciary Act of 1789, 1 Stat. 73, all Justices of the United States Supreme Court were assigned to ride circuit and consider cases within their respective circuits, a practice that continued until 1891. Justice Story's Circuit included New Hampshire, which was convenient since he started teaching at Harvard Law School in 1829; this, in addition to being an accomplished treatise author, all while serving as an Associate Justice of the Supreme Court.

[11] Thankfully, it was not another assumpsit action.

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> mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. *It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions.* Such, it seems to me, is the reason, on which the exception is built, and not merely, that there is an equity binding upon the conscience of the party, which the statute does not reach or control. Nor is this mode of interpretation of statutes new in courts of law. * * * Now, if any exception out of the words of the statute is to be created by implication, I can scarcely conceive of one, which stands upon better reason than that now insisted on; for it is in furtherance, and not in evasion of the legislative intention.

Ibid. (Emphasis added.) Justice Story went on to observe that this implied exception was the majority rule in both English and American courts, *Ibid.* at 1308.[12]

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[12] This led the Chief Judge of the Court of Appeals of the District of Columbia to observe that, "there is an implied condition [in federal statutes of limitations] that in the case of fraud, it shall not commence to run until the fraud is discovered." *Lane v. U.S.*, 48 App.D.C. 547, 559 (1919) (Smyth, C.J., concurring), citing *Sherwood*.

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Justice Story's opinion had the influence one would expect. In 1875 the Supreme Court relied on it in deciding *Bailey v. Glover*, 88 U.S. 342. In that case Glover was alleged to have fraudulently conveyed property before filing bankruptcy. Bailey sought to set aside the conveyance after expiration of the two year statute of limitations in the Bankruptcy Act, which had no exception for fraudulent concealment. Nonetheless, Bailey claimed the concealment of the conveyance meant the statute of limitations did not commence running.

The Court noted that in such cases there was a conflict of authority, with the usual suspects on hand, *Ibid*. at 348, n. 5, 6. In equity suits "the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on part of the party committing the fraud to conceal it from the knowledge of the other party." *Ibid.* at 348. The Court declined to limit this rule to equity:

> But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent

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> fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.

Ibid. at 349.

The principles articulated in *Bailey* have become firmly entrenched in federal law. In *Kansas City v. Federal Pacific Electric Co*., 310 F.2d 271 (8th Cir. 1962), the Court considered whether the four year statute of limitations in § 4B of the Clayton Act, 15 U.S.C. § 15b, barred the plaintiff's claim despite its argument that the defendants concealed their violations of the Act. Defendants argued that the Act provided no exception for concealment.

In a meticulously researched opinion, the Eighth Circuit acknowledged that a court should not interpret or construe a statute that is clear and unambiguous on its face. 310 F.2d at 273-274. Section 4B unambiguously read that suit had to be filed "within four years after the cause of action accrued." *Ibid.* But relying on *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), the Eighth Circuit held that *Bailey* had adopted in federal courts the "old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered," 310 F.2d at 276, *citing Bailey, supra*, and *Sherwood, supra*. "This equitable doctrine is read into every federal statute of limitation." 310 F.2d at 276. Thus, one who "wrongfully conceals material facts and thereby prevents

discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong." *Ibid*. at 277, *citing* 34 AM.JUR. 188.

The real-world working of these rules is revealed in cases involving the Federal Employers' Liability Act ("FELA"), 45 USC § 51, *et seq.* In *Glus v. Brooklyn Eastern District Terminal*, 154 F.Supp. 863 (S.D.N.Y. 1957), plaintiff filed a FELA cause more than three years after his cause of action accrued, and defendant argued that the claim was barred by the special F.E.L.A. statute of limitations which provided that, "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Plaintiff claimed that defendant tricked him into not filing a timely claim. The issue was whether the defendant's trickery tolled the statute.

The statute contained no exception for fraud, and the majority of federal courts, including the Second Circuit, held that the timely filing of an action was a "condition precedent to recovery," the cause of action was extinguished after the statutory period, and it could not be extended "by delay caused by defendant's fraud or concealment." 154 F.Supp. at 865. Accordingly, the district court bowed to controlling Second Circuit precedent and dismissed the cause.

The Second Circuit affirmed in a brief opinion, *Glus v. Brooklyn Eastern District Terminal*, 253 F.2d 957 (1958), that cited to *Osbourne v. United States*, 164 F.2d 767, 768 (2d Cir. 1947), where the Court held:

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> [W]here a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, limiting the right as well as the remedy. Filing a complaint within the prescribed period is a condition precedent to recovery, and the cause of action is extinguished after the running of the period.[13] The general rule, developed chiefly with respect to the Federal Employers' Liability Act, §§ 1-10, 45 U.S.C. §§ 51-60, has been applied also to the period of limitations in the Jones Act, which incorporates the period in the Employers' Liability Act, and to the Suits in Admiralty Act. The practical results of the application of this rule have been that the period of limitation under any of the three statutes will control the time for bringing suit in a state court regardless of state statutes of limitations; that the period of limitation under any of these Acts will not be extended, as it would be in the case of an ordinary statute of limitations, by. . . the fraud of the defendant. . . .

The United States Supreme Court granted *certiorari* and overruled the majority approach:

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle

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[13] Compare these statements with some Missouri cases construing the statute of limitations in Missouri's wrongful death act, *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644, 646 (1947).

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> has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-233 (1959). The Court went on to hold that nothing in the F.E.L.A. indicated that "this principle of law, older than the country itself, was not to apply in suits arising under that statute." *Ibid.* at 234. *Glus* held that a defendant who deceives the plaintiff under such circumstances is equitably estopped from taking advantage of the statute of limitations.

Even staunch textualists like Justice Antonin Scalia have cited *Bailey* and its progeny for the proposition that, "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2000) (internal citations omitted). Although equitable tolling is broader than just fraudulent concealment, it includes instances where a party "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Implying an exception for fraud in statutes of limitations was not restricted to federal courts. In addition to the cases already discussed, in *Reynolds v. Hennesy*, 17 R.I. 169, 23 A. 639 (1891), the court considered a statute of limitations which included no fraud exception, and the issue in the case was whether concealment of the existence of a cause

of action will hinder the operation of the statute. The court acknowledged that there was strong authority on both sides, but it aligned itself with the side that said:

> [T]he statute must be expounded reasonably, so as to suppress, and not to extend, the mischiefs it was designed to cure; that it was intended to suppress fraud by preventing unjust claims from starting up after a great lapse of time, when evidence by which they might be repelled was forgotten, or had ceased to exist; that it should not, therefore, be so construed as to encourage fraud, by enabling those who, through falsehood or cheat, have managed for six years to keep one in ignorance of the fact that he had a cause of action, to take advantage of their own wrong-doing under a plea of the statute. We think the latter position is best sustained by reason and authority. It is certainly in the line of justice and morality, and the only objection to it is that it introduces an exception into the statute. * * * The statute does not take away the debt, but simply affects the remedy; and these exceptions show how liberally the statute has always been created as a remedial measure. But there is a wide distinction between ingrafting an exception into a statute by construction, and construing it according to its obvious intent. The rule laid down by Blackstone of considering the old law, the mischief and the remedy, when applied to this statute, shows that its purpose was to cut off those cases whose prosecution would, or might, result in fraud. It was clearly not intended to thwart the fundamental maxim that no one may take advantage of his own wrong. Hence, if one by fraud conceals the fact of a right of action for six years, *it is not engrafting an exception on the statute to*

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> *say he is not protected thereby, but it is simply saying he never was within it, since the protection was never designed for such as he.* But, whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy.

23 A. at 640, (emphasis added). To similar effect is *Waugh v. Guthrie Gas, Light, Fuel & Improvement Co.*, 37 Okla. 239, 131 P. 174 (1913), a comprehensive review of the law a century ago which demonstrates that the overwhelming majority of states recognized that fraudulent concealment would not bar a plaintiff from recovery, despite the absence of a fraud exception in the statute of limitations. *See, also, Falls Branch Coal Co. v. Proctor Coal Co.*, 203 Ky. 307, 262 S.W. 300, 305-306 (1924).

Missouri and the Effect of Fraud on Statutes of Limitations

Missouri did not have to take sides in the war between Massachusetts and New York because the issue was mostly decided by statute, *Smith v. Newby*, 13 Mo. 159, 164 (1850). The statute that solved the problem which plagued many states would eventually become R.S.Mo. § 516.280 (2000), which provides that, "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented." This statute traces its lineage to an 1807 act of the Territorial Legislature, 1 Terr.Laws, 144-145, which

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provided that if a defendant absconded from the territory or "by any other indirect means," obstructed the bringing of a timely action, the defendant could not plead the provisions of the Limitations of Actions Chapter in bar to any suit (App. 4). In 1835 the General Assembly enacted what amounts to § 516.280 in its present form, *Kauchick v. Williams*, 435 S.W.2d 342, 346 (Mo. *en banc*. 1968). The 1835 act added a provision which would eventually become § 516.300, stating: "The provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute." *Kauchick, supra*, 435 S.W.2d at 346. The latter provision applied to so-called "special statutes of limitations," laws that provided their own limitation periods for actions outside the general chapter on limitations, *Ibid*.

The earliest Missouri case that involved the issue of whether fraud would constitute an exception in such cases was *Revelle v. St. Louis, Iron Mountain & Southern Railway Co.*, 74 Mo. 438 (1881). In that case a statute permitted owners of livestock killed by railroads to sue for the value of their animals, provided the action was commenced within three years of the death. Plaintiff alleged that defendant killed his jennets and jacks and then hid their carcasses, thereby preventing him from timely filing suit. This Court held that the concealment by defendant was not within any exception to the special statute of limitations, and the equivalent to § 516.280 provided plaintiff no relief since it was inapplicable to special statutes. (Ironically, the Court also held that defendant waived reliance on the statute by not pleading it as a defense, 74 Mo. at 442-443.)

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Eight years after *Revelle* came *State ex rel. Barringer v. Hawkins*, 103 Mo.App. 251, 77 S.W. 98 (1903), an opinion by Judge Ellison of the Kansas City Court of Appeals, involving an action on a notary bond. At that time notaries and their sureties had their own chapter in the Revised Statutes of Missouri, including a provision as to their liabilities, with a built-in statute of limitations. Since the exceptions found in what became § 516.280 did not apply in actions against notaries, and since actions against notaries were not uncommon, the question came up occasionally as to whether their special statute of limitations would allow for an exception for fraudulent concealment, even though the special statute was silent on the question. That was the case in *Barringer*.

Barringer acknowledged *Revelle*, but distinguished it. The statute in Revelle provided that the action had to be commenced within three years "of the offense, and not after." *Barringer, supra*, 77 S.W. at 99. In contrast, the notary statue said that "no suit shall be instituted more than three years after *such cause of action accrued*." *Ibid.* (Emphasis added.) The Court reasoned that the livestock statute "left no room for construction since it fixed upon the time [for filing suit] by naming a specific and definite period . . . ." *Ibid.* In contrast the notary statute used the expression, "cause of action accrued," which "leaves something to be determined more than a mere calculation of time." *Ibid.* The Court concluded that the action against the notary did not "accrue" in order to permit the notary to assert the bar of the statute so long as his fraudulent concealment prevented plaintiff from learning he had a claim, *Ibid.*:

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> One of the theories which support a statute of limitations, and which justify such statute, is that a creditor or an injured party is given a reasonable time in which to go into court for redress of his grievance, whatever it may be, and that if he lies idly by, neglecting to seek redress for the specified time, he is cut off. He has slept on his rights until, from the policy of the law that disputes should have an end, and from justice to the opposite party, who may lose his means of protection and defense, he should not be permitted at such late day to ask relief. When the party who is thus protected by the statute himself fraudulently conceals from the other, by acts which would deceive an ordinary prudent man in the same situation, that there is a cause of action, that other cannot be accused of lack of diligence. For he cannot be blamed for not bringing into court that which his opponent fraudulently prevented him from knowing existed. And no sympathy need be wasted on the fraudfeasor by reason of his losing the protection of the statute, since he brought it upon himself by his own misconduct.

Ibid. In support of that position, the Court cited this Court's opinion in *Shelby County v. Bragg*, 135 Mo. 291, 36 S.W. 600 (1896), for the proposition that the rule postulated in *Barringer* exists even "without the aid of the statute." 77 S.W. at 99. *Barringer* quoted *Shelby County* for the proposition that, "it is well settled in this state, whether by force of the statute [i.e., the version of § 516.280 then in effect] *or independent of it*, that a fraudulent concealment of a cause of action will delay the operation of the statute of limitation until after discovery of the fraud." 36 S.W. at 601 (emphasis added), cited in

Barringer, supra, 77 S.W. at 99.[14] In accord with *Shelby County's* recognition of an "independent equitable principle of use in the administration of the law of limitations," later codified in what is now § 516.280, is *State ex rel. Bell v. Yates*, 231 Mo. 276, 132 S.W. 672, 674 (1910), and *Smile v. Lawson*, 435 S.W.2d 325, 327 (Mo. *en banc*. 1968).

Cases after *Barringer* did little to clarify the law. In 1942 this Court decided *State ex rel. State Life Insurance Co. v. Faucett*, 163 S.W.2d 592, another notary bond case, this one authored by Commissioner Dalton who sat with two other Commissioners. Commencing at page 594 of the opinion, the Court cites cases in which the different Courts of Appeals held that a notary could be prevented from relying on the statute if he or she did something to lull the injured party into nonaction. Thus, in *State ex rel. Meinholtz v. American Surety Company of New York*, 254 S.W. 561, 564 (Mo.App. 1923), the St. Louis Court of Appeals held that a cause of action against a notary who actively concealed his misconduct "accrued when relator discovered the fraud, or when by proper diligence and ordinarily prudent man could under the circumstances have discovered it." *State Life*

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[14] One might wonder why the *Shelby County* Court went outside the general statute of limitations, which clearly applied to the action before the Court, and cited to principles independent of the statute. Apparently, when *Shelby County* was decided, it was unclear whether fraudulent concealment would constitute "any other improper act," within the meaning of the statute, 36 S.W. at 601.

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Insurance, *supra*, 163 S.W.2d at 595. The Court also cited *Barringer* with apparent approval. (At least it did not say *Barringer* was *wrongly* decided.)

On the other hand, the Court also cited other cases involving different kinds of special statutes of limitations where no exception was allowed. For example it cited to *Kober v. Kober*, 324 Mo. 379, 23 S.W.2d 149 (1929), an action to cancel a deed induced by fraudulent representations releasing dower. The Court held that the special statute in that case contained no exceptions so that fraud would not toll the running of the statute, 23 S.W.2d at 152, cited in *State Life Insurance*, *supra*, 163 S.W.2d at 596.

Anyone hoping that the Court would definitively decide whether the *Kober* approach should trump the *Barringer* approach, or vice versa, would be sorely disappointed by the outcome of *State Life Insurance*. The Court dodged the issue by holding that, "Neither of the [defendants] participated in any affirmative action to conceal the fraud, and there was nothing to toll the statute, assuming that it could be tolled by active concealment, as conceded by [defendants] in the lower court." 163 S.W.2d at 596.

Two years after *State Life Insurance*, the Court revisited the issue of fraud and special statutes of limitations in *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347 (*en banc*. 1944), a case involving admission of a will to probate. In that case a crooked undertaker hid decedent's will, got himself appointed as decedent's administrator, and then embezzled funds from the estate. An heir of decedent discovered the will and tried to have it admitted into probate more than a year after issuance of letters of administration to the

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unscrupulous undertaker. The probate code provided that no will could be admitted into probate more than one year after the date of the first publication of the notice granting letters of administration, with no exception for fraud. The heir argued that the statute should not be construed to prevent probate of a will fraudulently concealed by the mendacious mortician beyond the one year period.

Apparently, the heir failed to cite any of the cases like *Barringer* because, according to *Bier*, none of the cases cited by the heir involved special statutes of limitations, 178 S.W.2d at 350. The Court concluded that it had "uniformly held that where a statute of limitations is a special one, not included in the general chapter on limitations, the running thereof cannot be tolled because of fraud, concealment or any other reason not provided in the statute itself." *Ibid*. In support of that "uniform rule," the Court cited only two cases, *State Life Insurance*, which cited many notary cases recognizing that fraudulent concealment *would* toll the special notary statute, and *Stowe v. Stowe*, 140 Mo. 594, 41 S.W. 951 (1897).

In *Stowe* the plaintiff sued in equity to impose a trust on property acquired by his step-mother and half-sister from the estate of his father. He claimed that defendants exercised undue influence over his father to get him to sign a will leaving nearly all of his property to them. His father's will was admitted to probate in 1876, when plaintiff was 17 years old. The statute of limitations for filing a will contest -- plaintiff's exclusive remedy – allowed "five years after probate" of the will to file an action contesting its validity. 41 S.W. at 953. Infants were afforded an additional five years after reaching majority to

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contest the will. Under these sections plaintiff had until 1885, or five years after his 21st birthday, to file such an action. Instead, plaintiff filed an action in equity in 1892, seven years after the statute ran.

This Court held that plaintiff's exclusive remedy was under the will contest statute. He did not claim any cover-up that kept him from learning the circumstances surrounding his father's execution of his will. Unlike *Barringer, supra*, the statute of limitations did not speak in terms of accrual of his cause of action; as in *Revelle, supra*, the statute began running on a fixed date, capable of ascertainment.

Given the language of the statute and the social interest involved in settling estates and "the quieting of men's estates," *Bier, supra*, 178 S.W.2d at 351, *Bier* and *Stowe* were correctly decided, but the broad statement in *Bier* that special statutes of limitations can never be tolled "because of fraud, concealment or any other reason not provided in the statute itself," presupposes that all such statutes are alike, something demonstrably false, compare *Barringer*. Given the laxity of plaintiff's legal research as described in *Bier*, citing only cases decided under the *general* statute of limitations, it is hardly surprising that the Court came to a conclusion that was overly broad. The important thing to take from *Bier* is that its holding about *all* special statutes was not the issue before the Court, for which reason "it would be unfair as well as improper to give permanent and controlling effect to casual statements outside the scope of the real inquiry." *State on Inf. Dalton v. Miles Laboratories, Inc*., 365 Mo. 350, 282 S.W.2d 564, 573 (*en banc*. 1955).

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The Missouri Wrongful Death Act

And Concealment

At the common law one of the established maxims was *actio personalis moritur cum persona,* or "a personal action dies with the person." *Cummins v. Kansas City Public Service Co.,* 334 Mo. 672, 66 S.W. 2d 920, 922 (*en banc.* 1933). This maxim had to do with the survival of the injured person's claim (or rather, the *lack* of survival). Initially, the maxim did not extend to an action for wrongful death, *Ibid.* In 1808 that all changed with the English case of *Baker v. Bolton,* 1 Campb. 493, an action by a husband for the death of his wife. In a very brief opinion, Lord Ellenborough ruled that "the death of a human being could not be ruled as an injury." The Court cited no authority for this principle, nor did it explain the policy underlying the rule.[15] The fact is Baker was wrong in its holding, *Long v. McKinney,* 897 So.2d 160, 179 (Miss. 2004).

Ironically, *Baker* was denounced as "barbarous" in Great Britain, *Moragne v. States Marine Lines,* 398 U.S. 375, 381 (1970). Nonetheless, American courts blindly accepted the rule, *Ibid.* at 386, and embraced the principle that no common law cause of action existed for death, *Cummins, supra,* 66 S.W.2d at 922 – 923. In 1846 the English Parliament adopted Lord Campbell's Act, the first wrongful death act in the common law world. Of

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[15] Prosser commented that Lord Ellenborough was "not the English judge most distinguished by a reputation for common sense." CASES AND MATERIALS ON TORTS 1088 (5th ed. 1971).

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necessity, the Act abolished the common law rule announced in *Baker* that precluded recovery for the death of another human being.

In 1855 the Missouri General Assembly enacted Missouri's first Wrongful Death Act as part of Chapter LI of the Revised Statutes of Missouri, entitled, "An Act for the Better Security of Life, Property and Character." (App. 6.) Section 3 of that Act established the basis for liability under the Act in most death cases, incorporating some common law concepts. Chapter LI also included provisions permitting actions for untrue accusations of fornication or adultery, §1, and the killing of animals by railroads, §5. Section 6 of the chapter included the statute of limitations for all such actions: "Every action instituted by virtue of the preceding sections of this act, shall be commenced within one year after the cause of action shall accrue." The Act was silent as to exceptions to the statute of limitations. It did not purport to repeal any common law maxims.

As has already been noted, there were many other ancient common law maxims that were implanted in Missouri law. Some have already been alluded to earlier, including *nullus commodum capere potest de injuria sua propria* (no one can obtain an advantage by his own wrong) and no one shall be permitted to profit by his own fraud, *Perry*, *supra*, 108 S.W. at 643. These maxims were (and continue to be) grounded on broad public policies, *State v. Drope*, 462 SW 2d 677, 683 (Mo. *en banc.* 1971); *Goodman v. Wampler*, 407 S.W. 3d 96, 99 (Mo. App. S.D. 2013).

They were part of the common law in 1855. Bouvier's LAW DICTIONARY referred to maxims as "principles and authorities, and part of the common law of the land; and are of the same strength as acts of parliament. . . ." 124 (6th ed. 1856). One of the influential treatises in the development of American law was Herbert Broom's A SELECTION OF LEGAL MAXIMS 205 (1845), which includes *nullus commodum potest de injuria sua propria*, attributed to Lord Coke's COMMENTARY ON LITTLETON from the early 17th Century.

As was noted earlier, these maxims controlled statutory laws in their operation and effect to the extent they were not repealed by, or inconsistent with, the express language of statutes, *Perry*, 108 S.W. at 644. It is presumed the legislature was conversant with these principles in 1855 when the Wrongful Death Act was enacted. So the essential question is this: Since the maxim that no one is permitted to take advantage of his own wrong was firmly embedded in Missouri law in 1855, did the legislature intend to repeal the maxim when it adopted the Wrongful Death Act?

Chancellor Kent provides the analytical tool for answering that question: "[I]t must be not presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required." COMMENTARIES, *supra*, at 55. Was it "absolutely required" to repeal the maxim insofar as the Wrongful Death Act is concerned? The answer is obvious: no more so than it was necessary to repeal the maxim in connection with the statute at issue in *Perry*, allowing husbands to take one-half their wives' estates. There is nothing about allowing an exception to the death statute of limitation for

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concealment that prevents the Wrongful Death Act from functioning, any more than the exceptions in § 516.280 hinder the operation of other causes of action.

Under the great weight of American law in 1855, statutes of limitations were subject to these maxims as Justice Story noted *Sherwood, supra*. In 1849, just six years before adoption of the Act, the New Hampshire Supreme Court said this:

> The general principle of natural justice and of positive law that precludes a party from deriving a benefit from his own wrong, has from an early period been applied by courts, both of law and of equity, to the construction of the statutes of limitation. It has accordingly been repeatedly held that a party shall not be protected by the lapse of time during which he has, by his own fraud, prevented the party whom he has injured from asserting his rights at law; and that he against whom the statute bar is interposed may avoid it by showing that he has been kept in ignorance of his claim till within the period limited by law for bringing his suit, by the fraudulent practices of the party setting up the defense.

Way v. Cutting, 20 N.H. 187, 190-191 (1849).

So why not include fraud or concealment exceptions in the death statute of limitations? Most likely for the same reason a *scienter* requirement was not included in the statute at issue in *Coyle v. Conway, supra*¸ or no exception for uxoricide was included in the statute involved in *Perry*: Such provisions would have been surplusage, *Coyle, supra*, 35 Mo. App. at 497.

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In the century following adoption of the Act for the Better Security of Life, Property and Character, no reported Missouri case decided whether § 6 would allow someone who killed another to avoid liability therefor by engaging in wrongful conduct that concealed his identity or culpability. At least insofar as identity was concerned, that all changed in 1958, 103 years after adoption of the Act, when Division 2 of this Court decided *Frazee v. Partney*, 314 S.W.2d 915 (Mo.).

Warren Frazee, his wife, and their five minor children were out for a Sunday drive on October 10, 1954, in Washington County, Missouri, when a green pickup truck driven by Howard Partney came around a curve, swerved into the Frazees' lane, forcing their vehicle off the road and down an embankment, causing it to roll over several times. These acts resulted in the deaths of the wife, Evahdene Frazee, and one of the children, Karen Frazee. Partney's vehicle was unscathed, and he did not stop or report the wreck. Somehow, in March of 1956 the Highway Patrol tracked down Partney and interviewed him, during which, he admitted his involvement in causing the wreck. The Frazees did not know of Partney's identity until that time, more than one year after the fatal events of October 10, 1954.

Upon finally learning of Partney's identity and involvement, the surviving Frazees sued him for the deaths of Evahdene and Karen. Partney argued that the one year death statute of limitations in R. S. Mo. § 537.100 (1949), meant that he was not liable for killing Evahdene or Karen. The Frazees countered that Partney violated a statute when he failed

to report the accident and that their cause of action did not accrue until they could discover Partney's identity and involvement in killing the victims.

Division 2 of the Court said that the death statute of limitations, which at that time was codified in R.S.Mo. § 537.100 (1949), was unchanged since 1855 except for amendments that were inapposite to the Frazees' case. These changes were: (1) a savings statute added in 1905, which permitted death plaintiffs one year to refile a case that had been dismissed without prejudice; and (2) a tolling provision added in 1909 applicable if the defendant left the state. Of course, the general exceptions to most statutes of limitations found in § 516.280 did not apply to a death action by virtue of § 516.300. 314 S.W.2d at 918.

Frazee held that § 537.100 was a special statute of limitations which meant under *Bier, supra*, 178 S.W. 2d at 350-351, that it had to carry its own exceptions and the Court could not "engraft others upon it." 314 S.W.2d at 919. *Frazee* also cited to *State Life Insurance, supra*, in support of that proposition, *Ibid.* Additionally, Frazee cited to several more cases at pages 919 – 920 of the opinion; none involved the question of whether fraud was an exception to the running of the death statute; some *did* involve the issue of the effect of fraudulent concealment on other special statutes of limitations, namely *Kober v. Kober*, 324 Mo. 379, 23 S.W.2d 149 (1929); *Parish v. Casner*, 282 S.W.392 (Mo. 1926); and *Turnmire v. Claybrook*, 204 S.W. 178 (Mo. 1918). The Court also relied on an A.L.R. annotation which, the Court believed, provided additional support for its position, *Exceptions Attaching to Limitation Prescribed by Death Statutes or Survival Statutes*

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Allowing Recovery of Damages for Death, 132 A.L.R. 292 (1941) (hereafter, "1941 Annotation").

In contrast, the Court noted that the Frazees failed to cite a single case holding that concealment would toll the death statute of limitations, 314 S.W.2d at 920. Additionally, the Court held that the legislature's failure to enact an amendment which would permit tolling for concealment indicated a legislative resolve to not hold accountable those who commit such wrongful acts, the effect of which was to allow them to enjoy the benefit of fraud and concealment, *Ibid.*

Finally, the Court rejected the Frazees' argument that their cause did not accrue until they learned the truth of the facts Partney concealed. The Court cited five earlier cases in which Missouri courts held that an action for death accrues at the moment of death.

The Court concluded that it was the legislature's fault that it had not seen fit to enact a tolling provision or allowed delayed accrual on account of fraud, concealment, or other improper acts, *Ibid.*, at 921. But that did not change the fact that the Court was "forced to construe the cold, clear words of the statute . . . ." *Ibid.* So conceived, the Court had no *choice* but to reward Partney for his concealment because the legislature *required* that. (Of course, if anyone in the Frazee vehicle who survived had suffered a whiplash, that person's right to recover for personal injury would be protected from Partney's concealment; it was only if he *killed* Warren's wife and the children's mother that the survivors' right to recover was not worthy of protection.)

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There is much wrong with what Division 2 said in *Frazee*. In the Court's defense, it was not given much to work with. In the Appendix filed by Plaintiffs are the briefs of the Frazees (Appellants) and Partney (Respondent).[16] Including the cover, the Appellants' Brief is eight pages long (App. 43 to 47). The argument section of the Brief is a total of *two and one-half pages long*, counting the conclusion (App. 46 to 47). They cited *four cases* in support of their claim that their causes did not accrue until Partney's identity was known. None of the cases they cited involved the issue of when a cause accrued for the purposes of the statute of limitations.[17] There was certainly no discussion of cases involving concealment that affected when an action was deemed to accrue, as in *State ex rel. Barringer v. Hawkins, supra,* where the Court construed a similarly worded, special statute of limitations and held that the expression, "cause of action accrued," permitted the

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[16] It is axiomatic that this Court may take judicial notice of its own records for a proper purpose, *In re Murphy,* 732 S.W.2d 895, 902 (Mo. *en banc.* 1987). Plaintiffs do not request this Court to take notice of facts in the briefs, but simply the depth and quality of the arguments advanced by Appellants in support of their position in *Frazee, supra.*

[17] The cases were *Brinkmann v. Common School District No. 27 of Gasconade County,* 238 S. W.2d 1 (Mo. App. 1951) (case regarding compulsory counterclaims); *Mertens v. McMahon*, 115 S.W.2d 180 (Mo. App. 1938) (case involving whether statute tolled by invalid service of process); *Maddux v. Gardner*, 192 S.W.2d 14 (Mo. App. 1945) (effect of suing John Doe defendant on running of statute); and *Tice v. Milner,* 308 S.W.2d 697 (Mo. 1957) (case that had nothing to do with accrual).

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Court to construe the statute of limitations to decide whether a party loses the protection of the statute when he fraudulently conceals facts necessary to determine if a cause of action existed, 77 S.W. at 99. Nor did Appellants cite foreign cases like *Falls Branch Coal Co., supra,* where the Kentucky Court of Appeals aligned itself with the majority rule in American jurisprudence, citing cases like *Bailey v. Glover, supra*, and *Shelby County v. Bragg, supra,* and held:

> A minority of the courts hold to the contrary, but we think the reasoning of those applying the majority rule is not only sound, but manifestly just. It does not attempt to engraft an exception to the letter of the statute, but provides a means by which one may not be deprived of his property without remedy by postponing the time of the *accruing* of the action until he actually discovers his rights, or it becomes reasonably possible for him to do so.

262 S.W. at 305 (emphasis in original).

More fundamentally, Appellants did not cite Justice Story's magnificent opinion in *Sherwood v. Sutton, supra,* or tie it in to the holding in *Perry, supra*, that the legislature does not repeal maxims like *nullus commodum potest de injuria sua propria* unless it is *necessary* to do so. Nor did they argue that there is nothing about the Wrongful Death Act that makes it *necessary* to repeal such maxims in order to make them effectual. There was no discussion of whether a tool like the statute of limitations, designed to *prevent* fraud, could be construed in such a fashion as to *perpetrate* fraud without violating the principles

of statutory construction that require a statute to be construed with reference to its spirit and reason, so that the reason of the law prevails over its letter in order that it not lead to injustice, oppression, or an absurd consequence, *Perry, supra,* 108 S.W. at 646 – 648. There was no discussion as to whether construing the death statute of limitations to allow Partney to profit from his wrong violated all of these principles.

When Respondent cited several cases holding that a death action accrues at the time of death, Appellants filed no Reply Brief pointing out that none of those cases involved the issue of whether *concealment* would have an effect on accrual, compare *Barringer* and *Falls Branch, supra*. While Partney cited *Bier, supra,* in his Brief (App. 53), Appellants filed no Reply Brief, so they could not point out that *Bier's* broad statement -- that *no* special statute of limitations could *ever* be subject to an exception for fraud or concealment -- was *dicta*. Nor could they inform the Court that in *State Life Insurance, supra*, this Court did *not* hold that fraud would *never* constitute an exception to a special statute of limitations, but rather that plaintiff offered no evidence that defendants "did anything to prevent anyone from finding out the true facts concerning the fraud." 163 S.W.2d at 594.

In fairness to the Frazees, there was a lot of bad law in other states, as the 1941 Annotation revealed. In Section III C of that Annotation, the author discussed states deciding whether tolling due to claims of fraud, misrepresentations or concealment was applicable to death statutes of limitations. Eight states and the United States in FELA cases held that such conduct was inapplicable to prevent the running of death statutes, including Kansas, Massachusetts, Michigan, New Hampshire, New York, Ohio, Texas and

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Wisconsin; only one state held that a fraud exception was applicable to a death statute of limitations. In the United States cases and those of Michigan, Ohio, Texas and Wisconsin, the decisions involved actions filed under F.E.L.A. Of course, in 1959, the year after *Frazee* was decided, the United States Supreme Court overturned all of the FELA cases, holding that concealment *would* prevent the running of the F.E.L.A. statute of limitations, *Glus, supra*.

In five of the eight states that were in the 1941 majority, the law is no longer as it was in 1941. Thus, in 1996 the Kansas Supreme Court held that the limitation period for a death claim "should start on the date of death *unless the information from which the fact of death or negligence can be determined was either concealed, altered, falsified, inaccurate, or misrepresented."* *Davidson v. Denning*, 259 Kan. 659, 914 P.2d 936, 947 (1996) (emphasis added).

After 1941 the Massachusetts Supreme Judicial Court recognized the reality that death causes are in reality common law claims, subject to all of the exceptions to the tort statute of limitations applicable to other common law claims, effectively overruling the case cited in the 1941 Annotation, *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 229 – 230 (1972).

Michigan still adheres to the rule that fraud does not prevent application of the death statute of limitations, but just barely in the face of strong dissents in *Trentadue v. Buckler Lawn Sprinkler*, 479 Mich. 378, 738 N.W.2d 664 (2007). In *Colaianni v. Stuart Frankel*

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Dev. Corp., 485 Mich. 1070, 777 N.W.2d 410 (2010), the Court granted leave to appeal to address whether *Trentadue* was correctly decided. Later that same year the appeal was dismissed because the parties settled their case, 791 N.W.2d at 720.

Ohio kept the rule against fraudulent tolling in *Shover v. Cordis Corp.*, 61 Ohio St.3d 213, 574 N.E.2d 457 (1991), another 4-3 decision 23 years ago, again with strong dissents. But seven years later, the Ohio Supreme Court overruled *Shover* in *Collins v. Sotka*, 81 Ohio St.3d 506, 692 N.E.2d 581 (1998). The Court noted:

> It is illogical to penalize the victim's survivors, who have already suffered a great loss, by shortening or extinguishing the time in which they may bring a wrongful death lawsuit. To do so merely rewards the criminal defendant. Although the defendant may be held accountable in a criminal court for the horrendous crime he committed, he can nonetheless escape civil liability, all at the expense of the victim's family, and simply because of the harsh application of a statute of limitations.
>
> In his dissent in *Shover*, 61 Ohio St.3d at 233, 574 N.E.2d at 471, Justice Douglas correctly pointed out the unfairness of holding that a statute of limitations accrues from the date of death, when he stated:
>
> "If * * * a wrongful death action stems solely from the wrongful death statute, then if the General Assembly decided to repeal Ohio's wrongful death statute, any tortfeasor who negligently injured another would need only be sure that his or her victim was dead in order for the tortfeasor to be absolved from civil

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> liability. If Ohio's wrongful death statute remains in effect and is interpreted in the fashion that the majority today interprets R.C. 2125.02(D), a tortfeasor need only kill his or her victim and fraudulently conceal the cause of death for two years to be absolved from civil liability."

692 N.E.2d at 584.

Contrary to the 1941 Annotation, New York now recognizes that fraud or concealment prevents the running of the statute when a defendant by deception causes a plaintiff to delay suit until after the statute of limitations has run, he or she cannot claim the benefit of the statute, *Arbutina v. Bahuleyan*, 75 A.D.2d 84, 428 N.Y.S.2d 99, 100 (1980); *McIvor v. DiBenedetto*, 121 A.D.2d 519, 503 N.Y.S.2d 836, 837 (1986).

Finally, contrary to the 1941 Annotation, Texas now allows fraudulent concealment to equitably estop a wrongdoer from benefitting from the death statute of limitations, *Cox v. Upjohn Co.*, 913 S.W.2d 225, 230 – 232 (Tex.Civ.App. 1995).

The trend of the law is not limited to states that were formerly mistaken. A new Annotation on the subject was published in 1991, entitled, FRAUDULENT CONCEALMENT OF CAUSE OF ACTION FOR WRONGFUL DEATH AS AFFECTING PERIOD OF LIMITATIONS, 88 A.L.R. 4th 851 (hereafter, "1991 Annotation). Section 3(a) of that Annotation identifies 20

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jurisdictions now holding that concealment tolls or delays commencement of the action.[18] According to Section 3(b), five states hold that fraudulent concealment estops a defendant from pleading the statute, including Nebraska, New York, North Carolina, North Dakota and Oklahoma.[19]

In addition to the 25 jurisdictions noted in the 1991 Annotation, five more states recognize that fraud is incompatible with the running of death statutes of limitations: Alaska, *Hanebuth v. Bell Helicopter International*, 694 P.2d 143 (Alaska 1984); Florida, *Fulton Co. Adm'r v. Sullivan,* 753 So.2d 549 (Fla. 1999); Mississippi, *Wells v. Radiator Specialty Co.*, 413 F. Supp.2d 778 (S.D. Miss. 2006) (applying Mississippi law); Utah, *Jensen v IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997); and Wyoming, *Corkhill v. Knowles*, 955 P.2d 438 (Wyo. 1998).

Section 4 of the Annotation describes three states where the old rule still prevails, including a 1919 opinion by the New Hampshire Supreme Court, *Desmaris v. People's Gaslight Co.*, 79 N.H. 195, 107 A. 491, and a 1947 Ohio Supreme Court case, *Sabol v.*

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[18] Those jurisdictions are Arizona, California, Colorado, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and West Virginia.

[19] Kentucky and Pennsylvania also recognize this theory, but they were already counted under § 3(a), *supra.*

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Pekoc, 148 Ohio St. 545, 76 N.E.2d 84.[20] And, of course, Missouri in *Frazee* has not yet been expressly overruled by this Court.

The reasoning in *Sabol v. Pekoc, supra,* was insightful in understanding how the statute could be deemed to exclude any limits on the statute, even in the face of fraud. The Ohio statute provided that actions had to be commenced within two years of death. The Court reasoned that the death act created a cause of action unknown at the common law, and a statute which gives a right unknown at common law "must be applied strictly in accord with all its essential terms." 76 N.E.2d at 88. This was consistent with *Frazee's* holding that it had no choice but to apply the plain terms of the statute as written.

Change Comes to the Missouri Wrongful Death Act

In *O'Grady v. Brown,* 654 S.W.2d 904 (Mo. *en banc.* 1983), this Court definitively decided whether the Missouri Wrongful Death Act had to be strictly construed because it was in derogation of the common law, *Cummins, supra,* 66 S.W.2d at 925. The Court held that that was not the case:

> Respondents assert that this statute must be "strictly construed" because it is "in derogation of the common law." We disagree. The wrongful death statute is not, strictly speaking, in "derogation" of the common law. Derogation is defined as "the partial abrogation or repeal of a law, contract, treaty, legal right, etc." or as a "lessening, weakening, curtailment,… impairment," detraction or taking away of a

[20] As was noted earlier, Ohio has repudiated its former position, *Collins, supra.*

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> power or authority. Wrongful death acts do not take away any common law right; they were designed to mend the fabric of the common law, not to weaken it. Remedial acts are not strictly construed although they do change a rule of the common law. *We must therefore apply the statutory language "with a view to promoting the apparent object of the legislative enactment.*"

654 S.W.2d at 907-908 (ellipses and emphasis in original) (internal citations omitted). In describing the purpose of the Act, *O'Grady* said this:

> The manifest purpose of our statute is clearly to provide, for a limited class of plaintiffs, compensation for the loss of the "companionship, comfort, instruction, guidance, counsel, … and support" of one who would have been alive but for the defendant's wrong." § 537.090. [ ] Furthermore, the wrongful death statute evinces a legislative intent to place the cost of "unsafe" activities upon the actors who engage in them, and thereby provide a deterrent to tortious conduct.

Ibid. at 908. Summarizing, the Supreme Court identified three basic objectives behind the statute: "to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death." *Ibid.* at 909.

Liberal Construction and the Death Statute of Limitations

O'Grady set the stage for a case involving one of the most notorious criminals in the history of Kansas City, a mass murderer named Bob Berdella. Over a period of years Berdella picked up young men, took them to his home, and held them captive. He would

then commence a process of torture over an extended prior of time that ultimately led to their painful deaths. He would then dismember their bodies, feed parts to his dogs, and bury what was left in his back yard. Berdella did not tell anyone about his diabolical activities.

One of the young men escaped from Berdella's house, and Berdella was captured. Several of his victims had died years before and when family members sued him, he asserted the defense of the three year statute of limitations, which had long since expired. Under authority of *Frazee*, the trial court dismissed the cause, and plaintiffs appealed in *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992).

The Western District was initially faced with the issue of whether *Frazee* was binding precedent. In declining to apply the death statute of limitations, the Court focused on the major shift in construction of the Wrongful Death Act from *Frazee* to *O'Grady. Howell* recognized that "[i]t would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied [by a wrongful death statute]." 844 S.W.2d at 46, citing *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350 – 351 (1937).

Howell found that granting Berdella summary judgment was antithetical to the purposes of the wrongful death statute, 844 S.W.2d at 47. "Contrary to ensuring that tortfeasors pay for their misdeeds, granting Berdella's motion suggests that any tortfeasor can escape all civil liability merely by concealing his evil deeds for three years." *Ibid.* In holding that the statute of limitations was tolled for Berdella's fraudulent concealment of his tortious conduct, this Court was persuaded by the reasoning of a California decision:

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> Statutes of limitation are intended to prevent fraud, to keep parties from asserting rights after a lapse of time has destroyed or impaired the evidence which would show that such rights never existed, or has been satisfied, transferred or extinguished if they ever did exist. *To hold that by concealing fraud, or by committing fraud in such a manner as to conceal it until after the party committing the fraud could plead the statute of limitations to protect itself, is to make the law which was designed to prevent fraud the means by which it is successful and secure.*

Baker v. Beech Aircraft Corp., 39 Cal.App.3d 315, 114 Cal.Rptr.171, 177 (1974), *citing Waugh v. Guthrie Gas, Light, Fuel & Improvement Company*, 37 Okl. 239, 131 P. 174 (1913), *cited* in *Howell, supra*, 844 S.W.2d at 47 (emphasis added). Ultimately, *Howell* tolled the statute of limitations "until the plaintiffs could, by reasonable diligence, ascertain that they had an action." 844 S.W.2d at 47.

Plaintiffs would submit that the reasoning of *Howell* is compelling at bar. When Defendants suppressed the truth about what their employee had done, they made it impossible for Plaintiffs to enforce their rights in a timely manner. Permitting Defendants to enjoy the benefits of their cover-up would not advance the salutary purposes promoted by the Wrongful Death Act; it would suggest that they can escape justice by successfully concealing the evil deeds of their employee for more than three years. As Judge Graves might say, this seems abhorrent to all reason, and reason is the better part of the law.

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The Appropriate Remedy

The Western District at bar held that in cases of fraud, the death action does not accrue until the concealed facts are revealed, *Boland*, Slip Opinion at 21. In *Glus, supra*, the Supreme Court held that equitable estoppel was appropriate. The cases following *Bailey v. Gover*, apply equitable tolling to the statute. Other cases say, simply, that the statute does not run during the period of concealment.

The common bond in these cases is that they all apply the common law maxim that precludes someone from covering up misdeeds and then benefitting from that wrong. One of those remedies should be applied at bar.

CONCLUSION

Plaintiffs would respectfully submit that the judgments of the trial court should be reversed and these causes remanded for trial.

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CERTIFICATION AS TO WORD COUNT

Pursuant to Missouri Supreme Court Rule 84.06(b), Appellant hereby certifies that the word count herein, as calculated by the word count system employed, is 16,565 words and does not exceed the word limit provided by the rules.

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