
IN THE SUPREME COURT OF MISSOURI

SALLY BOLAND, SHERRI LYNN HARPER, DAVID C. GANN, JENNIRAE LITRELL, and HELEN PITTMAN,
Plaintiffs-Appellants,

vs.

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,
Defendants-Respondents.

COMBINED SUBSTITUTE BRIEF OF RESPONDENTS

Consolidated Appeals from the Circuit Court of Livingston County, Missouri
The Honorable Thomas Chapman, Circuit Judge
Circuit Court Case Nos. 10LV-CC00150, 10LV-CC00151 and 11LV-CC0004
and
The Honorable Jason Kanoy, Circuit Judge
Circuit Court Case Nos. 10LV-CC00111 and 10LV-CC00112

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JURISDICTIONAL STATEMENT

Respondent is satisfied with the Jurisdictional Statements in the Appellants' Substitute Brief.

STATEMENT OF FACTS

This consolidated appeal arises out of five wrongful death lawsuits that were filed against three corporate defendants. (Boland LF, p. 10, ¶ 4; Gann LF, p. 10, ¶ 4; Harper LF, p. 10, ¶ 4; Littrell LF, p. 10, ¶ 4; Pittman LF, p. 11, ¶ 4). Each Defendant has had some form of corporate relationship¹ with a community hospital in Chillicothe that in 2002 was known as Hedrick Medical Center.

The issue for this Court is whether allegations of fraudulent concealment can toll the statute of limitations in the Wrongful Death Act, Mo. Rev. Stat. § 537.100, even though no such exception is written into the statute. Although Appellants' Substitute Brief provides detailed factual allegations, only a few facts are truly material to the legal issue presented.

¹ Prior to 2002, Grand River Health Systems, Inc. ("Grand River") had been organized as a non-profit corporation to operate Hedrick Medical Center in Chillicothe, Missouri. In 2002, Grand River had two members, one of which was Health Midwest Development Group ("HMDG") (Plaintiffs never sued the other member from that timeframe). In 2002, the non-profit corporation now known as Community Health Group (CHG) was the sole member of HDMG. In 2003, Saint Luke's Health System, Inc. became Grand River's sole member, and the hospital was renamed Saint Luke's Hospital of Chillicothe.

Each of the deaths at issue occurred in the first half of 2002.² However, no wrongful death lawsuits were filed until more than eight years had passed.³ As all of the wrongful death lawsuits were filed more than five years after the three-year wrongful death statute of limitations had expired, the Defendants moved for judgment on the pleadings in each case. (Boland LF, pp. 50-56, 57-59; Gann LF, pp. 51-57, 58-60; Harper LF, pp. 51-57, 58-60; Littrell LF, p. 93-99; 100-02; Pittman LF, pp. 103-09, 110-12).

In response, the Plaintiffs argued that the Wrongful Death Act's statute of limitation should be tolled because of the Defendants' alleged "fraudulent concealment." Plaintiffs alleged that Jennifer Hall, a respiratory therapist who was employed by Hedrick Medical Center, intentionally and criminally caused the deaths of their respective

² The decedent in *Boland* died on February 3, 2002. (Boland LF, p. 11, ¶ 12). The decedent in *Pittman* died on March 9, 2002. (Pittman LF, p. 12, ¶ 10). The decedent in *Harper* died on March 22, 2002. (Harper LF, p. 11, ¶ 12). The decedent in *Gann* died on March 30, 2002. (Gann LF, p. 11, ¶ 12). The decedent in *Littrell* died on April 15, 2002. (Littrell LF, p. 11, ¶ 10).

³ Plaintiffs Helen Pittman and Jennirae Littrell filed wrongful death lawsuits on July 14, 2010. (Littrell LF, p. 2; Pittman LF, p. 2). Plaintiffs David Gann and Sherri Harper filed wrongful death lawsuits on October 4, 2010. (Gann LF, p. 2; Harper LF, p. 2). Plaintiff Sally Boland filed her wrongful death lawsuit on January 7, 2011. (Boland LF, p. 2).

decedents by injecting lethal doses of drugs that had not been ordered for the decedents.⁴ (See Boland LF, p. 11, ¶¶14-15; Gann LF, p. 11, ¶¶14-15; Harper LF, p. 11, ¶¶14-15; Littrell LF, pp. 11-12, ¶¶13, 16; Pittman LF, pp. 12-13, ¶¶13, 16). They further allege that Hedrick Medical Center personnel fraudulently concealed Ms. Hall's alleged actions,⁵ thereby prohibiting Plaintiffs from timely filing their suits. (*Id.*).

On June 15, 2012, the Honorable Jason A. Kanoy granted Defendants' Motions for Judgment on the Pleadings in *Littrell* and *Pittman*. (Littrell LF, p. 129-31; Pittman LF, p. 139-41). On June 21, 2012, the Honorable Thomas N. Chapman granted Defendants' Motions for Judgment on the Pleadings in *Boland*, *Gann* and *Harper*. (Boland LF, p. 125-31; Gann LF, p. 126-32; Harper LF, p. 126-32). Each Plaintiff appealed, and the Missouri Court of Appeals consolidated the appeals. After the Western District of the Missouri Court of Appeals issued its opinion, this Court accepted transfer.

⁴ Notably, no charges have ever been filed against Jennifer Hall in the more than twelve years that have passed since the deaths at issue.

⁵ While Defendants-Respondents vehemently deny these allegations, they recognize that this Court must accept them as true for purposes of this appeal. *Messner v. Am. Union Ins. Co.*, 119 S.W.3d 642, 644 (Mo. App. 2003).

RESPONSE TO POINT RELIED ON

THE TRIAL COURTS PROPERLY GRANTED THE DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS BECAUSE THE LAWSUITS WERE TIME-BARRED BY THE SPECIAL STATUTE OF LIMITATIONS IN THE WRONGFUL DEATH ACT, AND MISSOURI COURTS CANNOT ASCRIBE A TOLLING MECHANISM ONTO A SPECIAL STATUTE OF LIMITATIONS THAT THE LEGISLATURE DID NOT PROVIDE IN THE STATUTE ITSELF; MOREOVER, THE PLAINTIFFS DID NOT PLEAD SUFFICIENT FACTS TO INVOKE FRAUDULENT CONCEALMENT AS A TOLLING MECHANISM, EVEN IF IT COULD BE APPLIED TO THEIR WRONGFUL DEATH CLAIMS.

Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958)

Mo. Rev. Stat. § 537.100

Mo. Rev. Stat. § 516.300

Batek v. Curators at the University of Missouri, 920 S.W.2d 895 (Mo. banc 1996)

ARGUMENT

POINT I RESPONSE: THE TRIAL COURTS PROPERLY GRANTED THE DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS BECAUSE THE LAWSUITS WERE TIME-BARRED BY THE SPECIAL STATUTE OF LIMITATIONS IN THE WRONGFUL DEATH ACT, AND MISSOURI COURTS CANNOT ASCRIBE A TOLLING MECHANISM ONTO A SPECIAL STATUTE OF LIMITATIONS THAT THE LEGISLATURE DID NOT PROVIDE IN THE STATUTE ITSELF; MOREOVER, THE PLAINTIFFS DID NOT PLEAD SUFFICIENT FACTS TO INVOKE FRAUDULENT CONCEALMENT AS A TOLLING MECHANISM, EVEN IF IT COULD BE APPLIED TO THEIR WRONGFUL DEATH CLAIMS.

Issue Presented

The statute of limitations in the Wrongful Death Act requires all wrongful death actions to be filed within three years of the date of accrual. Missouri courts have consistently defined accrual to occur at the time of death. The actions in these consolidated cases were all filed more than eight years after the deaths. Did the trial courts err in dismissing those actions?

Introduction

The question presented asks whether Missouri courts may ascribe a tolling mechanism⁶ onto the Wrongful Death Act’s special statute of limitations, Mo. Rev. Stat. § 537.100, that is not provided by the statute. This Court has already said that it cannot in *Frazee v. Partney*, 314 S.W.2d 915, 919 (Mo. 1958). Numerous Missouri cases have similarly held that courts have no such power, as it is the province of the legislature to provide any exceptions to special statutes of limitations, and courts “may not engraft others” upon them, even in cases of hardship. *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. banc. 1988). *See also Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 20 (Mo. banc 1995) (“Statutory exceptions are strictly construed and are not to be enlarged by the courts upon consideration of apparent hardship.”); *Black v. City National Bank & Trust Co.*, 321 S.W.2d 477, 480 (Mo. 1959).

This Court should again reject the request to ascribe a fraudulent concealment tolling mechanism to a special statute of limitations. And even if this Court concludes that allegations of fraudulent concealment could toll the statute of limitations, all Plaintiffs failed to plead adequate facts to support tolling in these cases, thereby mandating dismissal. *See Batek v. Curators at the University of Missouri*, 920 S.W.2d 895, 900-01 (Mo. banc 1996).

⁶ For ease of reference, this brief will at times refer to a “tolling mechanism” or “tolling device” to generally describe any measure that would prevent the statute from running in this case—whether through tolling, delayed accrual or some other method.

Standard of Review

An appellate court’s review of a grant of judgment on the pleadings is *de novo*. *In re Gene Wild Ins. Trust*, 340 S.W.3d 130, 142-43 (Mo. App. 2011). This Court “reviews the petition of the losing party to determine if the facts pled were insufficient as a matter of law.” *Mitchell v. Nixon*, 351 S.W.3d 676, 679 (Mo. App. 2011) (quotations and citations omitted). “The grant of judgment on the pleadings is upheld where, holding all facts alleged in the opposing party’s petition as true, the moving party was entitled to judgment as a matter of law.” *Id.* The primary issue is the correctness of the judgment, not the route taken to reach it. Therefore, this Court “will affirm on any ground sufficient to sustain the judgment and [is] not limited to the grounds relied on by the trial court.” *Id.* (quotations omitted).

Legal Argument and Authorities

Appellants’ argument to toll the wrongful death statute of limitations due to alleged fraudulent concealment is not a viable theory under Missouri law. This Court has consistently held that special statutes of limitations, including Mo. Rev. Stat. § 537.100 in the Wrongful Death Act, cannot be tolled for any reason not provided in the statute itself. *See, e.g., Norden*, 756 S.W.2d at 163; *Black*, 321 S.W.2d at 480; *Fraze*, 314 S.W.2d at 919. This black letter law has been continually applied by Missouri courts when interpreting special statutes of limitations, with the consistently stated goal of applying the plain language of the statute to effectuate the legislature’s intent. *See, e.g., Krutz v. Meter*, 313 S.W.3d 138, 139-40 (Mo. App. 2010); *Hammond v. Mun. Corr. Inst.*, 117 S.W.3d 130, 138 (Mo. App. 2003); *Bregant ex rel. Bregant v. Fink*, 724 S.W.2d 337,

338 (Mo. App. 1987). Appellants' argument that there is a hidden tolling mechanism in the wrongful death statute of limitations should again be rejected.

A. Under Missouri statutes and binding precedent, the three-year wrongful death statute of limitations expired long before any of the Appellants' claims were filed.

1. The plain language of the Wrongful Death Act requires filing within three years of accrual.

The Appellants' claims arise under the Wrongful Death Act, Mo. Rev. Stat. § 537.080, et seq. Wrongful death is a statutory cause of action that has "no common-law antecedent." *Sanders v. Ahmed*, 364 S.W.3d 195, 203 (Mo. banc 2012). The Wrongful Death Act provides its own statute of limitations, which reads as follows:

Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him the judgment be

arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.

Mo. Rev. Stat. § 537.100 (emphasis added). The statute clearly states that an action must be instituted within three years after it accrues, and it provides specific exceptions that are inapplicable to this appeal.

The analysis, therefore, is simple. The Appellants' wrongful death claims accrued when their decedents died in 2002. The applicable three-year statutes of limitations expired in 2005, and each case was well out of time when filed in 2010 or 2011. As the statute contains no applicable tolling mechanism, this Court should affirm the grant of judgment on the pleadings, as the cases are time-barred.

2. *Wrongful death actions accrue at the time of death in Missouri, as courts have consistently held for decades.*

Missouri courts have continually held that a wrongful death action accrues at the time of death. *See, e.g., Frazee*, 314 S.W.2d at 921 (stating that "our courts have held in several cases that the cause of action for wrongful death accrues at the death"); *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 97 (Mo. App. 2001) ("A cause of action under §537.080 accrues to the statutory beneficiaries when the death occurs."); *Dzur v.*

Gaertner, 657 S.W.2d 35, 36 (Mo. App. 1983) (“As to *time*, for purposes of calculating the statute of limitations, the cause of action ‘accrues’ to the statutory beneficiary when the death occurs.”).⁷

It may be stated as a sound general proposition that a cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time. ... A cause of action accrues at the time when its owner may legally invoke the aid of a proper tribunal to enforce his demand; when he has a present right to institute and maintain an action or suit.

Frazee, 314 S.W.2d at 920. “It may be stated as a general principle that, unless affected by statute, a cause of action ‘accrues at the moment of a wrong, default or delict by the defendant and the injury of the plaintiff ... if the injury, however slight, is complete at the time of the act.’” *Id.* Thus, a “cause of action accrues, and limitations thereon begin to

⁷ See also *Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136-37 (Mo. banc 1989); *Crane v. Riehn*, 568 S.W.2d 525, 527 (Mo. banc 1978); *State ex rel. Kan. City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142, 145 (Mo. banc 1976); *Brown v. Mo. Delta Med. Ctr.*, 334 S.W.3d 465, 466 (Mo. App. 2010); *Denton v. Soonattrukal*, 149 S.W.3d 517, 522 (Mo. App. 2004); *Piskorski v. Larice*, 70 S.W.3d 573, 575 (Mo. App. 2002); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo. App. 1982); *State ex rel. Research Med. Ctr. v. Peters*, 631 S.W.2d 938, 940 (Mo. App. 1982).

run ... when the right to sue arises.” *Id.* See also *Chambers v. Nelson*, 737 S.W.2d 225, 226 (Mo. App. 1987) (same).

It is inherently logical that a wrongful death action “accrues” at the time of death, as the term “accrual” refers to the time “when a suit may be maintained thereon.”

BLACK’S LAW DICTIONARY 21 (6th Ed. 1990). The accrual or existence of a cause of action must be distinguished from the discovery of the wrongful act or the identity of the defendant, as the cause of action existed—and hence accrued—whether or not it had been discovered. *Frazee*, 314 S.W.2d at 920. A limitations period begins to run at the time that a cause of action accrues, or comes into existence, “not from the time when one may be effectively commenced.” *Id.* at 921.

Missouri courts have held time and time again that a cause of action for wrongful death accrues at the time of a decedent’s death, as that is when the plaintiff-heir sustained the injury giving rise to the right to sue. See *supra* p. 9-10 & n.7. The cause of action has accrued because the right to sue clearly exists once there is wrongdoing and resulting harm, regardless of the heirs’ awareness of malfeasance.

The Court of Appeals’s now vacated opinion correctly defined accrual as the time “when the right to sue arises.” (Slip op. at 11). But the court incorrectly concluded that the statute of limitations did not accrue “until the date the alleged malfeasance was reasonably discoverable due to the Respondents’ fraudulent concealment.” (*Id.*). In effect, the court held that the Plaintiffs had no right to sue (despite having allegedly been injured by the Defendants’ wrongful actions) until they were, or should have been, aware

of the Defendants' malfeasance. As such, the court mischaracterized a tolling mechanism (commonly known as the "discovery rule") as a matter of accrual. (*See id.* at 21).

A prior Missouri case described a similar argument as an improper attempt to judicially adopt the discovery rule, in clear contravention of legislative intent. *See Miller v. Duhart*, 637 S.W.2d 183, 188 (Mo. App. 1982) ("[I]n effect, arguing that the limitations period should not begin to run until the tort is capable of ascertainment ... could be construed as a request to adopt a discovery rule ..."). "Discovery, as a trigger for the commencement of a period of limitations, has been rejected in Missouri, except for the specific instances wherein the legislature has so designated." *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593, 594-95 (Mo. App. 1983) (citing *Jepson v. Stubbs*, 555 S.W.2d 307, 312-13 (Mo. banc 1977)). "It is inaccurate to say that although wrongful acts have been committed there is no cause of action unless and until plaintiff discovers the acts." *State ex rel. Stifel, Nicolaus & Co. v. Clymer*, 522 S.W.2d 793, 796 (Mo. banc 1975). This Court expanded on that idea in *Clymer*:

Logic supports the conclusion stated in the foregoing authorities. A cause of action is given to redress the wrong inflicted by the wrongful conduct. That conduct gives rise to the right of action by the injured party. When suit is brought, it is to recover for the wrongful acts done by defendant in the past, not to recover for something that happens at the time of discovery. It is inaccurate to say that although wrongful acts have been committed there is no cause of action unless and until plaintiff discovers the acts.

Id.

Though accrual of common-law claims can at times be delayed until the claim is “capable of ascertainment,” pursuant to Mo. Rev. Stat. § 516.100, that statute expressly does not apply to wrongful death claims, per Mo. Rev. Stat. § 516.300. The General Assembly has never enacted a similar provision for the Wrongful Death Act’s special statute of limitations. *See* Mo. Rev. Stat. § 537.100. The importance of this dichotomy is apparent from this Court’s analysis of the historical development of Missouri law:

The significance of this legislative history is that it shows a long-standing legislative practice of treating separately limitations fixed by the general limitation statutes and those otherwise provided by statute. When the two-year malpractice limitation was enacted, the legislature quite clearly and presumably deliberately placed it in the general limitation article. In so doing the legislature must be charged with knowledge of the distinction theretofore established by the legislation and recognized by the courts ... between statutes of limitation found in the general statutory chapter on such subject and periods of limitation otherwise provided.

Kauchick v. Williams, 435 S.W.2d 342, 346-47 (Mo. banc 1968) (citations omitted). This intentional separation demonstrates that no mechanism for delayed accrual was legislatively intended for wrongful death actions because no such mechanism was added to Section 537.100. The “legislature has not seen fit to enact for death actions either a tolling provision or a delayed accrual on account of fraud, concealment, or other improper act,” and if the scope of the tolling mechanisms for wrongful death actions is to

be “enlarged [this Court has stated] the remedy is legislative, not judicial.” *Fraze*, 314 S.W.2d at 917.

This Court has consistently rejected introducing a discovery rule into the special statute of limitations of Section 537.100. *See Fraze*, 314 S.W.2d at 919 (“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.”⁸ *Id.* This Court should now re-affirm that well-established principle of Missouri law that a wrongful death cause of action accrues at the decedent’s death.

3. *This Court has already rejected application of a “fraudulent concealment” tolling mechanism in a wrongful death action.*

Because the statute of limitations in Section 537.100 began to run in 2002, when all of the decedents passed away, the statute of limitations for every claim on appeal ran in 2005, absent some tolling mechanism. There is no assertion that any tolling mechanism provided for in the statute applies here, and Missouri courts have consistently rejected tolling a special statute of limitations for any reason not stated in the statute. In

⁸ *See also* Section 3, *infra*, page 18, for further discussion and supporting legal authority regarding this point of law.

addition, this Court has rejected the Appellants' exact argument—that fraudulent concealment tolls the statute of limitations in Section 537.100.

As both circuit court judges who granted judgment to Defendants recognized, the allegations of fraudulent concealment are legally immaterial, as only the General Assembly may create exceptions to a statute of limitations provided for a statutory cause of action. *See Norden*, 756 S.W.2d at 163; *Bregant*, 724 S.W.2d at 338 (stating that “because we are dealing with a statutorily created cause of action, it is the province of the legislature to provide any exceptions” to the statute of limitations); *Fraze*, 314 S.W.2d at 919.

“Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception.” *Butler*, 895 S.W.2d at 19; *see also Brandon*, 46 S.W.3d at 97 (same). The time limitations on a wrongful death action have been held to be more than just an ordinary statute of limitations. Rather, they are “a necessary condition attached to the right to sue.” *Bregant*, 724 S.W.2d at 338 (quoting *Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1, 4 (Mo. App. 1975)). Once the “statute of limitations expires and bars the plaintiff’s action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature.” *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993).

Because Missouri law does not allow for tolling of the wrongful death statute of limitations, regardless of any concealment allegations, the Appellants failed to timely file their claims. This Court’s opinion in *Fraze* is directly on point.

The wrongful death claims in *Fraze* arose out of a 1954 motor vehicle accident caused when defendant Partney crossed the center line as he “dozed off.” *Fraze*, 314 S.W.2d at 917. Partney criminally left the scene of the accident, which caused the immediate death of a mother and subsequent death of her child. *Id.* Because the surviving family members did not know who had caused the accident, they did not file their wrongful death suit within one year of the deaths, as then required by Section 537.100. *Id.* at 916. However, they filed their lawsuit promptly after learning Partney’s identity in 1956, after he was finally located and interviewed by the Highway Patrol. *Id.*

The *Fraze* plaintiffs argued that the statute of limitations should be tolled because the defendant had “fraudulently, intentionally, deliberately, willfully, maliciously, and of his spite absented himself and concealed his identity from the plaintiffs and all other persons” while the period of limitations was running. *Id.* This Court rejected that argument, holding that only the legislature could provide a tolling mechanism for the wrongful death statute, and that “general tolling provisions or exceptions did not apply to this special act which carried its own limitations.” *Id.* at 918. This Court cited Section 516.300, which then (as now) provided that “the provisions of sections 516.100 to 516.370 shall not extend to any action which is or shall be otherwise limited by statute; but such action shall be brought within the time limited by such statute.” *Id.* This Court observed that this law had been construed to provide that “a special statute of limitations must carry its own exceptions and we may not engraft others upon it.” *Id.* at 919.

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.

Id. (emphasis added).

The *Frazee* Court explained that Missouri law precluded it from extending the wrongful death statute of limitations, regardless of Partney's conduct. Rather, this Court had to apply the legislative intent, as expressed in the statute:

In the final analysis we are seeking here to determine the legislative intent. We must consider not only the fact that our legislature has, in twice adding specific exceptions to the time limitations of our death act, failed to enact any exception which would extend the time by reason of such conduct as shown here, but also the fact that § 516.300, which has at all times remained in force, specifically provides that the general statutes of limitation shall not extend "to any action ... otherwise limited by any statute." We must further consider the various judicial constructions of these statutes, which have entered into and become part of them. We must and do hold that the limitation of one year specifically provided in §537.100 was not tolled or the period extended by the defendant's conduct, even attributing to it the full effect of plaintiff's contentions.

Id. at 920.

This Court also rejected the plaintiffs' argument that their causes of action should not accrue until the family "learned the identity of defendant so that they might institute and maintain effective suits against an actual defendant." *Id.* After lengthy analysis, the *Frazer* Court observed that "our courts have held in several cases that the cause of action for wrongful death accrues at the death" and concluded "the cause of action accrued when the defendant's liability became perfect and complete." *Id.* at 921 (emphasis added) (five citations omitted). This Court, therefore, held that a wrongful death action "accrues, and limitations thereon begin to run, when the right to sue arises." *Id.*

The *Frazer* Court further explained why Mo. Rev. Stat. § 516.100 was inapplicable. That section states "that a cause of action shall not be deemed to accrue when the breach of duty occurs but when the damage therefrom is sustained and capable of ascertainment." *Id.* After discussing why the section was factually inapplicable, this Court explained that Section 516.100 "could not in any event apply to a death action which is 'otherwise limited.'" *Id.* (citing Section 516.300, which states that Sections 516.100-516.370 do not apply to special statutes of limitations). Thus, this Court concluded, "[t]he legislature has not seen fit to enact for death actions either a tolling provision or a delayed accrual on account of fraud, concealment, or other improper act (as § 516.280), notwithstanding the prior constructions which we have discussed." *Id.*

This Court added that if the scope of the statute was to be enlarged, "the remedy is legislative, not judicial." *Id.* Thus, the Court affirmed judgment for defendant Partney, despite his fraudulent actions. *Id.* Similarly, this Court should reject the Appellants' request to circumvent the statute of limitations for a reason not provided by the Missouri

Wrongful Death Act, and should affirm the circuit courts' grant of judgment on the pleadings. This case is right on point with *Frazer*.

4. *Howell v. Murphy is factually and legally distinct.*

No case from this Court has tolled the statute of limitations within Section 537.100 for any reason not stated in the statute. Though one case from the Western District Court of Appeals has arguably done so, that case is highly distinguishable. See *Howell v. Murphy* 844 S.W.2d 42 (Mo. App. 1992).

The *Howell* court confronted a legal paradox. The families of the victims of Bob Berdella (who had secretly held his victims captive, tortured them to death, and then dismembered and hid their bodies) could not file wrongful death actions within the three-year period of limitations because, in the eyes of the law, no deaths had yet occurred. *Id.* at 47. The victims were presumed missing—not dead—for five years pursuant to Mo. Rev. Stat. § 490.620. *Id.*

The *Howell* court stated that, under Missouri case law, “a wrongful death action accrues at the moment a victim dies.” *Id.* at 45. As Berdella was the only source of information from which any actual date of death could be determined, the *Howell* court observed “the virtual impossibility for the plaintiffs’ ascertaining that the victims were dead—not just missing—before the three year [wrongful death statute of limitations period] expired.” *Id.* The court emphasized that the “victims’ families had no choice but to wait before asserting [a wrongful death] action” as the “law will not permit a missing person to be presumed dead until he or she has been missing for at least five years.” *Id.* at 45, 47 (citing Mo. Rev. Stat. § 490.620). Therefore, the victims’ families “could not

have asserted any action within that five-year period until they had facts to overcome the law's presumption of life." *Id.* at 47.

Because of the convicted murderer's "concealment of the bodies and the law's presumption that the victims were only missing, not dead," the wrongful death lawsuits could proceed despite having been filed more than three years after the "actual" dates of death finally provided by Berdella, as they were filed within three years of the life presumption being overcome. *Id.* ("Given Berdella's concealment of the bodies and the law's presumption that the victims were only missing, not dead, we conclude that the limitation set forth in § 537.100 was tolled until the plaintiffs could, by reasonable diligence, ascertain they had an action.") (emphasis added).

In the cases at bar, there is no allegation that the fact of death was concealed. As such, there is no legal presumption that the alleged victims were only missing, not dead, to delay accrual of Plaintiffs' causes of action. This factual and legal distinction renders *Howell* inapplicable.⁹

5. *Fraze* remains good and controlling law.

The *Howell* court also suggested that the reasoning of *Fraze* had been superseded by this Court's decision in *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. banc 1983). *See Howell*, 844 S.W.2d at 46. That statement should be granted no legal import. First, it is

⁹ If this Court believes that *Howell* and *Fraze* do conflict to any extent, this Court should follow its own precedent in *Fraze*, rather than a Court of Appeals decision.

properly construed as mere *dicta* from a lower court. Second, that suggestion is demonstrably false.

- a) The *Howell* court's assertion that *Fraze* was superseded by *O'Grady* was *dicta*.

“A judicial opinion should be read in light of the facts pertinent to that case, it being improper to give permanent and controlling effect to statements outside the scope of the real inquiry of the case.” *McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 248 (Mo. App. 2003). “Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court’s decision of the issue before it.” *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.2d 124, 133 (Mo. App. 2006).

The *Howell* court’s statement that *Fraze* had been superseded by *O'Grady* is clearly *dicta*, as the court had no need to disavow *Fraze*. The *Fraze* opinion itself provided the solution to the legal paradox confronting the *Howell* court when it stated: a “cause of action accrues, and limitations thereon begin to run ... when the right to sue arises.” *Fraze*, 314 S.W.2d at 920. The *Howell* court correctly solved the legal paradox confronting it by concluding that the claims arising from the Berdella murders did not accrue until the legal presumption that the victims were missing, not dead, was removed. *Howell*, 844 S.W.2d at 47.

Due to the legal presumption of life, the families could not sue for wrongful death during the five-year period when the victims were legally deemed missing, because the families had not yet suffered the requisite legal harm—a legally recognized death. It was not until there was evidence to overcome the statutory presumption that the victims were

missing that they could legally be declared dead, thereby allowing the wrongful death causes of action to accrue. Thus, under a straight-forward application of Section 537.100, their suits were timely. *Id.* at 46-47.

The *Howell* Court’s reasoning demonstrates why there was no need for it to disavow *Frazees*’ rule of law:

Moreover, the *Frazees* court stated emphatically, “We are not concerned here with any question of the *existence* of either a cause of action, or of parties plaintiff, or of a party defendant; this case presents merely an inability to discover the identity of the defendant.” In this case, we are concerned with the question of the existence of a cause of action. We conclude, therefore, that *Frazees* and any other case in which death could not [sic]¹⁰ be ascertained do not provide guidance for this case.

Id. at 46-47 (emphasis in original). As the *Howell* Court believed *Frazees* was not controlling, its statement that *O’Grady* had superseded *Frazees* was unnecessary to its decision, and therefore was *obiter dicta*.

¹⁰ The use of the word “not” must have been a clerical error, as the deaths in *Frazees* were immediately known, but the deaths in *Howell* were not.

- b) O'Grady did not change Missouri law regarding the mechanisms available to toll special statutes of limitations.

Whether it was *dicta* or not, the *Howell* court's statement that *O'Grady* overruled *Fraze* was inaccurate. Missouri courts have continued to decline requests to toll special statutes of limitation for reasons not set forth in those statutes after *O'Grady*.

The rule of law applied in *Fraze*—that Missouri courts cannot engraft tolling mechanisms to special statutes of limitation not provided by the statute itself—remains good law. No opinion from this Court has supported *Howell's dicta* that the reasoning of *Fraze* has been “superseded” or otherwise abrogated by *O'Grady*. In fact, no opinion from this Court has so much as questioned the continuing viability of *Fraze*.

Only two Missouri appellate opinions (excluding any cases currently pending before this Court) have cited *Fraze* since *Howell* was issued. Both cases applied the same rule of law as this Court did in *Fraze*. One was a wrongful death case, in which this Court rejected a tolling argument, citing *Fraze* for the proposition that exceptions to general statutes of limitations do not apply to the Wrongful Death Act's special statute of limitations. *Dupree v. Zenith Goldline Pharms., Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002). The other case favorably cited *Fraze* when rejecting an argument that the plaintiffs' inability to discover the identity of the tortfeasor delayed the accrual of their trespass cause of action. *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 104 (Mo. App. 2005).

This Court also cited *Fraze* favorably after *O'Grady*, but before *Howell*, in the 1988 *Norden v. Friedman* decision—a further indication that *O'Grady* did not in any way

affect *Fraze*. See *Norden*, 756 S.W.2d at 163 (citing *Fraze* for the proposition that “[a] special statute of limitations must carry its own exceptions and we may not engraft others upon it”). Any effort to distinguish *Norden* because it did not involve the wrongful death statute of limitations misses the point. The Wrongful Death Act is one of several special statutes of limitation in Missouri, to which the rule of Missouri law relied upon in *Fraze* and many other cases has been consistently applied.

Missouri courts have consistently prohibited themselves from engrafting exceptions onto special statutes of limitations. See *id.*; see also *Neal v. Laclede Gas Co.*, 517 S.W.2d 716, 719 (Mo. App. 1974) (“Further, statutes of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions ... and even cases of hardship make no difference.”); *Kohout v. Adler*, 327 S.W.2d 492, 494-95 (Mo. App. 1959) (holding that active concealment of a wrong did not toll a special statute of limitations “even though discovery of the wrong done ... was prevented by ... further wrong in covering his fraud”).

This rule has been applied even when the Court of Appeals explicitly considered *O’Grady*. In *Bregant*, the court rejected a minor plaintiff’s argument that the wrongful death statute of limitations should be tolled during her minority. *Bregant*, 724 S.W.2d at 338. The court cited *O’Grady*’s statement that the legislature “expected the statutory cause of action to keep pace with developments in the common law.” *Id.* However, the court explained that the Wrongful Death Act is strictly a statutory creation, and “the courts of the state have long held that where there is a special statutorily created statute of

limitations the courts cannot create judicial exceptions.” *Id.* Any “change in the wrongful death statute of limitations must come from the legislature,” as it “is the province of the legislature to provide any exceptions.” *Id.* at 337-38. Thus, the rule of deference to special statutes of limitations in statutory actions, as applied by this Court in *Fraze*, remains good law and controlling precedent.¹¹

Moreover, *O’Grady* did not involve a statute of limitations issue. In fact, the *O’Grady* opinion does not even reference, much less cite, *Fraze*. As such, this Court should reject *Howell*’s assertion that *Fraze* has been superseded. *See State v. Wade*, 421 S.W.3d 429, 433 (Mo. banc 2013) (“Generally, this Court presumes, absent a contrary showing, that an opinion of this Court has not been overruled *sub silentio*.”).

The sole issue in *O’Grady* was whether a wrongful death case could be pursued for the death of a viable fetus. *O’Grady*, 654 S.W.2d at 910. There was no suggestion that case was untimely filed. The *O’Grady* Court was charged with defining the term “person” in a manner consistent with legislative intent. The term “person” was not defined in the Wrongful Death Act and was held to have “no ‘plain and ordinary meaning’” that the Court could apply to determine whether a viable fetus was a “person.” *Id.* at 909. This Court, therefore, looked to the “purpose for which the statute was

¹¹ This Court’s deference to the right of the legislature to create and shape statutory causes of action was recently emphasized *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012) (“The General Assembly has the right to create causes of action and to prescribe their remedies.”).

passed” because legislative intent was not discernable from the plain language of the statute. *Id.*

In *Fraze*, as in *O’Grady*, this Court was “seeking ... to determine the legislative intent.” *Fraze*, 314 S.W.2d at 920. But there is no need to consider policy objectives to determine legislative intent when considering the Wrongful Death Act’s statute of limitations. The plain language of Section 537.100 answers the question posed by this case. The *Fraze* Court, consistent with many other courts before and after it, held that the Missouri General Assembly had clearly expressed its intent that no exceptions were to be engrafted on Section 537.100—based on the text of the statute, prior amendments, and case law. *Id.* at 920-21.

A Missouri court “has no authority to read into a statute a legislative intent contrary to the intent made evident by the plain language.” *Reichert v. Board of Educ. of City of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007). In this case, that means that Missouri courts have no authority to ascribe tolling mechanisms on special statutes of limitations such as Section 537.100. For this reason, Missouri courts have continuously rejected the Appellants’ argument that Section 537.100 should be tolled because of alleged concealment, given the lack of any statutory authority to do so. *See, e.g., Dupree*, 63 S.W.3d at 222; *Fraze*, 314 S.W.2d at 920; *Bregant*, 724 S.W.2d at 338. As each of the wrongful death lawsuits involved in this appeal was filed years after the statute of limitations expired, this Court should affirm the trial courts’ entry of judgment on the pleadings in favor of the Defendants.

B. Appellants’ arguments rely largely on other states’ laws, they ignore important tenets of Missouri common law that defeat their position, and they contradict fundamental legal doctrines such as the separation of powers and *stare decisis*.

Faced with clear Missouri law stacked against their position, Appellants have relied largely on authorities from other jurisdictions and policy arguments. A point-by-point response is unnecessary, as this case should be decided by the plain language of Mo. Rev. Stat. § 537.100 and this Court’s precedent, including *Frazee*, as described in Section A. Nonetheless, this section of the brief will respond to the primary themes and arguments expressed in Appellants’ Substitute Brief.

1. Cases cited from other jurisdictions offer no insight into the interpretation of Missouri law, and many are distinguishable.

Appellants’ brief would make for an interesting legal history lecture, but much of it sheds no light on the central question facing this Court: What was the Missouri General Assembly’s intent when it enacted, and later amended, Mo. Rev. Stat. § 537.100? *See Butler*, 895 S.W.2d at 19 (“All canons of statutory interpretation are subordinate to the requirement that the Court ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning.”).

Appellants have cited numerous cases from other jurisdictions, spanning two centuries. The first, and most obvious, reason that this Court should give little weight to these decisions is that they say nothing about Missouri law. Such cases arise under

different facts and statutory schemes, and they apply different legal precedents. It is surely uncontroversial to state that this Court’s primary mission is to apply and interpret Missouri law. *State ex rel. Nixon v. Telco Directory Publ’g*, 863 S.W.2d 596, 601 (Mo. banc 1993) (stating that “authority from other states loses its persuasive force” against contrary Missouri law).

Though the jurisdictional distinction is important, there are additional reasons to give little weight to these cases. For instance, Appellants assert that the Missouri General Assembly would have considered it “surplusage” to include a tolling provision when creating the wrongful death statute in 1855.¹² (Aplt. Br. at 49). Yet, the cited pre-1855 cases offer scant support for that argument because they were not wrongful death cases. *See Sherwood v. Sutton*, 21 F. Cas. 1303 (D.N.H. 1828) (action related to sale of ship); *Ferris v. Henderson*, 12 Pa. 49, 1849 WL 5745, at *1 (Pa. 1849) (action by former slave for time he was improperly held in captivity); *Troup v. Smith*, 20 Johns. 33 (N.Y. 1822) (assumpsit case)¹³; *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201, 201 (Mass. 1807) (same). The pervasive issue in these cases was whether courts of law could apply tolling

¹² Missouri’s first wrongful death statute took effect in 1855. *See* Mo. Rev. Stat. Chap. LI, § 2-3; *State ex rel. Research Med. Ctr. v. Peters*, 631 S.W.2d 938, 941 (Mo. App. 1982).

¹³ In *Troup*, the defendant had passed on. His executors were sued, but it was not a wrongful death suit. Regardless, the court in *Troup* held that fraud did not toll the statute of limitations. *Id.*

principles previously applied by courts of equity. See *Sherwood*, 21 F. Cas. at 1303-04; *Troup*, 20 Johns. 33. As such, these cases offer no indication that Missouri legislators in 1855 would have assumed that equitable tolling principles would automatically and necessarily apply to a new statute that created new legal rights, in the absence of an express tolling provision.

The importance of this distinction is seen in New Hampshire. Appellants rely on Justice Story's *Sherwood* opinion, as well as the New Hampshire Supreme Court's opinion in a case regarding a farm sale, *Way v. Cutting*, 20 N.H. 187, 1849 WL 2388 (N.H. 1849). These common-law cases permitted tolling based on fraud. *Sherwood*, 21 F. Cas. at 1308; *Way*, 1849 WL at *5. However, when faced with whether common-law tolling applied to the state's wrongful death statute, the New Hampshire Supreme Court rejected that argument and granted judgment to the defendant. *Desmaris v. People's Gaslight Co.*, 107 A. 491, 492 (N.H. 1919) ("If it were conceded that the general statute limiting actions for deceit could be tolled by the defendant's fraudulent concealment, it would not affect the result here."). See also *Guerin v. N.H. Catholic Charities, Inc.*, 418 A.2d 224, 226 (N.H. 1980) (same result in survival action).

Moving forward in time, Appellants rely on an A.L.R. annotation for the assertion that the weight of authority in other states supports tolling. Again, the critical point is that none of these foreign cases interpreted the language of Mo. Rev. Stat. § 537.100 to determine the intent of the Missouri General Assembly. But there are other distinguishing factors in the listed cases, demonstrating that the weight of authority in favor of tolling is not as strong as claimed.

The annotation cites several cases for the proposition that “fraudulent concealment affects statute of limitations—[b]y tolling or delaying commencement of statute.” 88 A.L.R. 851 (Section 3[a] header). Some of these cases upheld the statute of limitations on the grounds that fraud was not sufficiently pleaded or proven—without analyzing the issue at bar. *See Favors v. S. Indus., Inc.*, 344 So.2d 693, 695 (La. Ct. App. 1977); *Patten v. Standard Oil Co. of La.*, 55 S.W.2d 759, 761 (Tenn. 1933); *McBride v. Burlington, C.R. & N.R. Co.*, 66 N.W. 73, 74 (Iowa 1896). Several other cases are clearly distinguishable because the court applied—or declined to apply—a tolling statute to the wrongful death claim. *See Geisz v. Greater Baltimore Med. Ctr.*, 545 A.2d 658, 668 (Md. 1988); *Merrill v. Reville*, 380 A.2d 96, 97 (Vt. 1977); *St. Clair v. Bardstown Transfer Line*, 221 S.W.2d 679, 680- 81 (Ky. 1949); *Jenkins v. Jenkins*, 444 N.E.2d 1301, 1303 (Mass. Ct. App. 1983); *Greenock v. Rush Presbyterian St. Luke’s Med. Ctr.*, 382 N.E.2d 321, 324-25 (Ill. App. Ct. 1978).

Michigan was also listed as a tolling state, but the Michigan Supreme Court held in 2007 that the wrongful death statute could not be tolled by a common-law tolling device. *See Trentadue v. Buckler Lawn Sprinkler*, 738 N.W.2d 664, 670-71 (Mich. 2007) (holding that “where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter”).

Other states have nuances in their rules. For instance, the Ohio Supreme Court allowed for delayed accrual of a wrongful death action, over a vigorous dissent by Chief

Justice Moyer. *See generally Collins v. Sotka*, 692 N.E.2d 581, 585 (Ohio 1998). The court held that the cause of action did not accrue until the date that the defendant was convicted of murder. *Id.* at 585. This unusual tolling mechanism would have no application here, as Jennifer Hall is not a Defendant and has never been charged with, much less convicted of, murder.

Rather than trying to follow these widely varied cases from foreign jurisdictions, the Court should apply the plain language of Section 537.100 and Missouri case law.

2. *Appellants assert that the common law has created a hidden tolling mechanism in Section 537.100, but several aspects of Missouri common law directly contradict Appellants' common-law argument.*

a) Appellants' brief offers no clear legal theory, which is further evidence that a tolling provision would not have been surplusage.

Tellingly, Appellants' brief never settles on a legal theory that would allow this Court to reverse the circuit courts' application of Section 537.100. This Court has already rejected the concepts of delayed accrual and tolling for fraudulent concealment in *Frazee*, as discussed in Section A. The cited estoppel cases are federal, and this Court has not applied that doctrine in this context. Plus, that argument—to the limited extent it has been made here—was waived when it was not raised in the trial court.¹⁴ *See Smith v.*

¹⁴ In addition, the Court should reject any estoppel argument as an end run around the legislature's clear intent when it did not include a provision for tolling based on fraudulent concealment in Section 537.100.

Shaw, 159 S.W.3d 830, 835 (Mo. banc 2005) (stating that the court “will generally not convict a lower court of error on an issue that was not put before it to decide”); *Strunk v. Hahn*, 797 S.W.2d 536, 549 (Mo. App. 1990) (calling it “a fundamental rule that contentions not put before the trial court will not be considered by the appellate court”).

Instead, Appellants have essentially asked this Court to figure out the appropriate legal theory. (Aplt. Br. at 64). This absence of a legal theory is important in considering what appears to be the Appellants’ overarching argument. They assert that the legislature, in 1855, knowingly omitted any tolling provision—or discovery rule—from the wrongful death statute, because it would have been “surplusage.” (*Id.* at 49). Thus, Appellants contend, the decisive question is: “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?” (*Id.*).

Surely, if the legislature had intended to include a tolling device in the wrongful death statute, it would have clarified how that device would function—as it did for actions subject to the general statutes of limitations when enacting what is now Section 516.100. Instead, this Court is being asked to assume that the legislature intended to prevent the statute from running in wrongful death cases, yet felt it was unnecessary to clarify that fact, or to explain how the tolling device would operate. This is a highly illogical assumption.

- b) The inclusion of a tolling device in the general statutes and the legislature's failure to act after *Frazee* both contradict the notion of a hidden tolling device in Section 537.100.

The other major problem with Appellants' argument is that it is contradicted by a statute that was already in place in 1855, and by nearly 160 years of subsequent Missouri jurisprudence. When the first wrongful death statute went into effect in 1855, an existing statute tolled the limitations period for fraudulent concealment—the statute that is now Mo. Rev. Stat. § 516.280. (Aplt. Br. at 39, citing *Kauchick v. Williams*, 435 S.W.2d 342, 346 (Mo. banc 1967)). Section 10 of the 1835 statute stated that the act “shall not extend to any action which is, or shall be, otherwise limited by any statute” *Id.* That section is now codified as Mo. Rev. Stat. § 516.300. Those developments raise three key points. First, in 1835, the legislature did consider it necessary to expressly include a tolling provision for fraudulent concealment. The legislature did not view stating such a rule as “surplusage.” Second, it was clear in 1855 that the general tolling device would not apply to the wrongful death statute. With this knowledge, it is hard to imagine that the legislature would have considered a tolling provision to be “surplusage.”

Finally, the statute that is now Mo. Rev. Stat. § 516.280 extends the limitations period on common-law claims based on the defendant “absconding or concealing himself, or by any other improper act” Mo. Rev. Stat. § 516.280. But even with that statute in place for common-law claims, the legislature felt compelled to add such a provision to the Wrongful Death Statute in 1909, when it added a provision for tolling based on absence from the state. *See* Mo. Rev. Stat. § 537.100; *see also Frazee*, 314

S.W.2d at 918. The fact that the legislature added a provision for “absconding” to the Wrongful Death Act, but did not add a provision for “concealing,” is further evidence that the absence of such a provision is meaningful.

If the statute that became Mo. Rev. Stat. § 516.300 was a signal that an express tolling provision was required to toll Section 537.100, then *Fraze* was a flashing neon sign. This Court rejected the argument that a common-law tolling doctrine was inherently a part of the wrongful death statute of limitations. Instead, this Court relied on the oft-cited principle of Missouri law that “[a] special statute of limitations must carry its own exceptions and [the courts] may not engraft others upon it.” *Fraze*, 314 S.W.2d at 919. As detailed in Section A, the *Fraze* Court held that the limitations period of Section 537.100 begins running at the decedent’s death and cannot be tolled for fraudulent concealment, or for any other reason not expressly stated in the statute. *Id.* at 920-21.

If there was any doubt before *Fraze*, it was then clear that if the legislature wanted a tolling provision, it needed to enact one. In 1967, the legislature amended the statute of limitations in Section 537.100—but did not add a tolling mechanism. Instead, it extended the limitations period to two years. *See* L.1967, p. 663, § 1. In 1979, the legislature again amended Section 537.100, and again it declined to add a tolling provision. Rather, the legislature stretched the limitations period to its current three years. *See* L.1979, S.B. 368, p. 631, § 1. *See also* *Bremson v. Moore*, 646 S.W.2d 863, 864 (Mo. App. 1982) (describing 1967 and 1979 amendments). In failing to add a tolling provision after this Court held that there was no tolling provision in the statute, the

legislature spoke with its silence. Its message was that there is no hidden tolling mechanism in Section 537.100. See *Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, 385 U.S. 182, 183-84 (1966) (interpreting Congress’s silence after judicial interpretation of Interstate Commerce Act as assent). Cf. *L & R Distributing, Inc. v. Dep’t of Revenue*, 529 S.W.2d 375, 379 (Mo. 1975) (holding that legislature’s rejection of proposed amendments indicated legislative intent).

- c) Missouri common law rejects Appellants’ hidden tolling argument because it demonstrates the need for an express provision.

One of Appellants’ themes is that statutes should be interpreted in conjunction with the common law. (Aplt. Br. at 17-18). This theme ties in with their theory that Mo. Rev. Stat. § 537.100 contains a hidden, undefined, tolling device. But Appellants ignore several common-law rules and principles that directly contradict their position.

Two key Missouri common-law principles defeat the concept of a hidden tolling device: (1) Statutes of limitations “may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature and the courts are not empowered to extend those exceptions.” *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 923 (Mo. banc 2003); and (2) “All canons of statutory interpretation are subordinate to the requirement that the Court ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning.” *Butler*, 895 S.W.2d at 19. Under these rules, an exception to a statute of limitations is either plainly stated or does not exist. As explained, Section

537.100 contains only two exceptions, and neither of them is applicable here. *See* Mo. Rev. Stat. § 537.100.

The analysis really ends there, but additional common-law interpretation principles counsel against applying a hidden tolling device. “The doctrine of *in pari materia* is a cardinal tenet of statutory construction.” *Romans v. Dir. of Revenue*, 783 S.W.2d 894, 895-96 (Mo. banc 1990). This doctrine “requires statutes relating to the same subject matter to be construed together.” *Id.* Here, Section 516.280 expressly tolls the general statutes of limitations for fraudulent concealment, but Section 516.300 limits this tolling device to Sections 516.100 through 516.370. Conversely, Section 537.100, the wrongful death statute of limitations, includes no tolling device for concealment. The best way to harmonize those statutes is simply to apply them as written. It is illogical to assume that a tolling statute was necessary in the general statutes but was somehow inherent within the wrongful death statute—particularly given Missouri’s strict rules for construction of special statutes of limitations. *See Norden*, 756 S.W.2d at 163 (“A special statute of limitations must carry its own exceptions and [the courts] may not engraft others upon it.”) (citing *Frazer*, 314 S.W.2d at 919).

Another important doctrine of statutory interpretation is: *Expressio unius est exclusio alterius*. “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980). Missouri courts have applied this doctrine cautiously, invoking it “only when it would be natural to assume by a strong contrast that that which is omitted must

have been intended for the opposite treatment.” *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005). But this case meets that standard. In *Fraze*, the court found it telling that “our legislature has, in twice adding specific exceptions to the time limitation of our death act, failed to enact any exception which would extend the time by reason of such conduct as is shown here.” *Fraze*, 314 S.W.2d at 920. Decades later, the legislature has added no more exceptions. These developments indicate that the legislature understands the need to list any exceptions and has decided against the tolling devices advocated by Appellants.

Finally, with respect to the discovery rule argument, there is enough common law to fill a banker’s box stating, unequivocally, that wrongful death actions accrue at death, not upon discovery. *See, e.g., Ward*, 774 S.W.2d at 136-37.¹⁵ If Appellants’ assertion is correct, and the common law informs the content of the statute, then that interpretation has become a part of the statute, such that the moment of accrual is defined as the moment of death. As such, there could be no hidden device in the statute that would move the date of accrual to the date of discovery.

All of these points demonstrate the fallacy of the assertion that there is a hidden mechanism for suspending or tolling the statute of limitations for discovery or concealment in Section 537.100. Missouri common law dictates that the statute must be interpreted as written, and that any exceptions must appear on the face of the statute. There are no such exceptions.

¹⁵ A comprehensive list of cases so holding appears on Pages 9-10 and in Footnote 7.

3. *The Court should not be persuaded by what is largely a policy argument, as it is the legislature's role to make policy, and other policies, including stare decisis, support Respondents' position.*

Appellants' argument is largely a policy argument designed to persuade this Court to substitute its opinion for that of the legislature. But there are several important policy considerations in favor of affirming the circuit courts' decisions—the first of which is the policy against deciding cases based on policy arguments.

- a) Under the separation-of-powers doctrine, this Court cannot substitute its judgment for that of the legislature.

One of the fundamental doctrines upon which this country and this state were founded is the separation of powers. Under Article III, Section 1 of the Missouri Constitution, “[a]ll the power to make laws in the name and with the authority of its constituent elements—its citizens en masse—is lodged in the temporary Legislature, subject only to the restraining clauses of the Constitutions of the state and nation.” *State Auditor v. Joint Comm’n on Legislative Research*, 956 S.W.2d 228, 230-31 (Mo. banc 1997) (quoting *Ludlow–Saylor Wire Co. v. Wollbrinck*, 205 S.W. 196, 197 (Mo. 1918)). This “constitutional demand that the powers of the departments of government remain separate rests on history’s bitter assurance that persons or groups of persons are not to be trusted with unbridled power.” *Id.* at 231.

Recognizing that principle, this Court has frequently asserted that it “will not substitute its judgment for that of the legislature as to the wisdom, social desirability or economic policy underlying a statute.” *Glossip v. Mo. Dep’t of Transp. & Highway*

Patrol Employees' Retirement Sys., 411 S.W.3d 796, 807 (Mo. banc 2013). Courts “are not permitted by judicial fiat to change the law to what we believe it should be.”

Sprenger v. Mo. Dep't of Pub. Safety, 340 S.W.3d 109, 112 (Mo. App. 2010). In upholding the legislature’s right to limit the recovery in a wrongful death action, this Court wrote that “[t]o hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same. This Court never has so held and declines to do so now.” *Sanders*, 364 S.W.3d at 205.

This Court’s sole mission is to determine whether the legislature actually included a device for suspension or tolling of the statute of limitations—not whether this Court believes that it should have done so. The legislature did not include such a device in Section 537.100, and this Court’s inquiry should extend no further.

Reversing the circuit courts’ decisions would not only disturb the legislature’s stated intent, it would also require this Court to bake from scratch a new rule of law. This Court would have to decide whether to delay accrual, to toll for concealment, or to use some other device to prevent the statute of limitations from running. Neither Missouri precedent nor the Appellants’ brief provides the recipe, so this rule-making would be left entirely to the preferences of the Court. But such rule-making is a legislative function that should not be undertaken by this Court, particularly in light of Missouri’s adherence to the doctrine of separation of powers.

- b) Under the *stare decisis* doctrine, this Court does not lightly overrule itself, and doing so here would dismantle decades of Missouri precedent regarding statutory interpretation.

Another important policy, which is also a rule of law, is this Court's adherence to the doctrine of *stare decisis*. "The doctrine of *stare decisis*—to adhere to decided cases—promotes stability in the law by encouraging courts to adhere to precedents." *State v. Wade*, 421 S.W.3d 429, 433 (Mo. banc 2013). "Under the doctrine of *stare decisis*, decisions of this Court should not be lightly overruled, especially when the opinion has remained unchanged for many years." *Id.* (quotations omitted).

As discussed in Section A, *Fraze* remains good law, unencumbered by this Court's decision on a wholly different issue in *O'Grady*. Appellants do not assert that *Fraze* is distinguishable. They spend a great deal of time analyzing early Missouri decisions, apparently suggesting that *Fraze* did not rest on a firm foundation.¹⁶ Clearly, it would unravel any certainty in the law if this Court were to hold that a case is no longer

¹⁶ Appellants cite *State ex rel. Barringer v. Hawkins*, 77 S.W. 98 (Mo. App. 1903), and *State ex rel. Meinholtz v. Am. Surety Co. of N.Y.*, 254 S.W. 561, 564 (Mo. App. 1923), notary cases where the statute of limitations was tolled based on concealment. (Aplt. Br. at 40-42). These cases precede *Fraze*, and thus if they were on point they were abrogated by *Fraze*, or if the notary statute is sufficiently different from the wrongful death case as to make them distinguishable from *Fraze*, then those cases have no application to this case.

viable because it did not consider enough prior precedent, or because it was poorly briefed. *Fraze* is the law of the state, as this Court recognized as recently as 2002. See *Dupree*, 63 S.W.3d at 222 (citing *Fraze*, 314 S.W.2d at 918).

Reversing the circuit courts and allowing this case to go forward would unravel a decision of this Court that has been undisturbed for 56 years, contrary to the principles of *stare decisis*. Additionally, a decision creating an unstated tolling mechanism would unravel decades of precedent on other issues, which would have far-reaching effects on Missouri law. If 537.100 is not applied as written to bar the Appellants' cases, then all of the following doctrines of Missouri law would be put into jeopardy:

- “A special statute of limitations must carry its own exceptions and [the courts] may not engraft others upon it.” *Norden*, 756 S.W.2d at 163.
- Statutes of limitations “cannot be avoided unless the party seeking to do so brings himself strictly within some exception.” *Brandon*, 46 S.W.3d at 97.
- “Statutory exceptions are strictly construed and are not to be enlarged by the courts upon consideration of apparent hardship.” *Butler*, 895 S.W.2d at 20.
- Statutes of limitations “may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature and the courts are not empowered to extend those exceptions.” *Shelter Mut. Ins.*, 107 S.W.3d at 923.
- “[U]nless affected by statute, a cause of action accrues at the moment of a wrong, default or delict by the defendant and the injury of the plaintiff * * * if the injury, however slight, is complete at the time of the act.” *Fraze*, 314 S.W.2d at 919.

Rather than creating such legal uncertainty, this Court should adhere to *stare decisis*, apply *Frazer*, and affirm the circuit courts' judgments.

- c) Though policy should not guide the Court's decision, this Court has recognized the benefits of strong statutes of limitations.

Finally, if the Court undertakes a substantive policy analysis—which it should not, for reasons explained above—then the Court should recognize Missouri's long-standing policy in favor of strong statutes of limitations. “Statutes of limitations rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society and are favored in the law” *Dolan*, 46 S.W.3d at 97; *see also Butler*, 895 S.W.2d at 19 (stating that “statutes of limitation are favored in the law”); *Hunter v. Hunter*, 237 S.W.2d 100, 104 (Mo. 1951) (same). “A statute of limitations is a legislative declaration of public policy not only to encourage our citizens to seasonably file and to vigilantly prosecute their claims for relief, but also to require them to do so or, otherwise, find their claims proscribed by law.” *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012).

A judicially created tolling device would weaken not only the wrongful death statute of limitations, but any limitations period that is written into a statutory cause of action. A new discovery rule or tolling device would essentially serve as a blueprint for attorneys filing new cases on how to plead around the statute of limitations, whenever there was any good-faith basis to do so.

While Appellants have accused the Respondents of fraud, there are substantial fraud concerns when cases are tried years after the events giving rise to the case, as Justice Story recognized. *Sherwood*, 21 F. Cas. at 1307 (stating that statutes of

limitations are intended to “prevent 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”). If this case goes to trial, Defendants will have to defend against accusations of murders allegedly committed some 13 years earlier by a woman who has never been charged with murder. In *Sherwood*, Justice Story tolled the statute, but his was not a death case. Justice Story was also painting on a much different canvas than is this Court, which must apply a specific statute and nearly two centuries of Missouri common law.

Appellants have cited to *O’Grady’s* statement that the Wrongful Death Act should be construed in light of its purposes—namely, to compensate victims’ families, to punish tortfeasors, and to deter wrongful conduct. (Aplt. Br. at 61, citing *O’Grady*, 654 S.W.2d at 909). But these considerations apply to any tort case. As Ohio Chief Justice Moyer wrote in addressing a similar point, “[i]f such a rationale were applied to every instance where a prospective plaintiff misses the statutory time for filing a complaint, we would declare every statute of limitations to be invalid.” *Collins*, 692 N.E.2d at 586 (Moyer, C.J., dissenting) (emphasis added). The policy objectives discussed in *O’Grady* are never enforced when any statute of limitations is applied. However, the statute of limitations is supported by different policy objectives—a consideration that was not present in *O’Grady*, but which is present here.

Finally, as the First Circuit has recognized, there are valid reasons for treating wrongful death actions differently from common-law actions for limitations purposes. See *Cadieux v. Int’l Tel. & Tel. Corp.*, 593 F.2d 142, 144 (1st Cir. 1979). The court was

reviewing a Rhode Island court’s refusal to apply a discovery rule to the state’s wrongful death statute. *Id.* at 144. The court also considered whether having a shorter statute of limitations for a wrongful death claim, compared with a negligence claim, violated the equal protection clause of the Fourteenth Amendment. *Id.* at 145. The court concluded that there were rational bases for the distinction, including that the extent of the injury is immediately known in a death case; the death immediately focuses third parties onto the issue of determining what caused the death; and “the survivors and the state have an interest in prompt settlement of the affairs of the deceased.” *Id.* The Missouri General Assembly may have considered any or all of these factors in declining to toll the limitations period of Section 537.100.

Again, it is not this Court’s province to evaluate the policy decisions of the legislature, but this Court should feel comfortable that by enforcing the legislature’s clear intent, and by adhering to *stare decisis*, the Court will also be furthering legitimate policy goals related to the finality of both cases and estates.

For all of these reasons, this Court should reject Appellants’ invitation to find a hidden tolling device within Section 537.100.

C. Even if fraudulent concealment were available as a tolling mechanism, the Appellants’ failure to sufficiently plead supporting facts is fatal to their claim.

The foregoing arguments should end this Court’s analysis. But even if Missouri law did allow tolling under Section 537.100, the inadequacies of the Appellants’ pleadings would preclude tolling in these cases. In Missouri, “when discovery of fraud is

relied on to toll the statute of limitations, the pleading should aver when the discovery was made, what it was, how it was made, and why it was not made sooner.” *State ex rel. School District of St. Joseph v. Wells*, 270 S.W.2d 857, 862-63 (Mo. 1954). As the petition in *Wells* contained no such averments, this Court ruled that the pleading was defectively fatal to the case and required its dismissal. *Id.* at 863.

The same is true for each of the Appellants’ Petitions, as they are wholly devoid of sufficiently pleaded allegations regarding “when the discovery [of fraud] was made, how it was made, and why it was not made sooner,” as required by Missouri law. *Id.* at 862-63. The entirety of the averments as to these elements in the Petitions was merely:

Plaintiff was not reasonably able to ascertain whether [he/she] had a cause of action against the named defendants until the filing of this Petition, as a direct result of the defendants’ conduct described herein.

(*Boland LF*, p. 12, ¶ 23; *Gann LF*, p. 12, ¶ 23; *Harper LF*, p. 12, ¶ 23; *Littrell LF*, p. 55, ¶ 23; *Pittman LF*, p. 55, ¶ 23). Clearly, this averment lacks the when, how and why elements required by Missouri law. Plaintiffs’ allegations simply do not explain how or when they learned of their causes of action, which precludes the courts from effectively evaluating and applying their proposed tolling mechanism.

Appellants had a duty not only to set forth with particularity the conduct that purportedly constituted fraudulent concealment, but also why their exercise of due diligence could not have led to discovery of the facts supporting their cause of action earlier. *See Batek*, 920 S.W.2d at 900 (“As it is necessary to prove these facts, it is necessary to plead them.”). In *Batek*, the plaintiff’s pleading failed to allege sufficient

facts to toll the statute of limitations for fraudulent concealment, as she simply alleged that the respondents fraudulently concealed their negligence by “representations and silence.” *Id.* She failed to set out with particularity the conduct that constituted fraudulent concealment, the individuals responsible for the alleged representations and silence, when she discovered the alleged fraud, why the respondents’ conduct precluded earlier discovery of her claim, or any averments that she exercised due diligence. As a result, her pleading was deficient as a matter of law. *Id.* at 900-01. Similarly, none of these Appellants’ Petitions pleaded necessary elements to explain when or how they exercised due diligence, or why, despite their due diligence, they could not have timely discovered the facts supporting their causes of action.

It is noteworthy that Appellants have in no way explained how they were able to file their wrongful death lawsuits in 2010 or 2011. In fact, although the Court of Appeals reversed the trial courts’ decisions, the court did not identify the date on which the cause of actions supposedly accrued. (*See generally* slip op.). Appellants certainly have not alleged that the Defendants subsequently advised them of any concerns about the accused respiratory therapist, so they must have obtained their “good faith basis” to file their wrongful death lawsuits through some other means. The law requires this information for legal scrutiny as to the application of the tolling mechanism. *See Batek*, 920 S.W.2d at 900-01; *Wells*, 270 S.W.2d at 863.

Thus, even if a fraudulent concealment tolling exception could be applied to the Wrongful Death Act’s special of statute of limitations (which it cannot), Plaintiffs’ pleadings are legally insufficient to invoke that tolling mechanism. *See Batek*, 920

S.W.2d at 900-01; *Wells*, 270 S.W.2d at 863. The Appellants alleged no facts whatsoever to explain either how they learned of these “suspicious deaths” or how they could not have learned of them earlier despite their due diligence. That failure requires affirmation of the trial courts’ entries of Judgment on the Pleadings. *See Batek*, 920 S.W.2d at 900-01; *Wells*, 270 S.W.2d at 863. As such, this Court should affirm the judgment on the pleadings in favor of Respondents based on Appellants’ inadequate pleading. *See Mitchell*, 351 S.W.3d at 679 (stating this Court “is primarily concerned with the correctness of the result, and not the route taken by the trial court to reach it,” so it will affirm for any reason sufficient to sustain the judgment, and is “not limited to the grounds relied on by the trial court.”).

CONCLUSION

Missouri’s Wrongful Death Act requires wrongful death lawsuits to be filed within three years of accrual, which occurs at death. Mo. Rev. Stat. § 537.100. Appellants’ request that this Court create an exception for fraudulent concealment fails as a matter of long-standing Missouri law. *Frazer*, 314 S.W.2d at 918-20. As all of the wrongful death cases in this appeal were filed more than eight years after the deaths of the decedents, all are time-barred. This Court, therefore, should affirm the trial courts’ entries of judgment on the pleadings in favor of Respondents in each case.

Alternatively, even if fraudulent concealment could serve as a tolling mechanism, the averments in the Petitions filed by the Appellants in the underlying cases are insufficient as a matter of law to invoke that doctrine.

For these reasons, Respondents Saint Luke's Hospital of Chillicothe, Saint Luke's Health System, Inc., and Community Health Group respectfully request that this Court affirm the entries of Judgment on the Pleadings in favor of all Respondents in each of the underlying cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2014, I electronically filed the foregoing document on the Case.Net filing system, which will send a notice of electronic filing to counsel of record, and served the foregoing document via electronic mail upon all counsel of record as follows:

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CERTIFICATION AS TO WORD COUNT

Pursuant to Rule 84.06(b) Respondents hereby certify that the word count herein, as calculated by Microsoft Word software used to create the brief, is 14,269 words and does not exceed this Court’s word limitation.

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