In the

Missouri Court of Appeals

Western District

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| **SALLY BOLAND,** | ) | |
| | ) | |
| **Appellant,** | ) | **WD75364 Consolidated with** |
| | ) | **WD75366, WD75367, WD75484 and** |
| **SHERRI LYNN HARPER,** | ) | **WD75485** |
| | ) | |
| **Appellant,** | ) | **OPINION FILED:** |
| | ) | **November 26, 2013** |
| **DAVID C. GANN,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | |
| **JENNIRAE LITTRELL, NATURAL DAUGHTER OF DECEDENT CLARENCE BAILEY WARNER,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | |
| **HELEN PITTMAN, NATURAL SISTER OF DECEDENT SHIRLEY R. ELLER,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| **v.** | ) | |
| | ) | |
| **SAINT LUKE'S HEALTH SYSTEM, INC. AND SAINT LUKES HOSPITAL OF CHILLICOTHE F/K/A THE GRAND RIVER HEALTH SYSTEM CORPORATION D/B/A HEDRICK MEDICAL CENTER AND COMMUNITY HEALTH GROUP,** | ) | |
| | ) | |
| **Respondents.** | ) | |

**Appeal from the Circuit Court of Livingston County, Missouri**
The Honorable Thomas N. Chapman, Judge and
The Honorable Jason A. Kanoy, Judge

Before Division Two: Thomas H. Newton, Presiding Judge, Karen King Mitchell, Judge and Gary D. Witt, Judge

This appeal arises from five separate wrongful death lawsuits all filed against the same three corporate defendants. The cases have been consolidated on appeal from the grant of judgments on the pleadings in favor of Respondents in each case.[1] The legal issue in each case is identical: whether the trial courts erred in granting Respondents' motions for judgment on the pleadings, finding that the three-year statute of limitations in the Wrongful Death Act had expired prior to the filing of the petitions. §§ 537.080, 537.100.[2] Because we determine that the statute of limitations did not accrue because of Respondents' fraudulent actions, we reverse and remand.

## Factual and Procedural History[3]

Appellants filed claims on behalf of five individuals who were allegedly intentionally killed by a respiratory therapist in the Hedrick Medical Center ("Hedrick") in Chillicothe. Respondents are three corporate defendants affiliated with Hedrick: (1) Saint Luke's Health System, Inc., (2) Saint Luke's Hospital of Chillicothe, f/k/a Grand

[1] Two judges granted judgments on the pleadings in the five separate cases now pending on appeal.
[2] All statutory references are to RSMo 2000 as currently supplemented unless otherwise indicated.
[3] As set out more fully below, in our review of a judgment on the pleadings, "[t]he well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc*., 224 S.W.3d 596, 599-600 (Mo. banc 2007) (quoting *State ex rel. Nixon v. Am. Tobacco Co*., 34 S.W.3d 122, 134 (Mo. banc 2000)). Accordingly, we adapt in large part the statements of facts from Appellants' petitions.

River Health System Corp. d/b/a/ Hedrick Medical Center, and (3) Community Health Group.[4]

Appellants allege that respiratory therapist Jennifer Hall ("Hall"), a Hedrick employee, administered an intentionally lethal overdose of succinylcholine and/or insulin and/or other medication that resulted in each of the five deaths and that the Respondents intentionally concealed Hall's actions. Succinylcholine is a muscle relaxant that paralyzes the respiratory muscles and is normally used in a hospital to allow the insertion of a breathing tube into the throat of a patient who is still conscious. In higher doses, succinylcholine results in paralysis and the victim slowly suffocates.

Following are the specific allegations relating to each death, including the relevant dates:

***Appellant Sally Boland***

Charles O'Hara, father of Appellant Sally Boland ("Boland"), was being treated at Hedrick when he died on or around February 3, 2002. O'Hara "coded"[5] and died after Hall administered a lethal overdose of succinylcholine and/or insulin and/or other medication. Boland filed her action on January 7, 2011.

***Appellant Sherri Lynn Harper***

David Harper, spouse of Appellant Sherri Lynn Harper ("Harper"), was being treated at Hedrick when he died on or about March 22, 2002. Hall administered a lethal dose of succinylcholine and/or insulin and/or other medication to David Harper that resulted in his death. Harper filed her action on October 4, 2010.

[4] The first two Respondents filed a joint brief.

[5] "Code" or "coded" refers to "code blue," a term used to describe a patient with a medical emergency, often cardiac arrest or inability to breathe.

***Appellant David Gann***

Coval Gann, father of Appellant David Gann ("Gann"), died on March 30, 2002 at Hedrick. Hall administered a lethal dose of succinylcholine and/or insulin and/or other medication to Coval Gann that resulted in his death. Gann filed his action on October 4, 2010.

***Appellant Jennirae Littrell***

Clarence Warner, father of Appellant Jennirae Littrell, was being treated at Hedrick when he died on April 15, 2002. Hall administered a lethal dose of succinylcholine and/or insulin and/or other medication to Warner that resulted in his death. Littrell filed her action on July 14, 2010.

***Appellant Helen Pittmann***

Shirley Eller, sister of Appellant Helen Pittman ("Pittman"), was being treated at Hedrick when she died on March 9, 2002. Hall administered a lethal dose of succinylcholine and/or insulin and/or other medication to Eller that resulted in her death. Pittman filed her action on July 14, 2010.

*** * * * ***

In addition to alleging facts specific to each patient, Appellants allege numerous facts applicable to all deaths. Between January 2002 and May 2002, Hedrick experienced a number of suspicious deaths, each of which involved Hall, who had access to the lethal medications. Although Hedrick's doctors, nurses, and administrators knew of the suspicious deaths, Respondents worked systematically to conceal any indication of the spike in deaths as well as the suspicious nature of the deaths. Respondents

intentionally and fraudulently concealed all indications of tortious conduct in the following manners:

-Respondents threatened and coerced employees of Hedrick to conceal information concerning the actions of Hall;

-Respondents failed to request autopsies so as to conceal the true causes of the patients' deaths when they knew a number of deaths were suspicious;

-Respondents informed and/or instructed Hedrick employees to notify patients' families that the causes of death were "natural" instead of caused by Hall;

-Respondents disbanded committees, such as the peer review committee, previously put in place by Hedrick to evaluate "codes" and determine preventative measures;

-Respondents failed to inform pertinent individuals and relevant medical communities about Hall's intentional and/or negligent battery of patients;

-Respondents failed to investigate and/or monitor Hall when requested to do so by law enforcement;

-Respondents discarded and/or failed to preserve crucial material evidence contained in Hall's locker pertaining to her intentional and/or negligent batteries;

-Respondents impeded the investigation of Hall by law enforcement.

Attached to the pleadings was an affidavit of Dr. Cal Greenlaw, a physician in Chillicothe who had admitting privileges at Hedrick during the relevant time frame. While working in the emergency room on February 18, 2002, Greenlaw treated a patient who suddenly "coded" due to a "cardiovascular collapse." Though the patient's blood

sugar levels kept bottoming out to zero, Greenlaw could not identify a valid medical basis for the patient's unusual blood sugar/insulin events.

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

Greenlaw was told by a nurse in the intensive care unit of two other suspicious "codes" and resulting deaths before the incident on February 18, 2002. Greenlaw "immediately became suspicious that someone in the industry was attempting to kill patients."

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

On March 26, 2002, Greenlaw met with Jim Johnson, Hedrick's hospital administrator. Greenlaw told Johnson that he suspected Hall of killing patients. Johnson said, "No, we don't have a problem. We can't let this get out or it will affect our admissions." After the meeting, Johnson instructed Hedrick nurses they would be fired if they were seen talking or even walking with Greenlaw.

Despite Greenlaw's warnings, there were more suspicious deaths at Hedrick. Greenlaw is aware of eighteen "codes" and nine suspicious deaths at Hedrick from February 3, 2002, through May 17, 2002, all of which occurred while Hall was on duty.

Respondents' pleadings also included an affidavit from Aleta Boyd, a registered nurse who worked at Hedrick for seventeen years. During the relevant time frame, Boyd was Hedrick's risk manager for internal events, which included incidents like patient falls, infection rates, and medication errors. During the first week of March 2002, Boyd "became aware that there was a drastic increase in code blue events and deaths during the month of February." After speaking with nurses and the pharmacist to rule out nursing error in the administration of insulin, Boyd "became suspicious that patients were intentionally being injected with insulin or some other drug causing them to have these insulin events." Boyd appointed two nurses to start an internal investigation in early March 2002 and to report their findings to her.

Boyd reported findings to Jones in March 2002. Boyd told Jones she "believed Jennifer Hall was harming our patients as she was the common denominator in all of the events." Boyd informed Jones that she "wanted to alert other nurses to be on the lookout for suspicious behavior of any employees." Jones instead instructed Boyd not to speak with other nurses about the matter and not to involve anyone else and to keep this matter confidential and "in my office."

Boyd also alerted Johnson, the hospital administrator, in March 2002. But Boyd "got the distinct impression from both Jim Johnson and Julie Jones that if [she] got very

aggressive in [her] investigation of this matter that [she] would no longer be employed at Hedrick Medical Center."

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

Boyd met again with Johnson and Jones in May, 2002, along with two other nurses. Boyd showed Johnson and Jones records of approximately fifteen patients who either "coded" or died under suspicious circumstances. Hall was listed in each patient's record. The nurses indicated a desire to inform the media if hospital administration failed to stop Hall and the suspicious deaths at the hospital. Jones's initial reaction was, "Oh my God, I can just see Channel 5 or Channel 2 showing up at our door."

According to Boyd, approximately two days after another suspicious death (which is not part of this appeal), Hall was suspended and ultimately fired. After Hall's suspension, a partially used bottle of insulin was found in her locker. In her affidavit, Boyd said that Hall, a respiratory therapist, had no legitimate reason to administer or inject patients with medication or to possess insulin.

There were no additional suspicious or unusual deaths after Hall's termination.

Appellants also allege that Respondents failed to notify the families of Respondents' suspicion that Appellants (and other patients) were intentionally harmed or murdered by Respondents' own employee, despite their duty to do so. In support of their assertion that Respondents owed such a duty, Appellants attached the affidavit of an expert indicating that the ordinary standard of care required by a "reasonable and prudent provider of medical services is to report to the families and/or patient that a sentinel event has occurred." A "sentinel event" is defined by the Joint Commission on Accreditation of Healthcare Organizations in part as "an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof" and "signal the need for immediate investigation and response." The expert opined that "the defendants would have had a duty to disclose and notify the families of the persons suspected of being murdered and/or harmed because of their suspicion that these events were taking place based on their investigation and notice by their staff members."

Appellants allege that instead of reporting the sentinel events to the families, Respondents affirmatively acted to conceal from Appellants the existence of a claim. Appellants accordingly allege they were "not reasonably able to ascertain whether [they] had a cause of action against the named Defendants until the filing of [the petitions], as a direct result of Defendants' described conduct herein."

**Standard of Review**

"The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Eaton*, 224 S.W.3d at 599 (citation omitted). "The well-pleaded facts of the non-moving

party's pleading are treated as admitted for purposes of the motion." *Id.* (citation omitted). "Judgment on the pleadings is appropriate where the question before the court is strictly one of law." *Id*. (citation omitted).

**Analysis**

The sole issue on appeal is whether the trial court erred in granting Respondents' motions for judgment on the pleadings on the ground that the lawsuits were time-barred by the three-year statute of limitation in the Wrongful Death Act, section 537.100. The Wrongful Death Act provides: "Whenever the death of a person results from any . . . circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person . . . who . . . would have been liable if death had not ensued shall be liable in an action for damages . . . ." Section 537.080.1. Relevant to this appeal, the Wrongful Death Act's statute of limitations states: "Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall *accrue*. . . ." (Emphasis added).

Appellants advance a number of arguments in favor of tolling and/or lack of accrual of the statute of limitations, largely grounded in the assertion that Respondents fraudulently concealed the causes of death and, therefore, the statute of limitations should be tolled or, alternatively, that the statute did not begin to accrue until the date the causes of death became evident or reasonably ascertainable. Respondents argue that the causes of action accrued when the patients died, all in 2002, and not when the alleged malfeasance was discovered or reasonably discoverable. Respondents thus assert that section 537.100 bars all five actions because all were filed more than three years after the

deaths giving rise to the causes of action, regardless of whether there was fraudulent concealment or any other event or consideration. Because we hold that the statute of limitations did not accrue until the date the alleged malfeasance was reasonably discoverable due to the Respondents' fraudulent concealment, we reverse.

*A. Accrual and tolling are distinct concepts.*

In arguing that the statute of limitations should not bar their claims, Appellants seem to conflate the concepts of accrual and tolling. Often these concepts produce the same result, but they are, in fact, different and distinct.

Accrual is defined as "when the right to sue arises." *Chambers v. Nelson*, 737 S.W.2d 225, 226 (Mo. App. E.D. 1987) (citing *Hunter v. Hunter*, 237 S.W.2d 100, 804 (Mo. 1951)). Accrual also marks the time when an applicable statute of limitations begins to run. *Chambers*, 737 S.W.2d at 226 (citation omitted). Tolling provisions, on the other hand, "interrupt[] the running of a statute of limitations in certain situations." BLACK'S LAW DICTIONARY (Thompson Reuters, 9th ed. 2009). *See also, e.g.,Corrales v. Murwood, Inc.*, 232 S.W.3d 609, 612-14 (Mo. App. E.D. 2007). 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.

Under some circumstances, the applicability of tolling provisions is determined by examining facts existing at the time of accrual. For example, section 516.170 indicates that the statute of limitations should be tolled if, *at the time the cause of action accrued*, the person entitled to bring the action was either under the age of twenty-one or mentally

incapacitated. *See e.g. Graham v. McGrath*, 243 S.W.3d 459 (Mo. App. E.D. 2007) (holding that a tolling provision based upon a potential plaintiff's mental incapacity was inapplicable where the incapacity did not exist at the time of accrual but instead arose at a later time).

It is perhaps more common, however, for accrual and tolling to occur at separate times. For example, section 516.260 provides that if commencement of a civil suit is stayed by an injunction, "the time during which such injunction shall be in force shall not be deemed any portion of the time in sections 516.010 to 516.370 limited for the commencement of such suit." Under these circumstances, a cause of action has accrued and the limitations period begun, but the time during which an injunction is operative does not count against the time provided by the limitations period. In other words, the running of the limitations period, though commenced, is interrupted and the clock is stopped or tolled until the injunction is lifted.

As analyzed *infra*, Appellants' confusion is understandable because the main authority upon which they rely, *Howell v. Murphy*, is a case decided by this court that similarly appears to have conflated the concepts of accrual and tolling in the context of the Wrongful Death Act. 844 S.W.2d 42 (Mo. App. W.D. 1992). But because the causes of action in this case did not accrue until the wrongful nature of the deaths were known or reasonably discoverable by a diligent plaintiff, the statute of limitations did not begin to run until that time; thus, we need not reach the question of whether Respondents' fraudulent actions could have tolled the statute of limitations after it commenced.

*B. Accrual within the Wrongful Death Action*

Accrual is not defined within the Wrongful Death Act and, thus, is open to interpretation by the courts. Justice John Paul Stevens identified "two possible approaches to construction of the word 'accrues' in statutes of limitations." *U.S. v. Kubrick*, 444 U.S. 111, 126 (1979) (Stevens, J., dissenting). Those possibilities are:

> (1) a claim might be deemed to "accrue" at the moment of injury without regard to the potentially harsh consequence of barring a meritorious claim before the plaintiff has a reasonable chance to assert his legal rights, or (2) it might "accrue" when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights.

*Id*.

As explored *infra*, Missouri courts have noted broadly that wrongful death causes of action accrue at the time of death, thus appearing -- at least at first blush -- to take the first approach. *See Frazee v. Partney*, 314 S.W.2d 915, 921 (Mo. 1958).[6] But that approach is not required by the plain language of the statute. Had the legislature intended for a cause of action to accrue only at death, it could have written the limitation as such: "Every action instituted under section 537.080 shall be commenced within three years after ~~the cause of action shall accrue~~ **death**."[7] Regardless, in a factual scenario such as this one, where the cause of death is alleged to have been intentionally concealed, fixing accrual at the time of death does not comport with section 1.010's mandate of liberal

[6] With the possible exception of *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992), it does not appear that any other Missouri court has been asked to determine *when* a cause of action for wrongful death accrues. Although the Court in *Frazee* spoke in terms of "accrual," the issue the court actually addressed, as discussed *infra*, was whether the time of "accrual" of a cause of action is the same as the time an action can be "effectively commenced." *Frazee*, 314 S.W.2d at 921. The court concluded that the two concepts were different, and, *on that basis alone*, rejected the plaintiffs' argument that their cause of action for wrongful death had not accrued at the time of death simply because they did not know the defendant's identity at that time. *Id*. The court did *not* hold that a cause of action for wrongful death always accrues at death, as that was *not* the precise issue presented to it.

[7] Indeed, other jurisdictions expressly require that a wrongful death statute of limitations commence at death. *See, e.g.* 740 ILCS § 180/2 (2007) ("Every such action shall be commenced within 2 years after the death of such person. . . ."); Ohio R.C. § 2125.02(D)(1) (2004) (except as otherwise provided, "a civil action for wrongful death shall be commenced within two years after decedent's death"); SDCL § 21-5-3 (2013) ("Every action for wrongful death shall be commenced within three years after the death of such deceased person").

statutory construction.[8] And it is inconsistent with our Supreme Court's mandate that, in order to promote the purpose and objectives of the Wrongful Death Act, the Act shall not be strictly construed. *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. banc 1983).

Applying these constructs, we hold that a liberal construction of the word "accrues" requires application of Justice Stevens's second approach. A wrongful death cause of action does not necessarily accrue at the time of death; rather, it accrues at the time that "a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights." *Kubrick*, 444 U.S. at 126.[9] And while, under this definition, the accrual point in a wrongful death action in many—if not most—cases will coincide with the time of death, here, it does not.[10]

As indicated above, our Supreme Court mandated in *O'Grady*, that the Wrongful Death Act is not to be strictly construed. In *O'Grady*, parents brought a wrongful death

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[8] Section 1.010 provides, in pertinent part, that "all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

[9] In this vein, some jurisdictions apply a discovery rule and expressly hold that a wrongful death cause of action does not run until a plaintiff discovers or reasonably should discover the existence of all of the elements of a cause of action. *See, e.g., Bradshaw v. Soulsby*, 558 S.E.2d 681 (W. Va. 2001); *Pope v. Gray*, 760 P.2d 763 (Nev. 1988); *Hanebuth v. Bell Helicopters Int'l*, 694 P.2d 143 (Alaska 1984); *Myers v. McDonald*, 635 P.2d 84 (Utah 1981); *Patterson v. United States*, 372 F.Supp.2d 195 (D. Mass. 2005) (holding that a wrongful death cause of action under Federal Tort Claims Act accrued when plaintiff learned government could have prevented murder). Some jurisdictions hold that tolling or equitable tolling or another estoppel-based rationale applies in wrongful death actions where allegations involve fraudulent concealment. *See, e.g.*, *DeCoss v. Armstrong Cork Co*., 319 N.W.2d 45 (Minn. 1982) (applying tolling); *Hoppe v. Smithkline Beecham Corp*., 437 F.Supp.2d 331 (applying tolling); *First Interstate Bank of Fort Collins, N.A., v. Poper Aircraft Corp*., 744 P.2d 1197 (Co. 1987) (applying tolling) *Geisz v. Greater Baltimore Med. Ctr*., 545 A.2d 658 (Md. 1988) (holding that statute authorized application of equitable principle of estoppel so as to toll statute of limitations where allegations were fraudulent concealment in wrongful death action); *Friedland v. Gales*, 509 S.E.2d 793 (N.C. 1998) (holding that defendant's intentional concealment of himself as the person who caused a death equitably estopped defendant from asserting defense of statute of limitations).

[10] The wrongful death claim frequently is related to medical malpractice. As Justice Stevens pointed out in *Kubrick*,

> The victim of medical malpractice frequently has no reason to believe that his legal rights have been invaded simply because some misfortune has followed medical treatment. Sometimes he may not even be aware of the actual injury until years have passed; at other times, he may recognize the harm but not know its cause; or . . . he may have knowledge of the injury and its cause, but have no reason to suspect that a physician has been guilty of any malpractice.

*U. S. v. Kubrick*, 444 U.S. 111, 126 (1979) (Stevens, J., dissenting).

suit for their stillborn child who died in the ninth month of the mother's pregnancy. Key to the case, our Supreme Court confronted the question of whether the parents could bring suit under the Wrongful Death Act under the theory that their unborn child fell under the definition of a "person" under the Act. *Id.* at 906. In rejecting the argument that the statute was subject to strict construction, the Supreme Court refused to follow earlier precedent and held in *O'Grady*:

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

*Id*. at 908 (citations and quotations omitted).

The *O'Grady* court then delineated three purposes behind the Wrongful Death Act: "To provide compensation to bereaved plaintiffs for their loss, to ensure that tortfeasors pay the consequences of their actions, and generally to deter harmful conduct which might lead to death." *Id.* at 909.

The *O'Grady* Court's dictate that the Wrongful Death Act must be applied with the Act's purposes in mind extends to the Act's statute of limitations. *Howell*, 844 S.W.2d at 42. In *Howell*, this court reversed the dismissal of three wrongful death actions against Robert Berdella, who held captive and tortured three individuals until their deaths. *Id.* at 43. In his earlier criminal case, Berdella had provided dates on which he claimed each of the three individuals were killed, all of the dates were more than three years before the filing of the civil action. Accordingly, Berdella argued that the statute of limitations found in the Wrongful Death Act had expired. *Id.* at 44.

In evaluating Berdella's claim, we noted that there was conflicting evidence as to the dates of death: Berdella's account of when each of the victims died (outside the period of limitations), and death certificates for each of the victims, reflecting legal declarations of their dates of death (within the limitations period). *Id*. at 45. We also noted that, pursuant to section 490.620, a missing person cannot be presumed dead until five successive years have elapsed. *Id*. at 47. Thus, the plaintiffs "could not have asserted any action within that five[-]year period until they had facts to overcome the law's presumption of life." *Id*. In other words, the plaintiffs' causes of action for wrongful death could not *accrue* until the plaintiffs knew—or could legally presume—that the missing victims were, in fact, dead.

Although our opinion in *Howell* ultimately held that the plaintiffs' causes of action were "*tolled* until the plaintiffs could, by reasonable diligence, ascertain that they had an action," the rationale supporting the holding is based on the idea that the plaintiffs' causes of action simply did not *accrue* until the plaintiffs were able to either discover or legally presume that the victims were dead. *Id*. (emphasis added). As we discussed in *Howell*,

> [B]y unlawful concealment, a wrongdoer is able to defeat the cause of action which otherwise the representatives were intended to have. In other areas of the law, unlawful concealment is recognized as tolling the statutory period. However, since no such tolling provision seems to be applicable to the death act, the wrongdoer escapes civil liability. This may be a possible interpretation of the statute but it is shocking to the conscience.

*Id*. at 46 (quoting JOHN D. RAHOY, *Recent Cases,* 24 Mo. L. Rev. 397, 399 (1959)).

While it is true that statutes of limitations rest upon sound public policy in that they promote peace and welfare and assure fairness to defendants, underpinning *Howell's* holding was the logic 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.* at 47 (citation omitted). In other words, the fairness contemplated by a statute of limitations is not afforded to one who has fraudulently concealed his or her actions. Indeed, "[i]t would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied by a wrongful death statute." *Id.* at 46 (quoting *O'Grady*, 654 S.W.2d at 909).

Similarly, in this case, Appellants have asserted allegations amounting to fraudulent concealment so as to delay the accrual of the statute of limitations. As noted above, Appellants allege that Respondents: (1) threatened and coerced employees of Hedrick to conceal information concerning the actions of Hall, (2) failed to request autopsies so as to conceal the true causes of the patients' deaths when they knew a number of deaths were suspicious, (3) informed and/or instructed Hedrick employees to intentionally mislead the patients' families that the causes of death were "natural" instead of caused by Hall, (4) disbanded committees previously put in place by Hedrick to evaluate "codes" and determine preventative measures, (5) failed to inform pertinent individuals and relevant medical communities about Hall's intentional and/or negligent battery of patients, (6) failed to investigate and/or monitor Hall when requested to do so by law enforcement, (7) discarded and/or failed to preserve crucial material evidence contained in Hall's locker pertaining to her intentional and/or negligent batteries, and (8) impeded the investigation of Hall by law enforcement. Such fraudulent concealment of

their actions, if true, would have prevented Appellants from ascertaining that they had a cause of action, just as in *Howell*. And granting Respondents' motions on the pleadings was contrary to all three purposes of the Wrongful Death Act, as recognized in *O'Grady*. Indeed, rather than ensuring that tortfeasors pay for their misdeeds, granting Respondents' motion for judgment on the pleadings would suggest that tortfeasors can escape civil liability merely by concealing their misdeeds for more than three years. *See Howell*, 844 S.W.2d at 47.

In arguing that fraudulent concealment has no effect whatsoever on the three-year statute of limitations, Respondents rely primarily on *Frazee*, which was decided more than fifty years ago and prior to the decision in *O'Grady* thirty years ago in which our Supreme Court announced a major shift in the interpretation of the Wrongful Death Act. 314 S.W.2d 915. See *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748m 765 (Mo. App. W.D. 2008). In *Frazee*, a motorist "dozed off," caused the death of two individuals, and then left the scene of the accident before being identified. *Id.* at 917. The motorist's identity did not become known until after the statute of limitations had run, but the plaintiffs nevertheless filed suit for wrongful death, claiming both that their cause of action had not "accrued" until they discovered the driver's identity and, alternatively, that the statute of limitations was tolled for the time period in which the driver's identity was unknown. *Id.* at 916. Sitting in division, our Supreme Court rejected the plaintiffs' arguments and held that the Wrongful Death Act's statute of limitations barred the action, even if, due to fraudulent concealment, the identity of the driver had not been discovered until after the statute had run.

*Frazee*'s holding was two-fold: first, the Court rejected the plaintiffs' accrual argument, finding that the "accrual" date of a cause of action was not the same as the date when the action could be "effectively commenced"; and, second, the Court rejected the plaintiffs' tolling argument on the basis that the statute of limitations was a special one that contained no tolling provisions for fraudulent concealment. *Id*. at 919-21.

*Frazee* is inapplicable for three reasons. First, as noted in *Smith*, *Frazee*'s application of strict construction to the Wrongful Death Act has been nullified by *O'Grady*, in which the Supreme Court mandated a liberal interpretation of the Wrongful Death Act. *Smith* at 765 (determining that the impact of *O'Grady* was to "nullify" the strict interpretation of the Wrongful Death Act).

Second, the *Frazee* court explicitly noted that it was not addressing the issue of the existence of a cause of action: "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." *Frazee*, 844 S.W.2d at 921 (emphasis in original). Thus, although couched in terms of "accrual," the plaintiffs' argument in *Frazee* did not, in earnest, address the issue of accrual. But, even if it had, as discussed above, fixing the accrual period for a wrongful death cause of action at death only is a strict construction of the statute, which is at odds with the mandates of both § 1.010 and the Supreme Court's subsequent decision in *O'Grady*. The *Frazee* court even noted that, while "generally" a cause of action accrues at death, the authority cited to the court did not sustain a "holding of delayed accrual of the *present*

cause of action," thus leaving open the possibility that the point of accrual might differ in a different context. 314 S.W.2d at 921 (emphasis added).

Third, *Frazee* held that the Wrongful Death Act's statute of limitations could not be *tolled* because of fraudulent concealment. But, as noted above, because the causes of action in this case were filed within three years of the dates they *accrued*, we are not concerned with whether any form of tolling applies.

Respondents further rely on cases that indicate (without analysis) that, under the statute of limitations set forth in the Wrongful Death Act, accrual of a cause of action occurs on the date of death. *See, e.g., Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 136-37 (Mo. banc 1989) (citing 1940 authority broadly noting that a cause of action "accrued to plaintiffs as designated beneficiaries at the moment, but not until the moment, that the death of the deceased occurred"). As explained above, we agree that, quite often, the accrual point of a wrongful death cause of action is at death. However, this proposition was noted only in passing in Respondents' citations in the context of a distinct and irrelevant issue. As we are directed to no case analyzing the issue under these facts, Respondents' cited authority is mere *obiter dictum*. The crux of our holding, as explained above, is that, pursuant to section 1.010, *O'Grady*, and *Howell*, 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 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.

Respondents also argue that the general statute of limitations set out in section 516.100 and the fraudulent concealment tolling provision of section 516.280 are not applicable here because the Wrongful Death Act contains its own special statute of limitations. We agree with Respondents on that point and do not apply those provisions, as section 516.300 makes clear that the limitations contained within sections 516.010 to 516.370 do not extend to this action. *See, e.g. Smith*, 275 S.W.3d at 782 (noting that wrongful death statute of limitations is separately provided).[11] As set out above, the mandate of *O'Grady* and its application in *Howell* instead determine this action. And, given that the petitions were all filed within three years after the causes of action accrued, we simply do not reach the question of whether the statute of limitations, once commenced, was tolled for any reason.

We hold that the limitation set forth in section 537.100 does not accrue until Appellants could, by reasonable diligence, ascertain that they had an action, in accordance with *Howell*.[12] The judgments on the pleadings are reversed, and the causes remanded for further proceedings consistent with this opinion.

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Gary D. Witt, Judge

All concur

[11] At least two courts have analyzed language from section 516.100 or section 516.280, including the "capable of ascertainment" language, in the context of wrongful death actions: *Wilson v. Jackson*, 823 S.W.2d 512, 514 (Mo. App. E.D. 1992) and *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94, 97 (Mo. App. S.D. 2001). Because the Wrongful Death Act contains its own statute of limitations, we believe that those cases incorrectly applied the general statute of limitations from section 516.100.

[12] This holding is based upon the allegations in the petitions. It will be up to the plaintiffs to prove the allegations of fraudulent concealment and the relevant dates of reasonable discovery.