
CASE NO. SC94030

**STATE OF MISSOURI ex rel.
BOB T. BEISLY, II,**

Relator

vs.

**THE HONORABLE TIMOTHY PERIGO,
CIRCUIT COURT OF JASPER COUNTY-CARTHAGE, MISSOURI,**

Respondent.

**WRIT OF PROHIBITION IN THE
CIRCUIT COURT OF JASPER COUNTY, MISSOURI
29th JUDICIAL CIRCUIT
The Honorable Timothy Perigo, Circuit Judge
Case No. 13AP-CC00037**

SUBSTITUTE BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

This case involves an original proceeding for writ of prohibition filed by relator in the Southern District of the Court of Appeals. At issue is whether respondent will exceed his authority, unless prohibited, in denying relator's motion to dismiss in a civil action currently pending in the Circuit Court of Jasper County, Missouri, entitled *Wilma Jean Irwin v. Bob T. Beisly II, et al.*, Case No. 13AP-CC00037. The court of appeals issued the writ and made it permanent on January 23, 2014. This Court granted respondent's application for transfer on March 25, 2014. This Court has jurisdiction to control the court of appeals and may issue and determine original remedial writs pursuant to the Missouri Constitution, Article V, §4.

STATEMENT OF FACTS

The underlying case is a civil action to recover money damages under Mo. Rev. Stat. §537.080 for the wrongful death of Belinda Beisly (“decedent”) who died on July 15, 2009. On February 13, 2013, more than three years after decedent’s death, plaintiff, decedent’s mother, commenced the underlying action against decedent’s husband, relator Bob T. Beisly II, and defendant, Jeremy Maples. In this case, plaintiff claims that relator and Maples killed decedent and concealed their actions for more than three years after the decedent’s death. (Exhibit 1, page 1, paragraph 1.)

Section 537.100 requires, “[e]very action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue”. A cause of action for wrongful death “accrues” at the time of death. *Frazee v. Partney*, 314 S.W.2d 915, 921(Mo. 1958).

Section 537.100 provides two exceptions, which, if applicable, will toll the three-year statute of limitations. Neither of those exceptions apply in this case.

Relator filed a motion to dismiss the case as time-barred under the three-year limitation period in §537.100. (Exhibit 4, page 3.) Plaintiff opposed the motion, claiming that §516.280 tolled the statute of limitations during the time relator and Maples concealed their actions. (Exhibit 5, pages 2-3). On June 6, 2013, respondent overruled relator’s motion to dismiss. (Exhibit 10).

On January 23, 2014, the Southern District of the Court of Appeals made permanent a writ of prohibition, which prohibited respondent from taking any further action in the case other than to dismiss it as time-barred by §537.100. *State ex rel. Beisly*

v. *Perigo*, SD32800 (Mo. App. Jan. 23, 2014), *transfer granted*, (MO Mar. 25, 2014).

On March 25, 2014, this Court granted respondent's application for transfer.

POINT RELIED ON

THE TRIAL COURT ERRED IN APPLYING THE LAW WHEN IT OVERRULED RELATOR’S MOTION TO DISMISS PLAINTIFF’S WRONGFUL DEATH ACTION, BECAUSE THE ACTION IS BARRED BY §537.100, IN THAT THE ACTION WAS COMMENCED MORE THAN THREE YEARS AFTER THE DEATH OF PLAINTIFF’S DECEDENT AND NONE OF THE TOLLING EXCEPTIONS IN §537.100 APPLY.

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STANDARD FOR REVIEW

A writ of prohibition is appropriate to stop a trial court from proceeding on a claim that is barred by the statute of limitations. *State ex rel. Holzum v. Schneider*, 342 S.W.3d 313, 315 (Mo. banc 2011); *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 96 (Mo. App. S.D. 2001).

ARGUMENT

RELATOR IS ENTITLED TO A PERMANENT WRIT OF PROHIBITION THAT WILL PROHIBIT RESPONDENT FROM TAKING FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO ENTER AN ORDER DISMISSING THE UNDERLYING ACTION WITH PREJUDICE BECAUSE THE ACTION IS BARRED BY §537.100, IN THAT THE ACTION WAS COMMENCED MORE THAN THREE YEARS AFTER THE DEATH OF PLAINTIFF’S DECEDENT AND NONE OF THE TOLLING EXCEPTIONS IN §537.100 APPLY.

A. Issue Presented.

Whether a cause of action for wrongful death can be commenced more than three years after the decedent’s death if none of the tolling exceptions in §537.100 apply?

B. A Writ of Prohibition is Appropriate.

A writ of prohibition is appropriate to prevent a trial court from proceeding on a claim that is barred by the statute of limitations. *Holzum* at 315; *Brandon* at 96. In *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo.banc 1993), this Court held that once the “statute of limitation 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”. The writ of prohibition in this case should be made permanent because relator has no other adequate remedy at law to enforce the vested substantive right to be free from suit.

C. Courts Do Not Have the Constitutional Authority to Create Judicial Exceptions to Special Statutes of Limitations.

In this case, the plaintiff's claim is brought under Missouri's Wrongful Death Act, Mo. Rev. Stat. §537.080 et seq. Wrongful death is, in all respects, a statutory action with "no common-law antecedent." *Sanders v. Ahmed*, 364 S.W.3d 195, 203 (Mo. banc 2012).

Because wrongful death is a statutory cause of action, it has its own special statute of limitations set out in §537.100 which states:

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 a civil action must be brought within three years after the cause of action accrues. There are two exceptions, but plaintiff does not claim that either exception applies in this case. (*See* Exhibits 1, 3 and 8.)

Statutes of limitation for general common-law actions are set out in Chapter 516 of the Missouri Revised Statutes. In the trial court, plaintiff contended that §516.280 applies to this case. (Exhibit 5, pages 2-3). Section 516.280 states:

If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be prevented.

But §516.300 states:

The provisions of sections 516.010 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.

Mo. Rev. Stat. §516.300 (emphasis added).

Section 516.300 makes clear that §516.280 does not apply to any action, like wrongful death, which is otherwise controlled by a special statute of limitations. *Fraze* at 919 and; *Boland v. Saint Luke's Health Sys., Inc.*, WD75364 (Mo. App. Nov. 26, 2013), *transfer granted*, (MO Mar. 25, 2014) at 21.

In the court of appeals, respondent argued that the court should use the doctrine of “equitable estoppel” to provide a judicial exception to the special statute of limitations during the time that plaintiff did not know the identity of the defendants. (See Brief of Respondent (SD32800) page 21.) “The courts of this state have long held that where there is a special statutorily created statute of limitations the courts cannot create judicial exceptions.” *Bregant v. Fink*, 724 S.W.2d 337, 338 (Mo. App. E.D. 1987). See e.g., *Fraze* at 919, (wrongful death claim under Chapter 537); *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. banc 1988) (failure to register securities under Chapter 409); *Braun v. Petty*, 129 S.W.3d 449, 452 (Mo. App. E.D. 2004) (suit to quiet title under Chapter 140) and; *Krutz v. Van Meter*, 313 S.W. 3d 138, 139 (Mo. App. W.D. 2010) (suit for accounting under Chapter 461).

Missouri’s Constitution prohibits the courts from exercising powers that belong to the legislature. Mo. Const. Art. II, §1. Only “the legislature has the constitutional power to create and abolish causes of action” and to place limits on the causes of action it creates. “To hold otherwise would be to tell the legislature it could not legislate”. *Sanders* at 205.

“The courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to

a coordinate branch of our tripartite government.” *Board of Education of St. Louis v. State*, 47 S.W.3d 366 (Mo. 2001). Courts do not have the constitutional authority “to accommodate the law of Missouri to the apparent equities of a particular case.” Courts “cannot supply that which the legislature has either deliberately, or inadvertently, or through lack of foresight omitted from the controlling statutes.” *State ex rel. Mercantile National Bank at Dallas v. Rooney*, 402 S.W. 2d 354, 362 (Mo. 1966). 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.” *Cooper v. Minor*, 16 S.W.3d 578, 582 (Mo. banc 2000).

D. A Cause of Action for Wrongful Death “Accrues” When the Plaintiff’s Decedent Dies Not When the Plaintiff Learns the Identity of the Defendant.

A cause of action for wrongful death under §537.080 et seq. “accrues” at the time of the decedent’s death. *Frazer* at 921; *Deming v. Williams*, 321 S.W.2d 720, 722 (Mo. App. W.D. 1959); *Crane v. Riehn*, 568 S.W.2d 525, 527 (Mo. banc 1978); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 185 (Mo. App. E.D. 1982); *Dzur v. Gaertner*, 657 S.W. 2d 35, 36 (Mo. App. E.D. 1983); *American Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136-37 (Mo. banc 1989); *Brandon* at 96-97; *Piskorski v. Larice*, 70 S.W.3d 573, 575 (Mo. App. E.D. 2002); *Brown v. Mo. Delta Med. Ctr.*, 334 S.W.3d 465, 466 (Mo. App. S.D. 2010). Plaintiff asserted in all of the petitions she filed in this case, that her decedent died on July 15, 2009. (See Exhibit 1, page 1, paragraph 1; Exhibit 3, page 1, paragraph 1 and; Exhibit 8, page 1, paragraph 1.) Plaintiff’s cause of action under §537.080 accrued on July 15, 2009, at the time of decedent’s death. Plaintiff commenced

this action when she filed her original petition on February 13, 2013, more than three years after the cause of action accrued. (See Petition for Writ of Prohibition, paragraph 4 and Answer to Petition for Writ of Prohibition, paragraph 1). Plaintiff's cause of action is barred under the special statute of limitations set out in §537.100 because it was commenced more than three years after the cause of action accrued.

In the court of appeals, respondent argued that the court should extend the statute of limitations under Missouri's Wrongful Death Act for the plaintiff in this case by construing the time when a cause of action "accrues" under §537.100 to mean the time when the plaintiff learns the identity of the defendant rather than the time when the plaintiff's decedent died. (See Brief of Respondent (SD32800) page 7.)

In *Fraze v. Partney*, this Court specifically ruled that a cause of action "accrues" within the meaning of Missouri's Wrongful Death Act when the plaintiff's decedent dies, not when the plaintiff learns the identity of the defendant. The Court recognized "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." *Fraze* at 920.

Knowing this, the legislature enacted §516.280 excepting from the general period of limitations, cases where defendants have absconded or concealed their identity by some improper act. But the legislature did not intend to apply this exception to wrongful death actions because it enacted §516.300, which limits the scope of §516.280 and it did not enact a similar exception for the Wrongful Death Act.

In *Fraze*, the Court pointed out that the language of the statute is clear and Missouri courts have consistently construed the meaning of the term “accrue” in many prior decisions. Consequently, this Court recognized that only the legislature has the constitutional authority to change a special statute of limitations:

The legislature has not seen fit to enact for death actions either by tolling provision or a delayed accrual on account of fraud, concealment, or other improper act (as Sec. 516.280), notwithstanding the prior constructions which we have discussed. Undoubtedly a hardship has resulted here, and this decision has not been easy. We are forced to construe the cold, clear words of the statute, and if its scope is to be enlarged we feel that the remedy is legislative, not judicial. *Fraze* at 921(emphasis added).

E. A Cause of Action for Wrongful Death Cannot be Commenced More Than Three Years After the Decedent’s Death If None of the Tolling Exceptions in §537.100 Apply.

In *Fraze v. Partney*, this Court ruled on the issue presented in this case. In *Fraze*, the defendant caused a motor vehicle accident and fled the scene. Two members of plaintiffs’ family were killed in the accident. The period set out in §537.100 expired before the defendant was located and identified by the police. Plaintiffs brought wrongful death actions against defendant claiming that he fraudulently concealed his identity from plaintiffs and the police. None of the tolling exceptions in §537.100 applied. *Fraze* at 916-17.

Judgment was entered in defendant's favor. This Court affirmed, holding that a cause of action for wrongful death cannot be commenced after the expiration of the period of limitation if none of the tolling exceptions in §537.100 apply. The Court reasoned that Missouri's Wrongful Death Act, not common law, created the cause of action subject to a special statute of limitations. "A special statute of limitations must carry its own exceptions and we (the court) may not engraft others upon it." *Fraze* at 919.

Although §516.280 tolls the applicable statute of limitations for general common law causes of action if the defendant prevents the commencement of an action "by absconding or concealing himself," §516.300 makes it clear that §516.280 does not extend to the Wrongful Death Act because it contains its own special statute of limitations.

In *Fraze*, this Court explained "[t]he significance of this is that the tolling provisions and exceptions of the general statutes are inapplicable, such as Sec. 516.280 providing an extension of time when one absconds or conceals himself or by other improper act prevents the commencement of an action." *Fraze* at 919.

In his order overruling relator's motion to dismiss in this case, respondent acknowledged the Supreme Court's decision in *Fraze*, but did not follow it. Instead, respondent argued, that this Court "*expressly rejected*" its decision in *Fraze* in *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. banc 1983). (See Brief of Respondent, p.7).

In *O'Grady*, this Court decided whether a fetus is a person under the Wrongful Death Act. *O'Grady* does not mention the wrongful death statute of limitations. *O'Grady* does not mention *Fraze*.

It does not seem reasonable to conclude that this Court has “expressly rejected” one of its prior decisions without mentioning it in the later decision. In fact, since *O'Grady*, this Court has continued to cite *Fraze* with approval. See e.g. *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. banc 1988) and *Dupree v. Zenith Goldline Pharmaceuticals*, 63 S.W.3d 220, 222 (Mo. banc 2002).

In the court of appeals, respondent argued that *Fraze* had been “superseded” by the Western District’s decision in *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992). Even if one were to assume that a decision by the court of appeals could “supersede” a decision of the Supreme Court, the issues in *Fraze* and *Howell* were different.

The issue in *Howell* was: When did the plaintiffs’ causes of action for the wrongful death of their decedents accrue? In *Howell*, the plaintiffs brought a civil action against Berdella for the wrongful deaths of their decedents, Howell, Sheldon and Ferris. Berdella captured the decedents, tortured them to death and hid their bodies. *Howell* at 43 and 47. On April 2, 1988, parts of Sheldon’s body were found and identified. *Howell* at 45.

Murder charges were brought against Berdella. On December 19, 1988, Berdella pled guilty to the murder charges. At the plea hearing, Berdella testified that Howell died

on July 6, 1984; Sheldon died on April 14, 1985; and Ferris died on September 27, 1985. *Howell* at 43.

Plaintiffs filed their wrongful death action against Berdella on May 10, 1989. Berdella filed a motion for summary judgment claiming that the action was barred by §537.100 because it was not commenced within three years of the deaths of the decedents. *Howell* at 43.

In support of his motion for summary judgment, Berdella filed an affidavit reaffirming the dates of death that he had given in his guilty plea. *Howell* at 43. Plaintiffs tried three times to take Berdella's deposition but he refused to answer any questions. Plaintiffs presented evidence that they did not know Sheldon was dead until his body parts were found and they did not know Howell and Ferris were dead until Berdella testified during his guilty plea. The trial court entered summary judgment in Berdella's favor and plaintiffs appealed. *Howell* at 43-45.

In reversing the trial court's entry of summary judgment, the Missouri Court of Appeals, Western District, recognized that under §490.620, the decedents were presumed to be alive for at least five years from the dates they had been missing. By law, plaintiffs "could not have asserted any action within that five year period until they had facts to overcome the law's presumption of life." *Howell* at 47.

The dates of the decedents' deaths (i.e. the dates when plaintiffs' causes of action accrued) were controverted material facts. The court of appeals ruled that the trial court should not have entered summary judgment based upon the dates provided solely by

Berdella, especially in light of his contumacious refusal to give deposition testimony. *Howell* at 45.

The court of appeals held that plaintiffs' cause of action for the wrongful death of Sheldon accrued "on April 2, 1988, when authorities found parts of his body. For Howell and Ferris, the plaintiffs' causes of action accrued on December 19, 1988, when Berdella pleaded guilty to murdering the victims. Hence, the plaintiffs' actions for wrongful death were not barred by §537.100." *Howell* at 47.

The Court of Appeals, Western District, distinguished the issue presented in *Howell* from the issue decided by this Court in *Fraze*:

Moreover, the *Fraze* 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." 314 S.W.2d at 921 (emphasis in original). In this case, we are concerned with the question of the existence of a cause of action. *Howell* at 46.

In *Fraze*, the question concerned when the plaintiff discovered the identity of the defendant, not when the decedent died (*i.e.* when the cause of action accrued). In *Howell*, when the decedents died was the question. *Howell* at 46. Unlike *Howell*, in this case, there is no question when plaintiff's decedent died and the date of death is when the cause of action accrued.

This Court's decision in *Fraze*, controls the issue in this case. *O'Grady* and *Howell* do not.

After the *O'Grady* and *Howell* decisions, this Court continued to follow its decision in *Fraze*. In 1988, five years after *O'Grady*, the Court cited *Fraze* as controlling authority for the proposition that “[a] special statute of limitations must carry its own exceptions and [the courts] may not engraft others upon it.” *Norden* at 163.

In 2002, nineteen years after *O'Grady* and ten years after *Howell*, this Court cited *Fraze* for the proposition that “Section 516.200 does not apply to wrongful death actions, such as the family brings here.” *Dupree* at 222. In *Dupree v. Zenith Goldline Pharmaceuticals*, the Supreme Court relied on *Fraze* and rejected an argument that a tolling provision in the general statutes could apply in a wrongful death case. *Id.*

The rule in *Fraze* controls. Article V, Section 2 of the Missouri Constitution states that the Missouri Supreme Court “shall be the highest court in the state” and that its “decisions shall be controlling in all other courts.” Trial courts and appellate courts of this state do not have the constitutional authority to overrule, “supersede” or disregard controlling decisions of the Missouri Supreme Court. *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 822-23 (Mo. App. E.D. 2010).

Most Missouri courts that have been asked to invent exceptions to special statutes of limitations in areas other than wrongful death have followed *Fraze* and have refused to do so. See e.g. *Norden* at 163, (failure to register securities under Chapter 409); *Braun* at 452, (suit to quiet title under Chapter 140) and; *Krutz* at 139, (suit for accounting under Chapter 461).

The special three-year statute of limitations for wrongful death actions can only be tolled if an exception under §537.100 applies. *Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1, 5 (Mo. App. E.D. 1975); *Hunt v. State Farm*, 560 S.W.2d 280, 281-82 (Mo. App. S.D. 1977); *Bregant* at 338; *Thompson v. Crawford*, 833 S.W.2d 868, 872 (Mo. 1992); *Baumgartel v. American Family Mut. Ins. Co.*, 29 S.W.3d 416 (Mo. App. E.D. 2000); *Brandon* at 98-99 and; *Dupree* at 222.

CONCLUSION

Courts do not have the constitutional authority to create judicial exceptions to special statutes of limitations. A cause of action for wrongful death “accrues” when the plaintiff’s decedent dies, not when the plaintiff learns the identity of the defendant. A wrongful death cause of action cannot be commenced more than three years after the decedent’s death if none of the tolling exceptions in §537.100 apply.

Plaintiff commenced this action more than three years after decedent’s death. None of the tolling exceptions under §537.100 apply in this case. Plaintiff’s action is barred by the three-year special statute of limitations in Missouri’s Wrongful Death Act. For these reasons, relator requests that this Court issue a permanent order prohibiting respondent from taking further action in the underlying case other than to enter an order dismissing the underlying action with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH MISSOURI SUPREME COURT RULE 84.06

Pursuant to Rule 84.06(c) of Missouri Court Rules, Volume I, the undersigned certifies that, to the best of his knowledge and belief:

1. Substitute Brief of Relator has been signed and contains the information required by Missouri Supreme Court Rule 55.03;
2. Substitute Brief of Relator complies with Missouri Supreme Court 84.06(b) and;
3. Substitute Brief of Relator contains 4,512 words with the exception of the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix as determined by Microsoft Word software used to prepare the brief.

/s/ Mark Turley

Mark Turley

