

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)
BOB T. BEISLY II,)
)
Relator,)
)
vs.)
)
THE HONORABLE TIMOTHY PERIGO,)
CIRCUIT COURT OF JASPER)
COUNTY-CARTHAGE, MISSOURI,)
)
Respondent.)

No. SC94030

RESPONDENT’S SUBSTITUTE BRIEF

Dated: May 5, 2014

Respectfully Submitted,

GRAVES GARRETT LLC
Todd P. Graves Mo. Bar # 41319
Edward D. Greim Mo. Bar # 54034
Ryan J. Parks Mo. Bar # 65090
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
(816) 256-3181 (telephone)
(816) 222-0534 (facsimile)
tgraves@gravesgarrett.com
edgreim@gravesgarrett.com
rparks@gravesgarrett.com

ATTORNEYS FOR RESPONDENT

Table of Contents

Table of Contents.....1, 2

Table of Authorities.....3, 4

Jurisdictional Statement.....5

Statement of Facts.....5

Points Relied On

I. THE WRIT SHOULD NOT ISSUE BECAUSE PLAINTIFF’S CLAIM DID NOT ACCRUE DURING THE PERIOD IN WHICH RELATOR SUCCESSFULLY CONCEALED HIS ACTS.....8

II. THE WRIT SHOULD NOT ISSUE BECAUSE THE DOCTRINE OF EQUITABLE ESTOPPEL TOLLS THE WRONGFUL DEATH STATUTE OF LIMITATIONS...8

Argument.....9

I. Plaintiff’s Claim Did Not Accrue During The Period In Which Relator Successfully Concealed His Acts.....11

A. Missouri’s Wrongful Death Act Permits Delayed Accrual of Wrongful Death Actions Where A Defendant Fraudulently Conceals His or Her Acts.....12

B. The Plain Text of the Wrongful Death Act Supports the *Howell* and *Boland* Approaches and Does Not Admit of Distinctions Between Different Types of Fraudulent Concealment.....15

C. The *Howell* and *Boland* Approaches Are Supported by the Policy Considerations Underlying the Wrongful Death Act and the Weight of Decisional Authority.....16

II. The Doctrine of Equitable Estoppel Tolls the Wrongful Death Statute of
Limitations.....19

Conclusion.....24

Certificate of Compliance.....26

Certificate of Service.....27

TABLE OF AUTHORITIES

Cases

Allred v. Chynoweth, 990 F.2d 527 (10th Cir. 1993).....23

Boland v. Saint Luke’s Health System, Inc., -- S.W.3d ---, 2013 WL 6170598 (Mo. App. W.D. Nov. 26, 2013).....8, 11, 12, 13, 14, 15

Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462 (Mo. banc 2001).....9

Brookshire v. Burkhardt, 283 P. 571 (Okla. 1929).....20, 21

Collins v. Sotka, 81 Ohio St . 3d 56 (1998)20

Denton v Soonattrukal, 149, S.W.3d 517 (Mo. App. S.D. 2004).....17, 18

Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958).....9, 11, 13, 14, 16, 17

Friedland v. Gales, 509 S.E.2d 793 (N.C. Ct. App. 1998).....22

Fulton County Adm’r v. Sullivan, 753 So.2d 549 (Fla. 1999).....21, 22, 23

Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 79 S. Ct. 760 (1959).....23, 24

Howell v. Murphy, 844 S.W.2d 42 (Mo. App. W.D. 1992), 844 S. W.2d 42 (Mo. App. W.D. 1992), *tr. denied* (Mo. 1993).....8, 11, 12, 13, 14, 17, 19

Hunter v. Hunter, 237 S. W.2d 100, 103 (Mo. 1951).....11

O’Grady v. Brown, 654 S.W.2d 904 (Mo. banc 1983).....8, 9, 10, 11, 13, 16, 17, 19

Overstreet v. Kentucky Cent. Life Ins. Co., 950 F.2d 931 (4th Cir. 1991).....20, 23

Sisters of St. Mary v. Dennigamann, 730 S.W.2d 589, (Mo. Ct. App. 1987).....8, 19

Smith v. Brown & Williamson Tobacco Corp., 275, S.W.3d 748, (Mo. App. W.D. 2008).....17

State ex rel. Eggers v. Enright, 609 S. W.2d 381 (Mo. banc 1980).....9

State ex rel. Union Elec. Co. v. Dolan, 256 S.W.3d 77 (Mo. 2008).....9

Strode v. St. Louis Transit Co., 95 S. W. 851 (Mo. banc 1906).....17

Van Beeck v. Sabine Towing Company, 300 U.S. 342, 57 S.Ct. 452, 81 L.Ed. 685 (1937).....9

Constitutions, Statues, and Court Rules

RSMo § 537.100.....6, 8, 12, 15, 16, 25

JURISDICTIONAL STATEMENT

At issue is whether Respondent properly exercised his authority in denying Relator's motion to dismiss the civil case styled *Wilma Jean Irwin v. Bob T. Beisly II, et al.*, Case No. 13ve-cv00117 such that a permanent writ of prohibition should not issue.

The Southern District of the Court of Appeals issued a permanent writ of prohibition on January 23, 2014, prohibiting Respondent from taking any other action in the case other than to dismiss it with prejudice. This Court granted Respondent's application for transfer on March 25, 2014. This Court has jurisdiction to issue writs of prohibition pursuant to art. V, sec. 4 of the Missouri Constitution.

STATEMENT OF FACTS

Respondent generally agrees with the Relator's statement of facts, but submits the following additions or disputed entries. On July 15, 2009, Belinda Beisly was found deceased in her residence in Richards, Vernon County, Missouri. *See* Second Amended Petition, ¶ 7. An autopsy determined that the cause of death was multiple gunshot wounds to the head and chest, and the coroner ruled her death a homicide. *Id.* At the time of her death, Belinda was 47 years old. *Id.* at ¶ 8.

Following Belinda's death, the Vernon County Sheriff's Department and the Missouri State Highway Patrol conducted an investigation into the case, assisted by additional state and federal agencies. *Id.* at ¶ 9. During that time, the Sheriff's Department conducted numerous interviews and pursued many different leads, but the murder remained unsolved. *Id.*

Plaintiff Norma Jean Irwin is the surviving mother of Belinda. *Id.* at ¶ 1. Ms. Irwin, a retired widow of limited means, labored for years to identify her daughter's killer. *Id.* at ¶ 25. Ms. Irwin was in frequent communication with law enforcement authorities regarding their

investigation into Belinda's death, and sought regular updates regarding the status of the investigation. *Id.* at ¶ 26. Shortly after Belinda's death, a reward fund was set up and publicized to encourage anyone with knowledge regarding Belinda's murder to come forward with information. *Id.* at ¶ 25. Even though over \$11,000 was raised for this fund, no witness or informant came forward. *Id.* Moreover, although the state and federal law enforcement authorities pursued many leads and conducted numerous interviews over the three years following Belinda's death, they were unable to file charges against anyone. *Id.* at ¶ 26.

On February 8, 2013, the Vernon County Sheriff's Office announced that deputies had arrested Bob Beisly II ("Relator") on one count of first degree murder. *Id.* at ¶ 10. The authorities also announced that there had been a murder charge and arrest warrant filed against Jeremy Maples ("Maples"). *Id.* The Vernon County Sheriff's Office relied heavily on testimony from incarcerated individuals and from Maples himself (who was already in jail) in their investigation of Relator. *Id.* Within days of criminal charges being filed, Ms. Irwin filed her wrongful death lawsuit against Relator and Maples. *Id.* at ¶ 26.

According to documents filed in the State's cases against Relator and Maples, the two men killed Belinda and then concealed their conduct from law enforcement and Belinda's family. *See State of Missouri v. Bob T. Beisly II*, Case No. 13VE-CR00120 (Mo. Cir. Ct., Vernon Co.); *State of Missouri v. Jeremy L. Maples*, Case No. 13VE-CR00122 (Mo. Cir. Ct., Vernon Co). Despite her diligent search, Ms. Irwin was unable to identify any person who could be sued until the arrests of Relator and Maples – more than three years after Belinda's death. (Second Amended Petition, ¶¶ 25-26). Ms. Irwin pleads that Relator and Maples fraudulently concealed their conduct, making it impossible for Ms. Irwin to timely sue them, in at least the following ways:

- (1) disguising the circumstances leading to Belinda's death (*see* Maples' statement

that Relator said to “make it look like a break in” (*Id.* at ¶ 17); Bob T. Beisly III’s statement that Relator said “use a shotgun because it could not be traced” (*Id.* at ¶ 18));

- (2) lying about their involvement in interviews with law enforcement (*Id.* at ¶¶ 19 & 21);
- (3) destroying evidence (*Id.* at ¶ 20); and
- (4) denying involvement in civil and criminal proceedings where Relator stood to gain other benefits, such as probation from a previous criminal conviction and other matters related to the estate of Belinda (*Id.* at ¶¶ 21-24).

Relator moved to dismiss Ms. Irwin’s action, citing the three-year wrongful death statute of limitations. Section 537.100, RSMo. On June 6, 2013, Judge Timothy Perigo of the Jasper County Circuit Court (“Respondent”), entered an order overruling Relator’s motion to dismiss, explaining that, “[i]f the plaintiff’s allegations are true, to allow a wrongdoer to escape civil liability is shocking to the conscience.” *Irwin v. Beisly*, No. 13AP-CC00037 (Mo. Cir. Ct. 29th Cir. Jun. 6, 2013). On January 23, 2014, the Southern District Court of Appeals issued a permanent writ of prohibition directing Respondent to take no further action in the case other than granting Relator’s motion to dismiss. *State ex. Rel. Beisly v. Perigo*, -- S.W.3d ---, 2014 WL 257277, *6 (Mo. App. S.D. Jan. 23, 2014) (per curiam). On March 25, 2014, this Court granted Respondent’s application for transfer.

POINTS RELIED ON

- I. THE WRIT SHOULD NOT ISSUE BECAUSE PLAINTIFF'S CLAIM DID NOT ACCRUE DURING THE PERIOD IN WHICH RELATOR SUCCESSFULLY CONCEALED HIS ACTS

Mo. REV. STAT. § 537.100

O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. banc 1983)

Howell v. Murphy, 844 S.W.2d 42, 46 (Mo. App. W.D. 1992), *tr. denied* (Mo. 1993)

Boland v. Saint Luke's Health System, Inc., -- S.W.3d ---, 2013 WL 6170598 (Mo. App. W.D. Nov. 26, 2013)

- II. THE WRIT SHOULD NOT ISSUE BECAUSE THE DOCTRINE OF EQUITABLE ESTOPPEL TOLLS THE WRONGFUL DEATH STATUTE OF LIMITATIONS

Sisters of St. Mary v. Dennigamann, 730 S.W.2d 589 (Mo. Ct. App. 1987)

STANDARD OF REVIEW

“Prohibition will not be granted except when usurpation of a jurisdiction or an act in excess of the same is **clearly evident**. *State ex rel. Eggers v. Enright*, 609 S.W.2d 381 (Mo. banc 1980) (emphasis added).

“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.” *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001). In order to withstand the motion, the petition must invoke “substantive principles of law entitling plaintiff to relief and ... ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.” *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. banc 2008) (citations omitted).

ARGUMENT

“It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied [by a wrongful death statute].” *Van Beeck v. Sabine Towing Company*, 300 U.S. 342, 350–51, 57 S.Ct. 452, 456, 81 L.Ed. 685 (1937), *quoted in O’Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. banc 1983). Relator’s petition for a writ of prohibition is fundamentally flawed because it seeks to perpetuate the very evils to be remedied by Missouri’s Wrongful Death Act (the “Act”) by relying on a decision of this Court which narrowly construed the Act. *See Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958).

In 1983, this Court rejected *Fraze*'s policy of narrowly construing the Act, instructing Missouri courts to henceforth "apply the statutory language 'with a view to promoting the apparent object of the legislative enactment.'" *O'Grady*, 654 S.W.2d at 908 (internal citations omitted). This Court explained that there are "three basic objectives behind the statute: to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death." *Id.* at 909. Relator's interpretation of the Act would not promote any one of the three basic objectives of the statute. Indeed, Relator's interpretation of the Act not only contravenes the very purpose of the Act, it also rewards the evils of concealment, destruction of evidence, intimidation of witnesses, and the very act of murder. These compounding evils undermine the purpose of the Act, dishonor the victim, cause interminable grief for the victim's family, and frustrate the public interest in sound and vigorous law enforcement.

In denying Relator's motion to dismiss, Respondent correctly determined that "[i]f the plaintiff's allegations are true, to allow a wrongdoer to escape civil liability is shocking to the conscience." *Irwin v. Beisly*, No. 13AP-CC00037 (Mo. Cir. Ct. 29th Cir. Jun. 6, 2013). This decision is proper for two reasons. First, Relator's conduct delayed the "accrual" of Ms. Irwin's cause of action, the triggering event for the running of the statute of limitations under the Act. Second, Relator's efforts to conceal his tortious conduct estop him from relying on the statute of limitations. Because Respondent properly construed the Act in denying Relator's motion to dismiss, the Court should deny Relator's petition for a writ of prohibition.

In considering each argument, this Court should follow *O'Grady's* instruction that the underlying remedial purposes of the Act require courts to broadly construe it. The Western District of the Court of Appeals has already done just that in similar cases, and analogous cases

from other jurisdictions show that the weight of authority is on Ms. Irwin's side – even in states whose highest courts have not, unlike the Supreme Court of Missouri, expressly instructed courts to construe the Act to promote its remedial purposes. In order to implement the purpose of the Act, and in order to satisfy the demands of justice, this Court should find that Relator's efforts to conceal his role in his wife's murder do not prevent Ms. Irwin's wrongful death claim from proceeding.

I. Plaintiff's Claim Did Not Accrue During The Period In Which Relator Successfully Concealed His Acts

“A cause of action accrues, and limitations thereon begin to run, when the right to sue arises.” *Hunter v. Hunter*, 237 S.W.2d 100, 103 (Mo. 1951). Relator relies on *Fraze* to support his contention that a wrongful death cause of action “‘accrues’ ... when the plaintiff's decedent dies, not when the plaintiff learns the identity of the defendant.” (Relator's Brief at 15). *Fraze* strictly interpreted the Act, including its limitations period, and some subsequent Missouri cases followed *Fraze*. However, this Court rejected a narrow construction of the Act in *O'Grady*, instructing courts instead to interpret the Act broadly in order to promote the “three basic objectives behind the statute: to provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death.” 654 S.W.2d at, 909.

After this Court's decision in *O'Grady*, the Western District of the Court of Appeals broadly construed the Act in two decisions that are particularly instructive here. In *Howell v. Murphy*, the Court of Appeals held that the Act's limitations period did not begin to run during the time the defendant had fraudulently concealed his acts of murder. 844 S.W.2d 42, 47 (Mo. App. W.D. 1992), *tr. denied* (Mo. 1993). Similarly, in *Boland v. Saint Luke's Health System*,

Inc., the Court of Appeals held that the Act’s limitations period did not begin to run during the time the defendants “fraudulently conceal[ed] their own bad acts.” -- S.W.3d ---, 2013 WL 6170598, *10 (Mo. App. W.D. Nov. 26, 2013). As shown in *Howell* and *Boland*, and as further described below, this Court should not construe the Act to permit a defendant to avoid liability and frustrate recovery by the victim’s family by fraudulently concealing his or her acts until the statute of limitations expires.

A. Missouri’s Wrongful Death Act Permits Delayed Accrual of Wrongful Death Actions Where A Defendant Fraudulently Conceals His or Her Acts

The Act requires actions to “be commenced within three years after the cause of action shall accrue.” § 537.100, RSMo. However, the Act does not define when the cause “shall accrue” or explain the factors courts should consider in deciding whether accrual has occurred.¹ The Western District of the Court of Appeals began to fill this gap in *Howell* and *Boland*, which,

¹ “Accrual” and “tolling” are distinct concepts. *See, e.g., Boland v. Saint Luke’s Health System, Inc.*, -- S.W.3d ---, 2013 WL 6170598, *5 (Mo. App. W.D. Nov. 26, 2013) (“Accrual is defined as ‘when the right to sue arises.’ Accrual also marks the time when an applicable statute of limitations begins to run. Tolling provisions, on the other hand, ‘interrupt [] the running of a statute of limitations in certain situations.’ Thus, while every cause of action has a time of accrual, not every cause of action will be subject to tolling. Further, if the cause of action has never accrued, there is nothing to toll, because an event or circumstance cannot ‘interrupt’ that which has never started.”) (internal citations omitted). Accordingly, the delay or postponement of “accrual” in this context is not the same as the “tolling” of a wrongful death cause of action.

under *O'Grady*, properly applied the Act to effectuate the Act's remedial purposes and avoid rewarding the very evil the Act was meant to remedy and deter.

In *Howell*, the Western District of the Court of Appeals held that the express language of the Act is not inconsistent with delaying accrual², noting that *Fraze*'s interpretation of the Act "can defeat the very purpose of the wrongful death action." *Howell*, 844 S.W.2d at 46. In fact, *Fraze*'s interpretation was "shocking to the conscience." *Id.* (citation omitted). Ultimately, the *Howell* court held that where the killer concealed his conduct, the plaintiffs' cause of action did not accrue "until the plaintiffs could, by reasonable diligence, ascertain that they had an action." *Id.* at 47. *Howell*'s analysis and holding apply with equal force here.

In November 2013, the Western District reinforced *Howell* with its decision in *Boland*, stating: "*Fraze*'s application of strict construction to the Wrongful Death Act has been nullified by *O'Grady*." 2013 WL 6170598, *8. The court in *Boland* concluded that "the term 'accrue' in section 537.100 must be liberally construed consistent with the purposes of the Wrongful Death Act. Thus, the three-year statute of limitations does not accrue if the affirmative actions of [the defendants in that case], to fraudulently conceal their own bad acts, caused plaintiffs to be unable, through reasonable diligence, to ascertain the existence of the cause of action." *Id.*

² Although the *Howell* opinion stated that the case considered the "question of the existence of a cause of action," and held that *Fraze* is no longer good law on the definition of accrual (844 S.W.2d at 46), it also references tolling principles in its holding: "we conclude that the limitation... was tolled ..." *Id.* at 47. Despite this use of potentially inconsistent terms, *Howell* ultimately followed *O'Grady*'s instruction to apply the Act to do justice, and *Howell*'s analysis applies with equal force to this case.

In order to reach the opposite result, Relator attempts to limit *Howell* to its specific facts. Relator contends that the concealed or missing information in *Frazer* was the identity of the defendant, whereas the concealed or missing information in *Howell* was the date of the victims' deaths. (Relator's Brief at 20). The result is a rule providing that fraudulent concealment of a *murder* allows delayed accrual, while fraudulent concealment of *the murderer* does not. Yet in either circumstance the predicate facts to bringing suit and establishing liability remain unknown as a direct result of the murderer's subsequent conduct. Neither the Act, nor case law, nor public policy supports this odd distinction. In *Howell*, the discovery of the *murder* had actually coincided with the discovery of *the murderer*, and ultimately, *Howell* stands for the proposition that where a murderer conceals his conduct, a wrongful death action does not accrue "until the plaintiffs [can], by reasonable diligence, ascertain that they [have] an action." *Id.* at 47. Furthermore, *Howell* explains that "[s]tatutes of limitations are intended to prevent fraud ... To hold that by concealing fraud, or by committing fraud in such a manner as to conceal it until after the party committing the fraud could plead the statute of limitations to protect itself, is to make fraud the means by which it is successful and secure." *Id.* (citation omitted). This holding is the core of *Howell*, and it does not support the proposition, advanced by Relator, that fraudulent concealment delays accrual *only* until the fact of the killing is discovered, or that it cannot delay accrual until a killer's identity is discovered.

Although he has not done so, it is possible that Relator could similarly attempt to limit *Boland* to its specific facts: the plaintiffs knew of the deaths and the defendants' involvement, but the defendants' fraud hid the *wrongfulness* of the deaths. This effort to limit *Boland* fails for the same reason – there is no basis to punish one type of fraud and yet reward another. *Boland* correctly held that a cause of action "does not accrue if the affirmative actions of Respondents, to

fraudulently conceal their own bad acts, caused the plaintiffs to be unable, through reasonable diligence, to ascertain the existence of the cause of action.” 2013 WL 6170598, *8. Thus, *Boland* does not support the proposition that fraudulent concealment is unavailable to delay or toll accrual in cases where the “missing piece” is the killer’s identity.

B. The Plain Text of the Wrongful Death Act Supports the *Howell* and *Boland* Approaches and Does Not Admit of Distinctions Between Different Types of Fraudulent Concealment

The Act is silent on the threshold question of *when* a wrongful death cause of action “shall accrue.” It is likewise silent regarding what circumstances might justify delaying or adjusting the date of accrual, and the Act makes no bright-line distinction between discovery of the “killing” or the “wrongfulness” of a death on one hand, and the discovery of the “killer” on the other hand.

What the Act *does* say about the identity of the defendant suggests that whatever else may trigger “accrual,” a killer’s identity and the death’s wrongfulness will typically be known at the time of accrual. The Act contains two tolling provisions, both of which hinge on events that happen after accrual has already occurred. The first provision tolls the limitations period if “any defendant” leaves the state “so that personal service cannot be had” § 537.100, RSMo. These provisions presuppose that the plaintiff will be aware of the killer’s identity and the death’s wrongfulness when the cause of action accrues.

Likewise, the second provision, which extends the statute for one year in the event of a nonsuit, assumes that a suit has been filed against a known defendant. That provision authorizes tolling if “personal service cannot be had upon such defendant in the state . . .” and when the “defendant is . . . 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.” *Id.* In other words, tolling is triggered by the defendant’s location. Yet, when the identity of the defendant is unknown, plaintiffs have no way of knowing the defendant’s location. Under Relator’s interpretation of the Act, when a defendant’s identity is unknown, the statute of limitations runs and the plaintiff is left without a remedy. However, if the defendant’s identity is known but the defendant leaves the state, the statute tolls and the plaintiff retains the ability to recover. Nothing in the plain text of the Act suggests that defendants who conceal a death or a death’s wrongfulness should be penalized, while defendants who conceal their involvement should be rewarded.

C. The *Howell* and *Boland* Approaches Are Supported by the Policy Considerations Underlying the Wrongful Death Act and the Weight of Decisional Authority

In contrast to the approach in *Fraze*, in *O’Grady* this Court said that “[w]e do not agree” that the Act “must be ‘strictly construed’ because it is ‘in derogation of the common law.’” 654 S.W.2d at 907-08. The Court explained that the statute was not in derogation of common law because wrongful death laws “do not take away any common law right; they were designed to mend the fabric of the common law, not to weaken it.” *Id.* at 908. The Court concluded, “[w]e must therefore apply the statutory language ‘with a view to promoting the apparent object of the legislative enactment.’” *Id.* (citation omitted).

O’Grady instructs that the Act should be broadly construed to effectuate its purposes. *Id.* at 909. Yet Relator contends that *O’Grady* did not supersede *Fraze* in part because *O’Grady* did not *explicitly* state that *Fraze* was superseded. (Relator’s Brief at 18). It is axiomatic, however, that a court’s decision does not need to expressly overrule or supersede a prior decision in order for the holding of the prior decision to become bad law. Applying this principle,

Missouri courts have recognized that *O'Grady* nullified or superseded other prior decisions, even though it did not do so explicitly. See, e.g., *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 766 (Mo. App. W.D. 2008) (“The impact of *O'Grady* is to nullify the reasons asserted for the holding in *Strode*. Thus, while the Missouri Supreme Court has not specifically stated that *Strode* is no longer to be followed, its holding is premised upon an interpretation of the Missouri wrongful death statute that no longer applies.”) (citing *Strode v. St. Louis Transit Co.*, 95 S.W. 851 (Mo. banc 1906)). It is clear from a reading of both *Frazee* and *O'Grady* that, as the Western District has observed, *O'Grady* represents a “major shift” in the Court’s approach to the Act that effectively superseded *Frazee*. *Howell*, 844 S.W.2d at 46 (“[W]e conclude that the reasoning of *Frazee* is superseded by *O'Grady*.”).

Relator seeks to avoid the impact of *O'Grady* by limiting it to the narrow set of facts underlying that case and claiming that it “does not mention the wrongful death statute of limitations.” (Relator’s Brief at 18). This ignores *O'Grady*’s instruction to lower courts to *always* apply the three purposes behind the wrongful death statute. It also ignores the importance that Missouri’s appellate courts have placed on *O'Grady* over the last three decades. As *Howell* explained, in *O'Grady* “the Supreme Court of Missouri announced a *major shift* in its interpretation of Missouri’s wrongful death statute.” *Howell*, at 46 (emphasis added).

The Western District of the Court of Appeals is not alone in reading *O'Grady* in this way. The Southern District applied *O'Grady* in a parallel context, broadly interpreting the Act’s one-year revival provision under the statute of limitations for nonsuits, which is included in Section 537.100. See *Denton v. Soonattrukal*, 149 S.W.3d 517, 524 (Mo. App. S.D. 2004). In *Denton*, a plaintiff argued that the claim was not time-barred because another plaintiff had filed suit and taken a nonsuit within the one-year period. A question arose whether the action fell outside of

the plain text of the revival provision, which only allowed “such plaintiff”—not a different plaintiff—to bring a new action within one year. *Id.* In reversing the trial court, the Court of Appeals held that the remedial purpose of the Act was paramount:

“In our review of the instant matter, it is a fundamental consideration that the manifest purpose of the wrongful death statute is to provide compensation for the loss of the companionship, comfort, instruction, guidance and counsel, etc., to statutorily designated, and hence a limited number, of relatives of a decedent wrongfully killed by a tortfeasor. ... [T]he trial court has employed a hyper-technical reading of section 537.100. We find such an interpretation to be contrary to the manifest purpose of the wrongful death act. Furthermore, such a literal interpretation as that espoused by Defendants would tend to diminish by mere procedural hyper-technicality two additional objectives behind the wrongful death statutes, that is ‘to ensure that tortfeasors pay for the consequences of their actions, and generally to deter harmful conduct which might lead to death.’”

Id. (citation omitted).

Here, Relator not only seeks a hyper-technical construction of the Act, but also advances illogical distinctions between delayed accrual for the concealment of the “killing” or of a death’s “wrongfulness” on one hand, and the delayed accrual for the concealment of the “killer” on the other hand. Most Missouri citizens would be surprised to learn that the Act was drafted or could be construed to draw such distinctions. What reason does the state have to reward concealment where a defendant is able to hide his own involvement in the killing, but not the fact that a wrongful death has occurred? If one purpose of a statute of limitations is repose and the prohibition of stale claims, it is difficult to understand why courts should engraft upon the Act a

distinction between staleness arising from an unknown identity on one hand, and staleness arising from uncertainty as to whether a death has occurred or an unknown cause of death on the other hand. Indeed, if courts were to create their own distinction under the Act, the opposite rule makes more sense. A plaintiff who knows that a specific person was involved in an accident or death has the opportunity and means to learn more about the defendant's actions and decide whether a good-faith claim can be filed asserting that the death was "wrongful." However, as was the case with Ms. Irwin, a plaintiff who knows a killing occurred may utterly lack the means to identify any person who was involved. Plaintiffs like Ms. Irwin are susceptible to losing their remedies after even a few years of relatively successful concealment.

Relator's construction of the Act contradicts the holding and spirit of *O'Grady*. Relator's concealment in the years since Belinda Beisly's murder prevented the earlier commencement of this action. This is precisely the sort of improper conduct that defeats the very purpose of the Act, and Relator should not be permitted to "escape all civil liability merely by concealing his evil deeds for three years." *Howell*, 844 S.W.2d at 47.

II. The Doctrine of Equitable Estoppel Tolls the Wrongful Death Statute of Limitations

Missouri courts apply the doctrine of equitable estoppel. *See Sisters of St. Mary v. Dennigmann*, 730 S.W.2d 589, 593 (Mo. App. E.D. 1987). Under this doctrine, a defendant may be estopped from asserting the statute of limitations by acting in a way that "induced the plaintiff to delay bringing suit until after the expiration of the statutory period." *Id.* When the principles of justice demand it, Missouri courts can and should utilize equitable estoppel to prevent a defendant in a wrongful death action from asserting the statute of limitations as a complete defense.

These principles have been applied by courts across the country in similar cases. As the Fourth Circuit stated in one such case: “To deny tolling would lead to unjust results. For example, denial would enable a murderer to escape civil liability by concealing his identity or the nature of his crime until the expiration of the period of limitations.” *Overstreet v. Ky. Cent. Life Ins. Co.*, 950 F.2d 931, 936 (4th Cir. 1991); *see also Collins v. Sotka*, 81 Ohio St. 3d 506, 510 (1998) (Ohio Supreme Court allowed the statute of limitations to be tolled “to prevent inequities,” concluding “[I]t is illogical to penalize the victim’s survivors, who have already suffered a great loss, by shortening or extinguishing the time in which they may bring a wrongful death lawsuit. To do so merely rewards the criminal defendant”).

Nearly a century ago, the Supreme Court of Oklahoma was faced with analogous facts involving a conspiracy to commit murder. *Brookshire v. Burkhart*, 283 P. 571 (Okla. 1929). The plaintiffs’ decedent had been killed in an explosion, but the plaintiffs were unaware who was responsible for the explosion until after the limitations period had run. *Id.* at 572. The allegations, as restated by the court, were that three defendants had conspired to kill the decedent and did so; that the plaintiffs tried to discover who was responsible but had limited means and uncovered no information through their inquiries, “and that it was only after months of investigation by numerous federal and state officials and after the expenditure of vast amounts of money in making such investigation that any information was obtained as to who was responsible for said explosion;” and that after the information obtained by officials was made public, the plaintiffs learned the defendants were responsible. *Id.* The *Brookshire* defendants demurred on limitations grounds and the trial court sustained the demurrer.³ *Id.* at 573. On

³ Like the standard in Missouri on a motion to dismiss, “[a] general demurrer admits the truth of all the facts well pleaded in the petition, and the petition must be liberally construed, and

appeal, the Oklahoma Supreme Court cited precedent that “a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud.” *Id.* at 578 (citation omitted). The court therefore reversed the trial court’s dismissal of the action, holding that plaintiffs’ allegations were sufficient to show fraudulent concealment. *Id.*

More recently, the Supreme Court of Florida affirmed a jury’s finding of fraudulent concealment tolling the statute of limitations. *Fulton County Adm’r v. Sullivan*, 753 So. 2d 549 (Fla. 1999) (per curiam). In *Sullivan*, as here, the decedent was killed while she and the defendant were going through divorce proceedings. *Id.* at 551. “Throughout the initial police investigation, [defendant] denied any involvement in the crime,” and it was not until several years later when the defendant confessed his participation in the crime that the plaintiffs filed their wrongful death lawsuit. *Id.* The jury found that the defendant had arranged the decedent’s murder, and awarded damages to the plaintiffs. The issue of fraudulent concealment was certified to the Florida Supreme Court, which held that under Georgia’s fraudulent concealment statute the jury’s verdict was supported. 662 So. 2d 706, 707 (Fla. Dist. Ct. App. 1995), *rev’d in part*, 753 So. 2d 549, 552-53 (defendant was a suspect from the beginning; the facts uncovered by the law enforcement agencies during their investigations were kept confidential and were not available to the plaintiffs; plaintiff was unaware of defendant’s involvement until defendant’s new wife told police that defendant had admitted his guilt to her and when a prisoner, with whom

all such facts must be taken as true for the purpose of the demurrer, and, where a pleading states facts upon which pleador is entitled to any relief, under the law, the general demurrer should be overruled.” *Id.* at 573.

defendant was incarcerated on another matter, also told police that defendant had confessed to the murder).⁴

The same result was reached under “equitable estoppel” principles in *Friedland v. Gales*, a North Carolina case in which the defendant had concealed his involvement in the murder of the decedent when confronted by the police. 509 S.E.2d 793, 794 (N.C. Ct. App. 1998). It was not until after the defendant confided in two fellow inmates, while incarcerated on other charges, that the plaintiff learned the defendant had killed the decedent. *Id.* The court held that the defendant was therefore equitably estopped from invoking the statute of limitations:

... According to the trial court’s findings, defendant actively concealed his wrongful conduct and prevented plaintiff from learning his identity before the statute of limitations had run. [T]he actual injury was known and the claim had accrued, but due to defendant’s intentional concealment, an essential fact necessary to bring the action, *i.e.*, the identity of the tortfeasor, was unknown. Plaintiff, lacking the reasonable means to discover the identity of the wrongdoer, reasonably relied on the concealment to his detriment by not filing a wrongful death action until such information became available to him. These findings of fact establish, as a matter of law, that defendant, having actual knowledge of material facts, actively and deliberately concealed those facts with the intent to prevent discovery thereof by others, including the plaintiff; and that in consequence of defendant’s conduct, plaintiff was without knowledge of those

⁴ The Florida Supreme Court held that the Georgia rather than Florida law applied and so did not reach the issue of fraudulent concealment under Florida law. *Sullivan*, 753 So. 2d at 552.

facts and without means to discover them within the period of the statute of limitations, thereby relying to his detriment on defendant's conduct.

Id. at 798. *See also Overstreet*, 950 F.2d at 942 (“It is no simple task to investigate a murder A mother whose son has been killed may of necessity and common sense seek assistance from ... the public official charged with the investigation and prosecution of crime. Whether Wilkey's mother acted prudently and reasonably is a question for the jury.”).

Even in a case where the defendant had been criminally charged, the Tenth Circuit held that the defendant's fraudulent concealment of her role in a murder tolled the statute of limitations in a wrongful death case. *Allred v. Chynoweth*, 990 F.2d 527 (10th Cir. 1993). In *Allred*, the defendant had been arrested and held over for trial after a probable cause hearing, at which the state court had found sufficient cause to believe the defendant committed the murder. *Id.* at 530-31. Nonetheless, because the defendant had lied to police and maintained her innocence at trial (and was subsequently acquitted), the Tenth Circuit held that the statute of limitations was tolled until the defendant admitted the murder in her book ten years later. *See id.* at 532 (“After lying at trial and convincing a jury to acquit her, she cannot argue the plaintiffs should have known a cause of action existed based on probable cause hearings.”).

Relying on case law that is outdated, Relator also asserts that the wrongful death statute of limitations is a substantive limitation (as opposed to merely procedural). Even assuming Relator were correct, the U.S. Supreme Court has held that even “a ‘substantive’ statute of limitations is nonetheless tolled by the principle of equitable estoppel, which it noted was ‘older than the country itself.’” *Overstreet*, 950 F.2d at 936 (citing *Glus v. Brooklyn Eastern Terminal*,

359 U.S. 231, 234, 79 S. Ct. 760, 763 (1959)).⁵

Despite her diligent search, and as a result of Relator's concealment, Ms. Irwin was unaware of Relator's involvement in Belinda's murder until more than three years after Belinda's death. *See* Second Amended Petition, ¶¶ 25-26. Relator's conduct after Belinda's murder was intentionally calculated to prevent anyone, including Ms. Irwin, from bringing a legal action against him. *Id.* at ¶¶ 17-18, 21-24. Finally, Ms. Irwin relied on Relator's conduct, in that she was unable to and did not bring a claim against him until after the expiration of the three-year period that Relator now asserts as an affirmative defense. *Id.* at ¶¶ 17-18, 21-26. Relator's concealment of his involvement in Belinda's murder should not avail him of all civil liability. Whether the statute of limitations is tolled under equitable estoppel or fraudulent concealment principles, courts in Missouri and across the country have refused to allow a murderer to benefit from his own conduct. In furtherance of the Act's purpose and in satisfaction of the demands of justice, Respondent properly denied Relator's motion because the statute of limitations was tolled.

CONCLUSION

Relator's sustained efforts to cover up his role in the murder of his wife (and the daughter of Plaintiff Irwin) prevented Ms. Irwin from learning of his involvement and suing him within three years of the murder. Punishing and discouraging such conduct is precisely the purpose of the Wrongful Death Act, and Relator's ability to conceal his role in his wife's murder for more

⁵ There was no common law action for wrongful death until Lord Campbell's Act was passed in England in 1846, and some courts had distinguished between "procedural" and "substantive" statutes of limitation. However, the court noted that "the mechanistic distinction between the types of limitations has been falling into favor for at least 50 years." *Id.*

than three years cannot allow him to evade justice. Because of Relator's fraudulent concealment, Ms. Irwin's wrongful death claim did not "accrue" under Section 537.100 until she learned of his identity. Furthermore, Relator's concealment of his tortious conduct estops him from relying on the statute of limitations.

WHEREFORE, Plaintiff respectfully requests that the Court deny Relator's request that this Court issue a writ of prohibition and that the preliminary writ of prohibition be quashed.

Respectfully submitted,

GRAVES GARRETT LLC

By: /s/ Edward D. Greim

Todd P. Graves Mo. Bar # 41319

Edward D. Greim Mo. Bar # 54034

Ryan J. Parks Mo. Bar # 65090

1100 Main Street, Suite 2700

Kansas City, Missouri 64105

(816) 256-3181 (telephone)

(816) 222-0534 (facsimile)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned certifies that:

1. Substitute Brief of Respondent has been signed and contains the information required by Missouri Supreme Court Rule 55.03;
2. Substitute Brief of Respondent complies with Missouri Supreme Court Rule 84.06(b);
and
3. Substitute Brief of Respondent contains 6,948 words and the total line count is 612.

/s/ Edward D. Greim
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2014, a true and correct copy of the Application for Transfer and required attachments were served via the Court's eFiling system on the following counsel of record

Mark Turley
SMITH & TURLEY
Post Office Box 494
Waynesville, Missouri 65583
Attorney for Relator

Karl W. Blanchard, Jr.
PO Box 1626
Joplin, Missouri 64801
*Attorney for Intervenor Plaintiff
in Case Number 13AP-CC00037*

and by U.S. Mail, postage prepaid on

Jeremy L. Maples
C/o Vernon County Sheriff's Office
2040 East Hunter
Nevada, Missouri 64772
*Defendant Acting Pro Se in
Case Number 13AP-CC00037*

/s/ Edward D. Greim
Attorney for Respondent