
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 REPLY 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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ARGUMENT

- I. Defendants’ argument that the plain language of the statute requires an action for wrongful death to be filed within three years, regardless of fraudulent concealment, ignores the common law maxims that do not allow tortfeasors to profit from their own wrongs or fraud. These maxims are as much a part of the substantive law of Missouri as is the statutory law unless they have been repealed. Defendants do not, and cannot, argue that the legislature repealed those maxims (Responding to Respondents’ Brief at 8-9).**

The Combined Substitute Brief of Respondents (hereafter “Respondents’ Brief”) is more remarkable for what it does *not* say than what it does. Defendants do not contest the most critical portions of the Substitute Brief of Appellants (“Appellants’ Brief”), presumably because they do not disagree with the propositions of law postulated therein.

Thus, they do not dispute that the Reception Statute, R.S. Mo. § 1.010 (2000), has the effect of adopting the corpus of the common law, including its maxims and principles into Missouri law.¹ *Goad-Ballinger Post 69 v. McNeill*, 716 S.W. 2d 300, 304 (Mo. App. W.D. 1986).² Nor do they dispute that two of those maxims are that no one is permitted to profit by his or her own fraud or take advantage of his or her own wrong (hereafter referred to as “the maxims”). That was the holding of this Court in *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641, 643 (1908). Because *Perry* was central to Plaintiffs’ argument, they spent a considerable amount of space discussing its facts and holding at pages 19–23 of their Appellants’ Brief. Defendants make no mention of *Perry* in their Respondents’ Brief,

¹ To similar effect is *L.E. Lines Music Co. v. Holt*, 332 Mo. 749, 60 S.W.2d 32, 34 (1933) (“common law is the law of our land unless abrogated by statute or Constitution”).

² This argument was advanced at page 17 of Appellants’ Brief.

for which reason they do not attempt to distinguish or dispute its holding at bar. Nor do they deny that a statute must be construed with reference to the common law in order to reach a just appreciation of “its purpose and effect,” *Ibid.* at 645.

There are profoundly important consequences to recognizing the coequal status the common law enjoys with statutes under our system of jurisprudence. “[T]he courts will look on a statute, not as upon an isolated piece of law-making, but as becoming an integral part of the whole body of the law, as soon as it is enacted.” Brunken, *The Common Law and Statutes*, 29 YALE L. J. 516, 520 (1920). That is why, under 19th Century (and older) authorities, a statute had to be construed with reference to the common law *in pari materia*, “so as to fit into the legal system of which it is a part. Statute and common law should be construed together, just as statute and statute must be.” Pound, *Common Law and Legislation*, 21 HARVARD L. REV. 383, 400 (1908). As the Connecticut Supreme Court observed in *Thibodeau v. Design Group One Architects, LLC*, 260 Conn. 691, 802 A.2d 731, 746 (2002), “When *in pari materia*, statutory law and the precepts of either preexisting or after-declared common law are to be construed together as one consistent and harmonious whole.”

Accordingly, the common law can operate to reduce a statute’s scope: “When the common law imposes a restriction unmentioned in a statute, the restriction governs unless circumstances show a legislative intent to abrogate it.” N. Singer, 2B SUTHERLAND STATUTORY CONSTRUCTION §50:2 (7th ed. 2013). For that reason, as Brunken notes: “[C]ourts have read into statutes provisions not expressed in so many words, in order to bring them into consonance with the general tendencies of the common law. Such

provisions are especially those very general principles which constitute fundamental justice.” 29 YALE L. J. at 520.

That is why in *Perry* the statute had to be read in conjunction with the maxims noted above in order to determine whether a statute that was silent as to the effect of uxoricide would allow a husband who murdered his wife to inherit half her property. Such a result would have manifestly violated the maxims that were just as much a part of Missouri law as the statute at issue in *Perry*. Finding that the legislature did not intend to repeal the maxims, the Court reconciled the apparent conflict between the common and statutory law by, essentially, reading the maxims into the statute in order to bring it into consonance with the general tendencies of the common law, thereby depriving plaintiffs of the benefit of their father’s calculated murder of his wife.

Of course, the legislature is free to repeal or alter the common law. But Respondents’ Brief does not deny that it is not to be presumed that the legislature intended to make any changes to the common law “further than the case absolutely required.” (Appellants’ Brief at 22, citing *Perry, supra*, 108 S.W. at 645).³ This is so because unless a statute abrogates the common law, “either expressly or by necessary implication, the common law rule remains valid.” *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 132 (Mo. App. E.D. 2009). *Accord: N.E. & R. Partnership v. Stone*, 745 S.W.2d 266, 267-268 (Mo. App. S.D. 1988); *Wiley v. Homfeld*, 307 S.W.3d 145, 149 (Mo. App. W.D. 2009)

³ To similar effect is *Estate of Williams v. Williams*, 12 S.W.3d 302, 307 (Mo. *en banc*. 2000).

(“common law rules remain in effect unless a statute clearly abrogates the common law, either expressly or by necessary implication”); *State v. Kollenborn*, 304 S.W.2d 855, 862 (Mo. *en banc*. 1957) (“law does not favor repeals of the common law by implication in a statute, and a legislative intent to do so is generally not presumed”).

In the context of the instant cause, the maxims are irreconcilable with a holding that § 537.100 allows tortfeasors to avoid accountability (and thereby profit by their wrongdoing and fraud) by covering up their misdeeds. Such a reading of the statute ignores maxims which, unless repealed, are just as much a part of Missouri law as the Wrongful Death Act. The Reception Act which adopted the common law, including its maxims, antedated the Wrongful Death Act by nearly four decades. Defendants do not deny that the maxims are incompatible with their reading of § 537.100, which means that a literal reading of § 537.100 in isolation from the common law can only prevail if the statute *repealed* the maxims.

There is no question that the Wrongful Death Act did not expressly repeal the maxims. The legislature knows how to write laws that expressly repeal the common law, *Overcast v. Billings Mutual Insurance Co.*, 11 S.W.3d 62, 69 (Mo. *en banc*. 2000). Defendants do not claim (nor could they) that it did so in this case.

Nor do Defendants argue that the Wrongful Death Act *impliedly* repealed the maxims. Such an argument would be feckless since their implied repeal is not necessary for the proper functioning of the Act, *Perry, supra*, 108 S.W. at 645. Stated differently, application of the common law maxims to prevent tortfeasors from benefitting from their wrongs or frauds does not inhibit or interfere with the salutary purposes of the Act.

To justly decide the cases *sub judice*, this Court must figure out what to do with the same maxims that it properly revered in *Perry*; it cannot simply ignore them. Absent a finding of abolition by the legislature, which is unsupported by the Act, or abrogation by this Court, which is simply inconceivable, this Court must reconcile the maxims and the statute. The most reasonable construction is to read the maxims into the Act to bring it into consonance with the general tendencies of the common law. That resolution is not unreasonable, any more than what the Court did in *Perry* was unreasonable.

If this Court applies the maxims to the cases *sub judice*, in the same fashion as it did to the statute at issue in *Perry*, it will *not* be inventing an exception to the statute never intended or considered by the General Assembly; instead, it will be construing the statute with maxims that remain a healthy and viable part of Missouri jurisprudence as “one consistent and harmonious whole.” The ineluctable consequence will be that Defendants at bar are deprived of the benefit of their own frauds and wrongdoing. For the reasons noted in Appellants’ Brief, that is the appropriate resolution of this cause.

II. Even if common law maxims are ignored, the plain language of § 537.100 does not require filing suit within three years of the deaths of Plaintiffs’ decedents under the canons of statutory construction (responding to Respondents’ Brief at 8 – 9).

Defendants’ argument comes down to this: The plain language of § 537.100, requiring actions to be filed within three years of the deaths of Plaintiffs’ decedents, provides no applicable exceptions, for which reason the trial courts did not err in dismissing

Plaintiffs' claims (Respondents' Brief at 8-9).⁴ Even if this Court does not consider the common law maxims, basic rules of statutory construction suggest a contrary result.

In their Appellants' Brief, Plaintiffs noted two important rules of statutory construction discussed in *Perry*: (1) a statute should be construed with reference to its spirit and reason so that even if a case falls within the *letter* of the statute, courts are not bound thereby if the case is not within the spirit and reason of the law and the plain intention of the legislature; and (2) the letter of a statute will not be followed when it leads to an absurd conclusion, 108 S.W. at 646 – 648 (Appellants' Brief at 22-23). Respondents' Brief does not discuss these fundamental canons of construction.

⁴ They also argue that a wrongful death action is a statutory cause of action for which there is no common law antecedent (Respondents' Brief at 8). This matter is not as cut and dried as Defendants suggest, *State ex rel. Kansas City Stock Yards Co. v. Clark*, 536 S.W. 2d 142, 150-157 (Mo. *en banc*. 1976) (Bardgett, J., dissenting opinion); *Moragne v. States Marine Lines*, 398 U.S. 375, 381 (1970); *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222, 229 (1972). Before 1855, when the Wrongful Death Act was enacted, Missouri courts never held that a common law action for death would *not* lie, *compare: James v. Christy*, 18 Mo. 162 (1853). Plaintiffs did not argue in the trial court that their cause should prevail for the reasons stated in *Gaudette* or *Moragne*, but it is simply wrong to blithely assume that Missouri has held that no action for death would lie at common law.

Even before *Perry*, these principles had a venerable heritage in Missouri law. Thus, in 1869 in *State ex rel. Missouri Mutual Life Insurance Co. v. King*, 44 Mo. 283, 285, this Court held that:

It is generally true that where words used in a statute are clear and unambiguous there is no room left for construction; but when it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and carried out, and made to control the strict letter.

See also: Riddick v. Walsh, 15 Mo. 519, 535 (1852), (“thing which is in the intention of the makers of a statute, is as much within the statute as if it were within the letter”), and *Greer v. Kennan*, 64 F.2d 605, 607 (8th Cir. 1933), (“the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity”). In *Holy Trinity Church v. United States*, 143 U.S. 457, 460-461 (1892), Justice Brewer, writing for a unanimous Court, said:

If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. * * * * All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. *It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character.* The reason of the law in such cases should prevail over its letter.

(Emphasis added.)

These rules are not limited to ancient cases. Over 30 years after *Perry, City of St. Louis v. James Brandis Coal Co.*, 137 S.W.2d 668, 669 (Mo. App. 1940), held that the primary rule of statutory construction:

is to ascertain and give effect to the lawmakers' intention, and . . . since such laws are presumably passed in the spirit of justice and for the welfare of the community, they should be interpreted, if possible, so as to further that purpose, and . . . frequently courts, to that end, look less to the letter or words of a statute . . . and more to the context, the subject matter, the consequence and effect, and the reason and spirit of the law in endeavoring to arrive at the purpose of the lawgiver.

Last year this Court observed that courts construe a statute “only when the meaning is ambiguous *or would lead to an illogical result defeating the purpose of the legislature.*” *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. *en banc.* 2013) (emphasis added); *accord: State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. *en banc.* 2006); *Sisco v. Board of Trustees of Police Retirement System of St. Louis*, 31 S.W.3d 114, 119, 121 (Mo. App. E.D. 2000) (courts apply rules of statutory construction when terms of statute “are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result in light of the statute’s purpose,” and when clearly necessary, “the strict letter of a statute must yield to the manifest intent of the legislature”).

As *Holy Trinity Church* held, *supra*, these principles have been applied to imply exceptions to statutes. As a general rule, courts have no authority to create exceptions to a

statute “not made by the act itself.” 73 AM.JUR.2d *Statutes* §204 (2014). However, cases have recognized that:

[E]xceptions to the general provisions of a statute may be implied by the courts, such as where the exceptions are necessary to give effect to the legislative intent or where the exceptions are essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole.

Ibid. Accord: United States v. Rutherford, 442 U.S. 544, 552 (1979). To similar effect is *Mister v. Kansas City*, 18 Mo. App. 217, 222-223 (1885):

We cannot construe [a statute] so as to add thereto a provision, in the nature of an exception, which the legislature did not see fit to insert. This, as is well settled by an unbroken current of authority, is not permissible where the language of the law is clear and unambiguous, as is the case here, *except where to give effect to the language used, according to its literal terms, would lead to a gross absurdity or manifest wrong, or inconsistency, which courts will not impute to a legislative body.*

(Emphasis added.)

Which leads to the most important omission in Respondents’ Brief: They do not deny that their reading of § 537.100 would lead to an illogical and absurd result, defeating the purpose of the legislature in enacting the Wrongful Death Act. According to *O’Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. *en banc*. 1983), the purposes animating the General Assembly in adopting this Act were to provide compensation to bereaved family members for their loss, to ensure that tortfeasors pay for the damages they cause, and to deter the conduct causing death. Can anyone *seriously doubt* that allowing tortfeasors to employ

fraud and cover-up in order to avoid responsibility for causing wrongful deaths is antithetical to these salubrious purposes? Can anyone *credibly* argue that such a result is not illogical and absurd, but rather rational and wise? To their credit, not even Defendants at bar claim the consequence of their interpretation is anything other than (in the words of *Mister*) “a gross absurdity or manifest wrong, or inconsistency.” 18 Mo. App. at 223.

Just as importantly, does anyone *truly believe* that this was the end *intended* by the General Assembly in 1855 when it passed “An Act for the Better Security of Life, Property and Character?” In order for Defendants to prevail, they must convince this Court that it was *the intention of the legislature* to allow defendants causing wrongful deaths to escape liability if they could successfully cover up their reprehensible acts for one year (the length of the original statute of limitations for death cases). Such a conclusion requires this Court to disregard the presumption that the legislature passes laws “in a spirit of justice and for the welfare of the community,” *Gist v. Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 123 S.W. 921, 924 (*en banc*. 1909).

Statutes of limitations are enacted to *prevent* frauds. *Bailey v. Glover*, 88 U.S. 342, 348 (1875). To hold that a party who fraudulently conceals its misdeed is permitted to plead the bar of the statute of limitations “is to make the law which was designed to prevent fraud the means by which it is successful and secure.” *Howell v. Murphy*, 844 S.W.2d 42, 47 (Mo. App. W.D. 1992); *accord: Bailey, supra*, 88 U.S. at 349. *Defendants do not deny that if § 537.100 is read to bar the claims of Plaintiffs in the instant cause, the effect will be the perversion of purpose decried in Howell and Bailey.* It is an effect that should be neither endorsed nor embraced by this Court.

Defendants attempt to apply canons of construction at pages 36-37 of their Respondents' Brief. They cite the doctrine of *in pari materia*, which Plaintiffs have discussed, *supra*. Plaintiffs agree the doctrine should be applied to harmonize the Wrongful Death Act and the common law.

They also rely on that old standby, *expressio unius est exclusio alterius*. Missouri courts have been tepid in their endorsement of the *expressio unius* maxim, describing it as “a mere auxiliary rule of construction in aid of the fundamental objective, which is to ascertain the intention of the lawmakers; and that it must be applied with caution.” *Springfield City Water Co. v. City of Springfield*, 353 Mo. 445, 182 S.W.2d 613, 618 (1944). It is unnecessary to apply the canon in this case since the intention of the legislature is well-explicated in *O'Grady, supra*.

Specifically, Defendants argue that since the legislature adopted two exceptions to the wrongful death statute of limitations since 1855, the failure to adopt an exception for fraud indicates the intention of the legislature to allow tortfeasors who conceal their tortious acts for more than three years to get off scot free. That is a truly silly argument.

The two exceptions adverted to by Defendants are a savings statute when a plaintiff voluntarily dismisses a death action, and a tolling provision when a defendant absconds. In both cases the common law provided no succor to plaintiffs who, for whatever reason, had to dismiss their death actions, or who are the victims of tortfeasors who abscond. Defendants point to no common law maxims that allow an action to be refiled within one year of a voluntary dismissal, which is hardly surprising since there were no statutes of

limitations in the common law.⁵ Nor do they cite common law maxims that toll the running of the statute of limitations because a defendant absconds, again because the common law did not recognize statutes of limitations. Hence, legislative enactment was the only source of relief to plaintiffs in those situations.

But there *was* a common law maxim that prevented defendants from profiting from their own wrong-doing and fraud. The former maxim was described by the United States Supreme Court as older than the United States itself, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959), for which reason it was unnecessary to expressly adopt it in the wrongful death statute of limitations (*see, also* Appellants' Brief at 26-38). It was no more necessary to codify the common law maxim as an express exception to the wrongful death statute of limitations than it was to codify the same maxim as an express exception to the statute in *Perry v. Strawbridge, supra*. Comparing the exceptions adopted in the amendments to §537.100 to the implied exception for fraudulent concealment is like comparing apples to oranges, for which reason *expressio unius* is inapposite.

At pages 34-35 of their Respondents' Brief, Defendants also resort to the rule of statutory construction sometimes called the "legislative acquiescence doctrine," *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97, 103 (*en banc*. 1957), claiming that the failure of the legislature to act since *Frazer* was decided indicates a legislative endorsement of allowing fraudulent tortfeasors to hide behind the statute of limitations

⁵ See authorities cited at p. 26 of Appellants' Brief.

when they kill people (but not when they maim them). *Van Dorpel* is particularly persuasive on why this malign doctrine has little value:⁶

[T]his beguiling doctrine of legislative assent by silence possesses a certain undeniable logic and charm. Nor are we oblivious to the flattery implicit therein; double flattery, in fact: flattery both to the profound learning and wisdom of the particular supreme court which has spoken, and flattery to a presumably alert and eagerly responsive state legislature. One pictures the legislators of our various states periodically clamoring and elbowing each other in their zeal to get at the pearls of wisdom embalmed in the latest decisions and advance sheets of their respective supreme courts-and thenceforth indicating their unbounded approval by a vast and permanent silence.

⁶ *Van Dorpel* was written by Justice John D. Voelker, renowned as a fly fisherman and as Michigan's "Literary Justice," the latter cognomen reflecting his accomplishments as the author of several books. The year after he wrote the opinion in *Van Dorpel*, Justice Voelker published the best-selling novel, ANATOMY OF A MURDER, which became an Academy Award-nominated film, released in 1959. Baker & Vander Veen, *John D. Voelker, Michigan's Literary Justice*, 79 MICH. BAR. J. 530 (2000). In his classic dissent to *People v. Hildabridle*, 353 Mich. 562, 92 N.W.2d 6, 11 (1958), involving the prosecution of eight nudists near Battle Creek, Justice Voelker observed: "It seems that we are now prepared to burn down the house of constitutional safeguards in order to roast a few nudists. I will have none of it." (This dissent was so persuasive it became the *majority* opinion.)

Yet there are several dark shadows in this picture. For one, it suggests a legislative passion for reading and heeding the decisions of our supreme courts which we suspect may be scarcely borne out by the facts. For another, pushed too far such a doctrine suggests the interesting proposition that it is the legislatures which have now become the ultimate courts of last resort in our various states; that if they delay long enough to correct our errors those errors thus become both respectable and immutably frozen; and, finally, the larger and more dismal corollary that if enough people persist long enough in ignoring an injustice it thereby becomes just. We reject as both un-Christian and legally unsound the hopeless doctrine that this Court is shackled and helpless to redeem itself from its own original sin, however or by whomever long condoned.

Courts throughout the land have long split over this doctrine of legislative acquiescence by silence. The usual arguments for recognizing it are that it gives stability and sureness to the law; that “rights” thus acquired can thus only be disturbed at regular and predictable intervals by but one branch of the government, the legislative; and, finally, that to disregard the doctrine amounts to judicial legislating. Now we recognize that a court should not lightly overrule an interpretation of a statute that has been the law for 37 years, but we also see little justice or utility in continuing to give stability or sureness to an unfortunate rule of law; nor do we understand that employers or their insurance carriers have gained any vested “rights” in the interpretation of this statute; nor do we think that the

reinterpretation of a statute in the light of long experience with an unfortunate interpretation constitutes judicial legislating.

85 N.W.2d at 102-103. Similarly, this Court indicated in *O'Grady, supra*, 654 S.W.2d at 911, that it was not impressed by the legislative acquiescence doctrine: "We are unwilling to speculate concerning the reasons for the legislature's inaction on this issue, and do not find this reasoning persuasive." *Accord: State v. Grubb*, 120 S.W.3d 737, 740 (Mo. *en banc*. 2003).

The canons of statutory construction suggest an independent basis for holding that Plaintiffs' claims are not barred by the wrongful death statute of limitations.

III. Contrary to Defendants' argument, the Court of Appeals correctly held that fraudulent concealment prevents accrual of a cause of action (responding to Respondents' Brief at 9-14).⁷

Defendants argue that *Frazer* correctly held that a wrongful death claim accrues at the exact moment of death, regardless of whether the tortfeasor covers up the death or the circumstances causing the death.

⁷ In the event that this Court determines that operation of § 537.100 should be restricted by the common law maxims, or that the statute has an implied exception for fraudulent concealment because of the rules of construction, then the statute of limitations will not apply to Plaintiffs' claims. If the Court disagrees with Plaintiffs' arguments on those points, then it is appropriate to consider when Plaintiffs' causes accrued in light of the affirmative, fraudulent conduct of Defendants.

That indeed was the holding of *Fraze*, but, as Plaintiffs noted in their Appellants' Brief, none of the cases cited by *Fraze* involved the question of whether accrual of a death action should be delayed by fraud; indeed, none of those cases involved any allegation of fraudulent concealment. Defendants cite 10 more cases decided after *Fraze*, standing for the proposition that a death case accrues when the decedent dies; none of those cases involved the question of whether fraud affects the accrual (Respondents' Brief at 9-10). The only case they cite that holds that fraud does not affect accrual is *Fraze*, the wisdom of which is, presumably, to be reexamined by this Court's transfer order.

So the real question is this: Did Plaintiffs' claims accrue when their decedents died, even though they had no way of knowing they *had* claims due to Defendants' mendacity? In this regard *Fraze* is distinguishable from the cases at bar. In *Fraze* the defendant fled the scene and remained silent. In the cases at bar, Defendants affirmatively misrepresented that Plaintiffs died of natural causes.

In the instant cause, the Western District held that since "accrue" is not defined by § 537.100, the meaning of the term had to be liberally construed under this Court's holding in *O'Grady*, Slip Opinion at 13-14. Such construction means that "accrue" is capable of a construction that is delayed until after the Defendants' fraud is discovered, especially where, as here, the delay was occasioned by Defendants' misconduct, Slip Opinion at 17. Critically, the Court held that the liberal construction of § 537.100 compelled the conclusion that when the legislature used the word, "accrue," it did not intend that it extend to actions that claimants could not know about due to affirmative, fraudulent concealment by tortfeasors, *Ibid.* at 19-20.

The Western District's Opinion was not an anomaly. In *State ex rel. Barringer v. Hawkins*, 103 Mo. App. 251, 77 SW. 98, 99 (1903), the Court held that a statute of limitations which spoke of suit having to be commenced within three years "after such cause of action accrued," allowed the Court to construe the statute to mean that fraudulent concealment would delay accrual. Kentucky similarly recognized that the effect of fraud was to postpone the time of accruing the action until the fraud was discovered, *Falls Branch Coal Co. v. Proctor Coal Co.*, 203 Ky. 307, 262 S.W. 300, 305 (1924).

Other than repeating the holding of *Frazer*, Respondents do not explain why the holding of the Western District is unsound. They cite to four cases where the Courts refused to imply a discovery rule delaying accrual of actions for purposes of statutes of limitations (Respondents' Brief at 12). None of those cases involved allegations that the defendants affirmatively hindered the plaintiffs in discovering they had a cause of action.

Defendants' reliance on discovery rule cases is problematic. A discovery rule exception to the statute of limitations is distinct from an exception relating to fraudulent concealment, compare 51 AM.JUR.2d *Limitation of Actions* §158 with § 162 (2014). That point is made in *Comment, Torts—Statutes of Limitations—Time When Statute Begins to Run*, 1953 WASHINGTON U. L. Q. 336, 337-338 (1953):

It is not necessary, however, that the plaintiff know of the existence of the cause of action, nor even that reasonable diligence would disclose it to him, before the statute can begin to run. If, however, the defendant somehow conceals the cause of action from the plaintiff the running of the statute is prevented.

The Opinion of the Western District is correct.

IV. Categorizing the wrongful death statute of limitations as a “special statute of limitations” does not undercut Plaintiffs’ argument (Responding to Respondents’ Brief at 23-26).

The key to *Fraze*e’s holding is this language, quoting *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347, 350 (*en banc*. 1944):

This court has 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. * * * No other exceptions whatever are engrafted on that statute, and it is not the duty or the right of the courts to write new provisions into the statute.

*Fraze*e, *supra*, 314 S.W.2d at 919. Relying on this language, Defendants claim that § 537.100 is a special statute of limitations for which no exceptions may ever exist unless legislatively enacted.

Defendants do not explain why the status of the statute requires this conclusion. A number of older cases held that where a statute creates a cause of action, a period of limitation set up in the same statute is regarded as substantive in nature, limiting the right as well as the remedy, *Osbourne v. United States*, 164 F.2d 767, 768 (2d Cir. 1947). This rationale has been employed with reference to the Missouri Wrongful Death Act, as Judge Shangler’s scholarly opinion in *State ex rel. Research Medical Center v. Peters*, 631 S.W.2d 038 (Mo. App. W. D. 1982), amply demonstrates.

Statutes of limitations were categorized as either substantive or remedial (also known as procedural), *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 255 (4th Cir. 1949), and in the case of the former, this language was typical:

A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, *is not a statute of limitations*. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

(Emphasis in original.) Under this reasoning, fraud or concealment by a defendant which prevented a plaintiff from bringing the action within time would not toll the running of the statute, *Ibid.* at 257.

This rationale was not universally embraced. *Scarborough* involved the Federal Employers Liability Act, so that the special statute of limitation was part of a remedial statute, the kind of law that should be liberally construed and should be interpreted to “discourage attempted evasion by wrongdoers.” *Ibid.* at 258. “And unless the statute so requires with crystal clarity, it should not be so applied as to negative broad principles well settled in our law by a long series of decisions.” *Ibid.* Thus, after discussing the rule governing special statute of limitations, *Scarborough* eschewed it:

It has often been said that a primary purpose of statutes of limitations in general has been the prevention of fraud. It is freely conceded by appellee here that fraud will toll the running of the so-called remedial statute of limitations. We cannot see a distinction and a difference, so clear and so real, between the two classes of statutes of limitations -- the remedial and the substantive -- as to justify the courts in fully giving effect to fraud in tolling the statute in one type (remedial) and then flatly denying that effect to fraud in the other type (substantive). The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations.

178 F.2d at 259. *Scarborough* was later cited by the United States Supreme Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 n. 4 (1959), which was discussed at length in Appellants' Brief at pages 33-36.

While Missouri has, at times, held that the wrongful death statute of limitations is a matter of substantive right and does not merely repose the remedy, *Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1, 4 (Mo. App. 1975), other cases suggest a contrary result. Thus, in *Cytron v. St. Louis Transit Co.*, 205 Mo. 692, 104 S.W. 109, 110 (*en banc*. 1907), plaintiff filed a timely action within one year of his son's death. Thereafter, more than a year after the death, an amended petition was filed, joining decedent's mother as a plaintiff. Defendant argued that mother's claim was barred by the special statute of limitations for wrongful death which required a timely filing as a condition to mother's right to recover. This Court rejected defendant's argument that the death statute "is not so much a statute of

limitation as it is a condition; that as a condition it is distinguished from a limitation in the right of amendment, and the party must bring himself rigidly within the condition to be entitled to recover.” *Ibid.* Instead, the Court held that the statute was written “with an honest purpose of limitation and repose only.” *Ibid.* Thus, “the stiff letter of the statutory term of limitation may be gently coaxed or relieved against by the benevolent interpretation and application of the Code provisions on amendments. . . .” *Ibid.* Cases subsequent to *Cytron* cited it for the proposition that even special statutes of limitations were remedial in character, and not substantive, *Research Medical Center, supra*, 631 S.W.2d at 943 n.4.

If special statutes of limitations are remedial rather than substantive, then the rationale for strictly construing them disappears, as in *Scarborough, supra*. That was the conclusion of *Howell v. Murphy, supra*, which found that the rule announced in *Frazee* was a consequence of a line of cases in which this Court held that the limitation period in the Act “was a condition imposed on the right itself,” for which reason most states required strict construction of wrongful death statutes, 844 S.W.2d at 45 – 46.⁸

Howell observed that this Court announced “a major shift in its interpretation” of the Wrongful Death Act in *O’Grady, supra*, which changed the law requiring strict construction of the Act, 654 S.W.2d at 907-908, cited in *Howell*, 844 S.W.2d at 46. Since the rule of strict construction was the underpinning for the holding of *Frazee*, it followed, according to *Howell*, that *Frazee* was no longer authoritative on the issue of whether

⁸ The classic exposition of this rule was found in *Sabol v. Pekoc*, 148 Ohio St. 545, 76 N.E.2d 84 (1947) (discussed at page 60 of Appellants’ Brief).

fraudulent concealment would permit a tortfeasor to take advantage of the statute of limitations, 844 S.W.2d at 47.

Defendants argue that *Howell* claimed that *Fraze* was effectively overruled by *O'Grady, supra*. Since *O'Grady* did not involve a statute of limitations issue, Defendants argue, it could not overrule *Fraze* (Respondents' Brief at 25), and of course Defendants are correct that *O'Grady* did not overrule *Fraze*. But it did undermine *Fraze's* vitality by changing the law requiring strict construction of the Act.

It is a matter of black letter law that, "An overruling decision destroys the effect of the overruled one as a precedent. A decision that is based wholly on another decision, which is overruled, is also overruled." 21 C.J.S. *Courts* § 202 at 201 (2006). The Western District essentially utilized that reasoning in declining to follow a decision by this Court in *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S.W. 851 (1906), in *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 766 (Mo. App. 2008):

The impact of *O'Grady* is to nullify the reasons asserted for the holding in *Strode*. Thus, while the Missouri Supreme Court has not specifically stated that *Strode* is no longer to be followed, its holding is premised upon an interpretation of the Missouri wrongful death statute that no longer applies. *Strode* does not resolve the issue presently before the court.

To the extent *Fraze* relied on a proposition of law repudiated by this Court in *O'Grady, Howell* was correct in declining to follow it.

V. The rule of stare decisis does not assist defendants' argument because the issues advanced in this case were not, for the most part, addressed in *Fraze* (responding to Respondents' Brief at 40-42).

Defendants argue that the rule of *Fraze* is entitled to the benefit of the weight of stare decisis, for which reason it should not be disregarded lightly.

In their Appellants' Brief, Plaintiffs noted that the arguments advanced by the *Fraze* plaintiffs were very thin, filling two and one-half pages of their brief and citing a total of four cases (App. 46–47). Among the arguments the *Fraze* plaintiffs did *not* make were:

- That § 537.100 was restricted by the common law maxims that forbid tortfeasors from gaining an advantage through fraud or wrong-doing.
- That the Court should imply an exception to § 537.100 for fraudulent concealment because refusing to do so is contrary to the clear intention of the legislature in adopting the wrongful death statute and results in an unjust, oppressive and absurd result whereby a tortfeasor can avoid responsibility by covering up misconduct that has fatal consequences.
 - That the Court should liberally construe the Wrongful Death Act to effect its remedial purposes.
 - That the Court should align Missouri with the majority rule in the United States which is that, “The statute of limitations for a wrongful death action may be tolled on a showing of fraudulent concealment of the existence of the cause of action.” 25A C.J.S. *Death* § 167 at 438 (2012).

None of these issues were discussed in *Frazer* because they were not briefed by the *Frazer* plaintiffs. Of course, the latter two arguments -- as to the liberal construction of the Act and the alignment of Missouri with the majority rule -- could not have been made in 1958 because *O'Grady* had not yet been decided, and *Frazer* was consistent with the majority rule in death cases when it was decided. But as to the other issues, it is not enough that they *could* have been discussed if anyone had seen fit to raise them. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). If a court has not considered a particular point, then "the connection of the decision with that point is not a connection of cause and effect, but is purely accidental, and as to that point the decision is no authority whatever." *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 (D.C. App. 1995), citing E. Wambaugh, *THE STUDY OF CASES* 24-25 (2d ed. 1894). The Supreme Court of New Jersey also relied on Prof. Wambaugh in explaining the rationale for this rule:

As it is the office of the court to pronounce a decision after having fully examined the question presented and the law relating thereto, and as it is the office of counsel to aid the court by presenting the questions and the law with the fullness that comes from long familiarity with the case and from thorough examination of authorities, a case decided after little or no argument has not full weight.

Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners, 5 N.J. 114, 74 A.2d 265, 270 (1950), *citing*, *STUDY OF CASES* at 46.

Missouri law is congruent with these principles. In *State ex rel. Lashly v. Becker*, 290 Mo. 560, 235 S.W. 1017, 1028 (*en banc*. 1921), this Court said:

The language of a judicial decision is always to be construed with reference to the circumstances of the particular case and the question actually under consideration, and the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision.

Accord: State v. Honeycutt, 421 S.W.3d 410, 422-423 (Mo. *en banc*. 2013).

Since the issues raised by Plaintiffs at bar were not discussed or decided in *Frazee*, the rule of *stare decisis* lends Defendants no assistance.

VI. Defendants' argument that the judgments of the trial courts should be affirmed because Plaintiffs' petition failed to adequately plead fraud is not well founded (Responding to Respondents' Brief at 44-47).

Defendants argue that Plaintiffs failed to allege how they learned of the fraud surrounding the deaths of their decedents, when they learned of the circumstances, etc. (Respondents' Brief at 40).

When Defendants made a similar argument in the trial court concerning the death of Charles O'Hara, Plaintiff, Boland, argued that if the trial court found that her petition

was factually inadequate, she should be granted leave to amend her pleading to state more detail (Boland L.F. 66-67).⁹ That relief is consistent with Supreme Court Rule 67.06.

The trial court did not grant Judgment on the pleadings for deficiencies in Plaintiffs' pleadings, but because *Frazer* was finding precedent (Boland L.F. 149).

If this Court believes the Plaintiffs' petitions are deficient, the appropriate remedy is to remand their cause to the trial court so that they may amend their pleadings. *Koller v. Ranger Insurance Co.*, 569 S.W.2d 372, 373 (Mo. App. 1978).

⁹ The same thing was true of the other Plaintiffs (Littrell L.F. 109-110; Harper L.F. 67-68; Gann L.F. 67-68; and Pittman L.F. 119-120).

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice System on July 14, 2014.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,606, excluding the cover, signature block, and this certificate.

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