IN THE SUPREME COURT OF MISSOURI

SC96649

In the Estate of: Joseph B. Mickels, Sr.

Ruth Mickels, Appellant

Appeal from the Circuit Court of the County of Marion, Probate Division, Missouri
Cause No. 16MR-PR00175
Judgment dated October 18, 2016
The Honorable John J. Jackson

INTERVENOR/RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Intervenor (hereinafter "Respondent") agrees with Appellant that this case has a lengthy procedural history. This Court heard the initial appeal in this matter in Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc 2016) (hereinafter sometimes referred to as the "earlier appeal"). The Plaintiffs in the underlying lawsuit and on the earlier appeal were the surviving spouse of the decedent and his children individually and not in any representative capacity. After the Missouri Court of Appeals for the Eastern District of Missouri affirmed the trial Court's grant of the Defendant's Motion for Summary Judgment, this Court accepted transfer upon Appellant's motion. In the earlier appeal, the legal file before this Court and the legal file before the Missouri Court of Appeals Eastern District are and were identical. Nowhere in the record on appeal in either Court was there any mention, one way or the other, about whether an estate had been opened for Joseph Boyd Mickels (hereinafter "decedent") or a personal representative appointed. The issue of a probate estate being opened and a personal representative being appointed was not discussed in the legal file or the briefs of the parties. Thus, the issues regarding a personal representative were outside the scope of that appeal.

In the earlier appeal, the only issue before both Courts was whether the Respondent was entitled to summary judgment on a cause of action for wrongful death when the uncontroverted evidence disclosed that the decedent would have died regardless of whether or not the Respondent was negligent.

Appellant's petition was filed on June 7, 2012. Supp LF, pg. 2. Respondents filed their First Amended Answer on July 15, 2013. Supp LF, pg. 35. Respondents plead the

statute of limitations, to-wit, RSMo. 516.105 (2016) as an affirmative defense in their first amended answer. Supp LF, pg. 38. The pleadings that are in the Supplemental Legal File before the Court are also the pleadings that were in the legal file before this Court in our earlier appeal.

Neither the pleadings, the points relied upon, or the parties' briefs in the earlier appeal discussed the statute of limitations. Instead, the only issue in the earlier appeal was whether the Respondent was entitled to summary judgment because the uncontroverted evidence disclosed that the decedent's condition was terminal when the Respondent read the MRI of his brain on December 18, 2008.

POINTS RELIED ON

POINT I: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE THIS COURT IN MICKELS V. DANRAD, 486 S.W.3d 327 (Mo. Banc 2016) DID NOT ESTABLISH A NEW CAUSE OF ACTION NOR DOES EQUITY PERMIT THE APPOINTMENT OF A PERSONAL REPRESENTATIVE IN THAT THE LAW CLEARLY REQUIRES A PERSONAL REPRESENTATIVE TO BE APPOINTED WITHIN ONE YEAR OF THE DATE OF DEATH AND SUCH A REQUEST WAS NOT MADE WITHIN ONE YEAR BY APPELLANT

Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc 2016)

MO. REV. STAT. § 537.020

Plaza Exp. Co. v. Galloway, 280 S.W.2d 17 (Mo. banc 1955)

MO. REV. STAT. § 537.021

POINT II: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE EVEN IF A PERSONAL REPRESENTATIVE WAS APPOINTED APPELLANT'S MEDICAL NEGLIGENCE SURVIVORSHIP CAUSE OF ACTION WAS FILED OUTSIDE OF THE STATUTE OF LIMITATIONS IN THAT MISSOURI REVISED STATUTE § 516.105 APPLIES TO A SURVIVORSHIP CAUSE OF ACTION AND HERE APPELLANT'S CAUSE OF ACTION WAS NOT FILED WITHIN TWO YEARS OF THE ALLEGED

NEGLIGENCE SO EVEN IF A PERSONAL REPRESENTATIVE WAS APPOINTED SUCH APPOINTMENT WOULD BE FUTILE

Mickels v. Danrad, 486 S.W.3d 327 (Mo. banc. 2016)

MO. REV. STAT. § 516.105

Davidson v. Lazcano, 204 S.W.3d 213 (Mo. App. E.D. 2006)

Caldwell v. Lester E. Cox Medical Centers-South, Inc., 943 S.W.2d 5 (Mo. App. S.D. 1997)

POINT III: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE EQUITY CANNOT OVERRIDE THE STATUTE'S CREATED BY THE GENERAL ASSEMBLY AND RSMO. § 473.020 IS A SPECIAL STATUTE OF LIMITATIONS THAT WAS CREATED BY THE LEGISLATURE SO IT MUST BE FOLLOWED.

Boland v. St. Luke's Health System, Inc., 471 S.W.3d 703 (Mo. En. Banc. 2015)

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

State ex rel Bier v. Bigger, 178 S.W.2d 347 (Mo. En Banc. 1944)

ARGUMENT

POINT I: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE THIS COURT IN MICKELS V. DANRAD, 486 S.W.3d 327 (MO. BANC 2016) DID NOT ESTABLISH A NEW CAUSE OF ACTION NOR DOES EQUITY PERMIT THE APPOINTMENT OF A PERSONAL REPRESENTATIVE IN THAT THE LAW CLEARLY REQUIRES A PERSONAL REPRESENTATIVE TO BE APPOINTED WITHIN ONE YEAR OF THE DATE OF DEATH AND SUCH A REQUEST WAS NOT MADE WITHIN ONE YEAR BY APPELLANT

A. Equity does not allow the court to avoid the requirement that a personal representative be appointed within one year of decedent's death

Appellant argues that the Probate Division of our Circuit Court has unfettered equitable jurisdiction to allow the appointment of a personal representative of a decedent's estate seven years after the decedent died. For that proposition, Appellant cites the case of In Re: Meyers' Estate, 376 S.W.2d 219 (Mo. banc 1964). However, that case has no similarity to the facts and issues currently before this Court. In Meyers', Laclede Gas sought to track funds that were in the decedent's bank account. Plaintiff claimed said funds belonged to it pursuant to an agreement between the decedent and Laclede Gas. The question before the court was whether the probate court could exercise its equitable powers to "trace" the funds and to establish a "trust account" for Laclede Gas. In short, the

question viewed in light of the law today was whether the probate court had the power to establish a constructive trust. It had absolutely nothing to do with a time deadline or statute of limitation established by the probate code.

Specifically, the Court in Meyers, noted that the only question for its "decision is whether the court was authorized to trace this trust fund into the account of decedent". *Id.* at 222. In rendering its decision the court first noted, "that, since this proceeding originated in the probate court, the circuit court, on appeal, had only such jurisdiction as could have been exercised by the probate court" and that "[j]urisdiction over trusts is one of equity's original and inherent powers." *Id.* Thus, the probate court could only establish a trust if it had "equitable jurisdiction." *Id.*

The Court in analyzing this issue first looked to RSMo. § 472.030, which was adopted in 1955 when the probate code was modified. The statute simply states:

> "The Court has the same legal and equitable powers to effectuate its jurisdiction and to enforce its Orders, Judgments and Decrees in probate matters as the Circuit Court has in other matters…"

Based upon the statute, the Court concluded that the legislature intended to allow the probate court to exercise equitable jurisdiction. *Id.* at 224. Thus, the probate court had equitable powers to trace the money that was in the decedent's possession and which was claimed to belong to Laclede Gas. *Id.*

Respondent has not found any Missouri cases that state that equity will allow a party to avoid the clearly enunciated statute which requires the appointment of a personal

representative within one year. Respondent believes that is because the Courts of Missouri clearly enforce their limitations of actions. Even the Eastern District in its Opinion of August 22, 2017, transferring this case to this Court noted that the Missouri Courts have gone so far as to announce that the non-claim statute of limitation is "rigidly enforced, and no one is entitled, either in law or equity, to file a claim after the expiration of the time fixed therein". Harrison Machine Works v. Aufderheide, 280 S.W. 711 (Mo. App. 1926).

If this Court were to accept the argument of the Appellant, it would thwart the intent of the legislature and would lead to complex problems in the future.[1] Even a court of equity may not depart from precedent and assume an unregulated power of administering abstract

[1] Additionally, in order for equity to apply, the court would have to disregard multiple statutory provisions under the probate code. This Court would have to disregard Section 473.020.2, which was relied upon by the probate court here in denying Appellants' application and which states, "The petition must be filed within one year after the date of death of the decedent…" This Court would also have to ignore Section 537.021, which states that, "The existence of a cause of action … for a personal injury not resulting in death… requires[s] the appointment by a probate division of the circuit court of (1) a personal representative of the estate of … a person injured… and such appointment shall be made notwithstanding the time specified in section 473.050." Lastly, this Court would have to disregard Section 473.050, which states, "Except as provided in … section 537.021, no letters of administration shall be issued unless application is made to the court for such letters within one year from the date of death of the decedent."

justice. Linville v. Ripley, 173 S.W.2d 687, 690 (Mo. App. W.D. 1943). Further, if this court adopts Appellants argument, someone might be able to have a Court in equity allow them to file a will contest even though they did not file the same within the time constraints of RSMo. § 473.083 (1989). In addition, a party could argue that a court in equity could allow them to file their claim against an estate outside the time as provided by RSMo. § 473.360 (1996). Time limits are established by our legislature for various reasons, one of which is to allow matters to be handled promptly.

Here, Appellant's main argument as to why equity applies and why they should be given a pass by this Court is that it would not be fair to them since they failed to understand the nature and extent of their cause of action. This Court in Mickels, supra, stated that under the facts of the case, Appellant's petition arguably stated a cause for a survivorship action. The Court further noted that a survivorship action existed under RSMo. § 537.020, which was already in existence at the time that Appellant's filed their original petition. As a general rule, a court of equity will not grant relief against a mistake of law. See Cardinal Partners, LLC v. Desco Inv. Co., 301 S.W.3d 104, 110 (Mo. App. E.D. 2010).

A similar argument was made in the case of Vestin Realty Mortgage, I, Inc. v. Penwick Partners, LLC, 279 S.W.3d 536 (Mo. App. 2009). In that case, the Appellants had a deficiency on a note in excess of $5,000,000.00. Appellant foreclosed upon their second deed of trust lien on real estate in Kansas City. They made a "full credit bid" for the entire amount of their deficiency at the foreclosure sale. Appellant then attempted to foreclose on their first deed of trust lien on real estate in the State of Oklahoma. The debtors plead and argued that the debt had been extinguished. The Appellants stated that they were entitled

to equitable relief in allowing their earlier foreclosure sale on the second deed of trust to be vacated. The trial court dismissed their petition. At page 542 of its Opinion, the Court stated as follows:

> "The Courts, even when operating in equity, are not available to dispense relief on a free-wheeling basis whenever feeling empathy and sympathy as to a party's unfortunate error, especially when granting relief would affect parties having no fault who gained rights in the transaction. 'A Court of equity may not depart from precedent and assume an unregulated power of administering abstract justice'; nor may it 'act merely upon its own concept of what is right or wrong in a particular case."

Appellants argue that the "Supreme Court intended for relator to pursue the new action." (Appellant's Brief, pg. 9). Appellants also argue that the Supreme Court intended for them to pursue this action based upon the following sentence in the opinion, "and his personal representative can bring that action under section 537.020 after his death." Mickels, 486 S.W.3d at 330. However, this statement glosses over two things.

First, it glosses over the Supreme Court's conclusion. In the conclusion of its opinion, the Supreme Court stated, "the allegations in the petition do state a cause of action for negligence **that would have been** actionable under section 537.020 **if** brought by Mr. Mickels' personal representative." *Id.* at 331. The conclusion examined the specifics of this case, whereas, the prior statement cited by Appellant was mere dicta for general causes of action filed under the survivorship statute. Secondly, Appellant's assertion glosses over the fact that there was nothing in the record on appeal in the earlier case that discussed the

issue of an estate or the appointment of a personal representative. The information concerning an estate and the appointment of a personal representative was not before this Court either as part of the facts or as part of the argument presented. As such, that issue was not before this Court and this Court did not decide how that issue would affect the case in the future. See MISSOURI SUPREME COURT RULE 84.13 stating, "allegations of error not briefed or not properly briefed shall not be considered in any civil appeal." See also, Smith v. Brown & Williamson Tobacco Corp., 410 S.W.3d 623, 638 (Mo. banc 2013) (noting that issues not briefed are not considered by the court on appeal).

Further, this Court cannot consider evidence or records that are outside of the record on appeal. See J & M Securities, LLC v. Brown, 388 S.W.3d 566, 570 (Mo. App. E.D. 2012). Here, the issue of an estate and a personal representative were outside the record in the earlier appeal. Appellants have not cited to any portion of the record for the earlier appeal which establishes that the issue of a probate estate or the appointment of a personal representative was previously before the courts.

B. *Mickels v. Danrad* did not articulate a new cause of action

This Court indicated that under the facts and circumstances of this case, the Defendant's alleged negligence did not cause the decedent's death "but surely injured him by depriving him of the opportunity to delay his death for up to six months." *Id.* at 329. The Court then stated as follows: "Mr. Mickels would have been able to sue Dr. Danrad for this negligence while he lived, and his Personal Representative can bring that action under Section 537.020 after his death." *Id*. at 330 (emphasis added). This Court noted that the claim that existed was one for medical negligence under the survivorship statute.

Under the common law, when Joseph Boyd Mickels expired so did his alleged cause of action for personal injuries and negligence against the Defendant. See Manson v. Wabash, R. Co., 338 S.W.2d 54 (Mo. 1960) ("At common law actions in tort did not survive the death of either the wronged or the wrongdoer"). Accordingly, there is no common law authority for the decedent's claim of negligence against the Defendant.

The Missouri General Assembly changed the common law rule by enacting Section 537.020, which is one of only two laws in Missouri that revive, "tort claims previously belonging to a deceased person". The two laws are the "survivorship statute" (Section 537.020), which "applies when the injury alleged to the decedent did not cause death, and the wrongful death statute and (Section 537.080) which applies when the injury did cause death." Wollen v. DePaul Health Ctr., 828 S.W.2d 681, 685 (Mo. 1992).

Contrary to Appellant's contention, a statutory survivorship action has been in existence for quite some time. In fact, Section 537.020 was enacted in 1939. The statutory section enacted in 1939 is in large part the same as the statutory section currently in existence. The statutory section enacted in 1939 provided, "that a cause of action upon which suit has been brought by the injured party for personal injuries, 'other than those resulting in death', shall not abate by reason of his death, but shall survive to the personal representative of such injured party, against the person, receiver or corporation liable, and the measure of damages shall be the same as if such death had not occurred." *See* Long v. F.W. Woolworth Co., 153 S.W.2d 88, 89 (Mo. App. W.D. 1941).

Further, a multitude of cases were brought on behalf of injured parties who were deceased prior to the Supreme Court decision in Mickels. In Long, an individual filed suit

for injuries she sustained when she fell on defendant's property. Long, 153 S.W.2d at 88. A trial was held and the plaintiff recovered but the defendant appealed the judgment and it was reversed and remanded. *Id.* Prior to the re-trial occurring, the plaintiff died and the plaintiff's husband was appointed the administrator of her estate. *Id.* Plaintiff's husband as administrator of her estate was then designated as the plaintiff by amendment to the pleadings via interlineation. *Id.* The cause was re-tried and a judgment was entered in favor of plaintiff. *Id.* Defendant appealed insisting that the petition in the name of the administrator should not have proceeded forward as the petition did not allege that plaintiff did not die as a result of her injuries. *Id.* The court of appeals in examining the issue stated, as follows:

> At common law the cause of action of [plaintiff] abated at her death and could only be continued by reason of the statute, Section 3670, R.S. 1939, Mo. St. Ann. §3820, p. 3398, which provides that a cause of action upon which suit has been brought by the injured party for personal injuries, 'other than those resulting in death', shall not abate by reason of his death, but shall survive to the personal representative of such injured party, against the person, receiver or corporation liable, and the measure of damages shall be the same as if such death had not occurred. *Id.* at 89.

The court noted that under this statute, it was essential for the personal representative to prove that the injured party did not die as a result of the injuries suffered but that he died from some independent cause. *Id.* It was further noted that both parties had tried the case upon the theory that the plaintiff had not died as a result of the injuries

from the fall. *Id.* Ultimately, the court of appeals agreed with the defendant and determined the action was barred due to the pleading error.

Thereafter, the plaintiff appealed to the Supreme Court. The Supreme Court in Long v. F.W. Woolworth Co., 159 S.W.2d 619 (Mo. 1942), overruled the decision of the court of appeals and affirmed the trial court judgment. The Supreme Court noted that there was no question as to whether the action survived. Long, 159 S.W.2d at 621. The court further noted that it "was not necessary for the plaintiff to plead that his predecessor's death did not result from the injuries complained of." *Id*. The Court further noted that the "pending suit based on her injuries did not abate but survived to him as her personal representative for the benefit of her estate and the defendant's liability and the measure of damages would be the same as if [plaintiff] had not died." *Id.* at 623. Accordingly, the Supreme Court determined that the action was proper and that the judgment of the trial court was correct.

The filing of a wrongful death action and a survivorship action was again examined by the Missouri Supreme Court in Plaza Exp. Co. v. Galloway, 280 S.W.2d 17 (Mo. banc 1955). In Plaza, a decedent's widow filed a wrongful death suit against Plaza Express for damages as a result of the death of her husband. *Id.* Another individual was appointed as the personal representative for the decedent's estate and as personal representative filed an action under Section 537.020 for the personal injuries sustained by decedent prior to his death. *Id.* at 20. The defendant filed an action seeking to interplead the two actions filed

by different plaintiffs into one action.[2] *Id.* The Supreme Court noted that each of the underlying plaintiffs had claims against the defendant; however, only one of the parties would ultimately be entitled to recover. *Id.* The Court noted, as follows:

> It follows that, at the instant of Bert Galloway's death, a claim for damages for the personal injuries he received in the June 1951 collision between his automobile and defendants' truck survived to his administrator if, but only if, the injuries received as a result of the collision *did not* result in Bert Galloway's death. It also follows that a claim or cause of action for Bert Galloway's wrongful death accrued to his widow if, but only if, those same injuries received at the same time *did* result in Bert Galloway's death. There was at this death only one claim in existence. It was either the same claim for damages which Bert Galloway had in his lifetime or it was a new claim which accrued to the widow upon his death. Both claims could not and did not exist. Which of the two did exist depends upon a determination of the fact issue of whether the injuries Bert Galloway received did or did not cause his death. **But both the instant defendants (plaintiffs in the two damage actions) could, as they did, *assert* their respective claims.** *Id.* at 22.

[2] As a result of the interpleader action, the case denotes the original plaintiffs in the underlying actions as the defendants in the interpleader action; here, for clarity the plaintiffs in the original and underlying action will still be referred to as the plaintiffs.

Accordingly, as early as 1955 the Missouri Supreme Court recognized that an action under both the survivorship statute and the wrongful death statute could proceed in the same action; however, there could only be recovery under one of the statutes. This appears to be the same recognition of the Supreme Court in Mickels as the court in Mickels noted, "Sections 537.020 and 537.080 are two sides of a single coin." Mickels, 486 S.W.3d at 329.

Overall, these cases show that survivorship actions have existed and were acknowledged by the Missouri Supreme Court long before the Court's decision in Mickels. Numerous cases since Long and Plaza have discussed survivorship actions under the statute. In Small v. American Tel. & Tel. Co., 759 F.Supp. 1427 (W.D. Mo. 1991), the Court determined that a claim for race discrimination under Title VII and 42 U.S.C. § 1981 survived the plaintiff's death as such claims were "personal injuries" the term "personal injury" including actions for injury to the person and to a person's rights. In Carter v. Pottenger, 888 S.W.2d 710 (Mo. App. S.D. 1994), the widow of a decedent pursued a claim for medical malpractice. Carter, 888 S.W.2d at 710-11. The decedent filed a medical malpractice action prior to his passing but died from injuries unrelated to the malpractice prior to trial. *Id.* at 711. The court noted that the malpractice action survived the death and could be pursued by a personal representative; however, the court dismissed the claim as the widow failed to be appointed as personal representative within the time allowed under the law. *Id*. In Sauter, decedent's children filed suit for personal injuries that their mother sustained when she fell on defendant's premises. Sauter v. Schnuck Markets, Inc., 803 S.W.2d 54 (Mo. App.1990). The Court noted that the claims for personal injuries to

decedent could have been brought under RSMo. § 537.020 by a personal representative; however, no personal representative of decedent was appointed within the time allowed under the law. *Id.* In Cunningham, the decedent's widow filed suit under the survivorship statute for personal injuries sustained in an automobile accident. State ex. rel. Cunningham v. Wiggins, 156 S.W.3d 473, 474 (Mo. App. 2005). Again, the court did not indicate that the action itself was improper, it simply noted that the action could not proceed because no personal representative had been appointed. *Id.*

The Missouri Court of Appeals, Eastern District, also examined this issue the year that Mr. Mickels died in Bamberger v. Freeman, 299 S.W.3d 684 (Mo. App. E.D. 2009). In Bamberger, an individual was in a car accident and as a result of the accident he was rendered a quadriplegic. *Id.* The individual brought a personal injury action against the driver that injured him, but he died while his personal injury claim was pending. *Id.* The cause of death was related to the quadriplegia. *Id.* Since the death was related to quadriplegia, decedent's wife and daughter filed and recovered against the tortfeasor under the wrongful death statute. *Id.* The personal representative of decedent's estate then filed under the survivorship statute to recover for decedent's personal injuries prior to death. *Id.* The Court noted that if death was not caused by the accident then the proper remedy was a survivorship action; however, if death was caused by the action the proper remedy was a wrongful death action. *Id.* at 687.

Overall, the point illustrated by the above cases is that a survivorship action is not a newly created action. Since the action was in existence as of the date of Mr. Mickels death, Appellant could have pled, and in accordance with the Supreme Court's ruling, did plead

a survivorship action. Furthermore, Appellant was not estopped from filing both actions even though she could only recover under either the wrongful death statute or the survivorship statute. It is "clear that under modern principles of pleading, and unlike the strict rules of common law pleading, a party may plead in the alternative. Rule 55.10, amended in 1973, states explicitly that "(a) party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." State ex rel. Scott v. Sanders, 560 S.W.2d 899, 901 (Mo. App. E.D. 1978).

It is not uncommon in medical negligence cases such as this to not only plead a count and cause of action for wrongful death but to also add additional counts for lost chance of survival and for a survivorship action. In Howell v. Murphy, plaintiffs filed a wrongful death action and actions under the survivorship statute for intentional and negligent torts. Howell v. Murphy, 844 S.W.2d 42 (Mo.App.1992) (overruled on other grounds by State ex rel. Beisly v. Perigo, 469 S.W.3d 434 (Mo. banc 2015)). The wrongful death claims surrounded the murder of three individuals and the tort claims under the survivorship action addressed the pain and suffering of the victims leading up to their deaths. *Id.* The court ultimately upheld the dismissal of the claims under Section 537.020 as the plaintiffs were not appointed as personal representatives for the decedent's estates within the time allowed by law. *Id.* at 49. Nevertheless, this case shows that actions for both wrongful death and survivorship claims have been pled together in the past.

Here, Appellant knew before the petition was filed on June 7, 2012, that the decedent would have suffered from December 12, 2008 when Respondent allegedly

misread an MRI film until the decedent's date of death on June 12, 2009. Thus, they knew at that time that there certainly was a survivorship cause of action for the decedent's alleged suffering for in excess of six months.

In addition, Dr. Carl Freter was a treating doctor for the decedent and not a retained expert. He had treated the decedent for his cancer. Mickels, supra at page 328. Presumably, the Appellants themselves or counsel for the Appellants talked with the decedent's treating physician to determine whether or not the alleged misdiagnosis of the December 12, 2008, MRI would have caused or contributed to cause the decedent's death. The testimony of Dr. Freter by deposition which was adopted in the Respondent's Motion for Summary Judgment and thus in front of this Court and in the earlier case clearly disclosed that it was his opinion that the decedent's condition was already fatal on December 12, 2008, and that he was doomed to die. By the process of elimination Appellants and their counsel should have known at that time that their only cause of action was one for the decedent's damages. At the very least, they could have plead the survivorship action and the wrongful death action in the alternative.

C. Precedent mandates the opening of an estate and the appointment of a personal representative within one year and the failure to do so bars a survivorship action

Here, the probate court's order specifically states that the request for the opening of an estate and the appointment of a personal representative was denied pursuant to MO. REV. STAT. § 473.020. That statute states, "The petition must be filed within one year after

the date of death of the decedent …" Absent a petition being filed within one year, the probate court lacks the ability to open the estate. See In re Fowler, 400 S.W.3d 796, 800 (Mo. App. W.D. 2013) (noting that a creditor must initiate formal administration of the decedent's estate within the one-year period specified in § 473.020.2, or be barred from proceeding under the estate statutes). Here, the undisputed evidence before the court establishes that no petition for the opening of an estate was filed with one year of decedent's passing.

Moreover, other statutory provisions within the probate code and caselaw interpreting those provisions establish that the probate court reached the correct result in denying Appellant's application. As noted by Appellant, the standard of review on this issue is *de novo*. When an appellate court conducts a *de novo* review, "the judgment may be affirmed on an entirely different basis than that presented to the trial court" and "can be affirmed on any theory that is supported by the record." Belton Chopper 58, LLC v. N. Cass Dev., LLC, 496 S.W.3d 529, 532 (Mo. App. W.D. 2016). Here, MISSOURI REVISED STATUTES §§ 537.021 and 473.050 also require this Court to affirm the probate court's decision.

Missouri law is well settled that a survivorship action requires a properly appointed personal representative. Section 537.020 is what is commonly known as a "survivorship action".

The plain language of Section 537.020.2 both authorizes and requires the following:

1. An "appointment";

2. of a "personal representative";

3. that is made by the "probate division of the circuit court";

4. filing a "written application";

5. by a "beneficiary" of the deceased.

Missouri Courts have held without exception that no "survivorship" claim exists absent the proper appointment of a "Personal Representative" by a Missouri probate court. See Cunningham, 156 S.W.3d at 476. ("Decedent's cause of action for personal injuries did not abate upon her death, but it survived only to a Personal Representative of her estate appointed by the Probate Division of the Circuit Court."); Carter v. Pottenger, 888 S.W.2d 710, 715 (Mo. App. 1994) ("the trial court was correct in dismissing Plaintiff's suit because she was not appointed as the personal representative of her late husband's estate by the probate division of the circuit court"); Sauter, 803 S.W.2d at 55 ("Section 537.020.2 requires the appointment of a personal representative by the probate division of the circuit court upon written application by one or more of the beneficiaries of the deceased").

The law is equally settled that the personal representative's appointment must be made within the one year time period "specified in Section 473.050".[3] See MISSOURI REVISED STATUTE § 537.021. Section 537.020 is the statutory section that governs survivorship actions and is the statute under which the Supreme Court stated that

[3] MISSOURI REVISED STATUTE § 473.050, contains language similar to Section 473.020, in that Section 473.050 states, "Except as provided in … section 537.021, no letters of administration shall be issued unless application is made to the court for such letters within one year from the date of death of the decedent."

Appellant's cause of action arose. Section 537.021 governs the manner in which an action under Section 537.020 is brought and it expressly adopts the statute of limitations for the opening of an estate as set forth in Section 473.050. Specifically, Section 537.021 states, in relevant part, as follows:

> The existence of a cause of action…for a personal injury not resulting in death…shall authorize and require the appointment by a probate division of the circuit court of:
>
> > (1) A personal representative of the estate of a…person injured…and such appointment in only those cases involving lost chance of recovery or survival shall be made notwithstanding the time specified in Section 473.050 for the exclusive purpose of pursing a cause of action related to such injury…

There is only one exception to the one year limitation period and that is for claims of "lost chance of survival." Kemp v. Balboa, 959 S.W.2d 116, 119 (Mo.App. E.D. 1997). This standard was reiterated by the Missouri Supreme Court in Johnson v. Akers, 9 S.W.3d 608, 610 (Mo. banc 2000). In Johnson, the Supreme Court stated that RSMo. § 537.021 "provide[s] only one express exception to the general rule that a probate division shall not issue administration for the estate of an intestate unless application is made within one year of the decedent's death." *Id.* That exception is for lost chance of survival. *Id.*

As stated by the Supreme Court in our Opinion:

"To be clear, Mr. Mickels' has no claim for 'lost chance of survival' under Wollen because all parties concede he could not have survived his brain tumor regardless

of whether Dr. Danrad was negligent in reviewing Mr. Mickels' first MRI". Mickels, 486 S.W.3d at 329, fn. 2.

The United States District Court for the Eastern District of Missouri succinctly followed this pronouncement in Maze v. Regions Bank, Inc., 2009 WL 102099 at *2 (E.D. Mo. 2009). In Maze, a decedent's daughter filed a claim as a plaintiff ad litem and in count I of her petition claimed that "defendant's negligence relating to the condition of the pavement which caused personal injury to the decedent and resulted in medical expenses." *Id*. at 1. This was a claim pursuant to Section 537.020. Count II of Plaintiff's petition was for wrongful death. *Id.* The United States District Court, citing Section 537.020.1(1) stated, "Under Missouri law, a cause of action for personal injuries not resulting in death does not abate by reason of the party's death, but instead survives to the personal representative of the injured party." *Id.* The Court then noted that contrary to plaintiff's position, she could not pursue her claim as a "*plaintiff ad litem." Id.* A "plaintiff ad litem" was only authorized to pursue a claim for lost chance of recovery or survival." *Id*. at 2. Alternative to her argument that she could pursue the claim as a "plaintiff ad litem," the plaintiff argued that she should be permitted to apply to the probate court for appointment as decedent's personal representative. *Id.* The United States District Court, in examining this issue, stated, "such application for letters is to be made to the court within one year of the date of death of the decedent." *Id.* The only exception to the one year requirement is for claims for lost chance of recovery or survival. *Id.* The court further stated, because the instant cause of action does not involve a claim of lost chance of recovery or survival, "no

exception applies here to permit Plaintiff to be appointed by the probate court as personal representative of the decedent's estate outside the one year limitations period.'" *Id.*

Maze is also contrary to the Eastern District's pronouncement that this situation is different from other situations "where the courts have rigidly enforced the statute of limitations contained in the probate code." The Court of appeals noted that other cases, "involved the administration of assets, where the claim would operate to the detriment of the estate by decreasing estate assets." Clearly, Maze dealt with a case where if the survivorship action was allowed to be pursued, it would have meant more assets for the estate; however, the court held that the one year limitation still applied and barred the claim.

Further, the Eastern District's interpretation of a distinction between this case and Kemp is flawed. In Kemp, the decedent, prior to his death, filed an action under 42 U.S.C. § 1983 alleging that he was injured. The case proceeded to trial and both parties appealed the trial court judgment. The case was remanded but prior to re-hearing, Mr. Kemp passed away. Thereafter, in an effort to continue to pursue the claim, Mr. Kemp's mother sought to be substituted as a plaintiff, which the court allowed. When the defendant in the action noted that Ms. Kemp had not timely been appointed as the personal representative, Ms. Kemp sought the opening of and was appointed personal representative. The defendant then filed to have the letters revoked. Perhaps Ms. Kemp was an outside party as she was not the injured person; however, if that is the case, then Ms. Mickels is an outside party as well as she is not Mr. Mickels who is alleged to have been injured. Further, unlike the Eastern District's interpretation, Ms. Kemp was seeking the appointment so that she could continue to pursue the claim and bring money into the estate. This is exactly what Ms.

Mickels is attempting to do in this matter. In Kemp, the defendant, like Dr. Danrad pointed out that the plaintiff was barred from appointment because more than one year had elapsed. As such, this case is similar to Kemp and the one year statutory bar prohibits this case from proceeding forward.

The Missouri Courts have held that in regard to a survivors' action "the term personal representative… refers to those to whom letters testamentary or letters of administration have been issued in a probate estate" Carter, 888 S.W.2d at 715. The Court in Ellison v. Fry, 437 S.W.3d 762, 773 (Mo. 2014) held that for one to be appointed a "personal representative" for a survivorship claim, one must open an estate and receive letters testamentary from a Missouri probate court. *See* Ellison, 437 S.W.3d at 773. It is, therefore, clear that the language of Section 537.020 and 537.021 compels and requires a written application, by a beneficiary, and an appointment by a Missouri probate court of a personal representative of the deceased's estate.

Missouri courts have also universally held that a beneficiary has only one year from the date of the death of the decedent to make a written application and be named a personal representative of the estate. Thus, the survivorship plaintiff is in fact the personal representative. Failure to comply with this rule bars a party from pursing a survivorship claim. Johnson, 9 S.W.3d at 609. ("The probate court requires the opening of an estate to occur within one year of death, and the Statute of Limitations of the probate code applies to the appointment of a personal representative."). This is also codified in Section 473.050(6). "Except as provided in Section 537.021 [for lost chance of survival claims], no letters of administration shall be issued unless application is made to the Court for such

letters within one year from the date of death of the decedent." Howell, 844 S.W.2d at 49, is a case that dealt with the same issue when the time period for filing a will and opening an estate was three years, not one. The Court of Appeals affirmed the summary judgment of the trial court finding that the Plaintiff's survivorship action was barred "by not taking steps to become personal representatives of the victims' estates within the three year limit…the Plaintiffs lost standing to assert an action as representatives of the estates."

The Missouri Supreme Court addressed this issue in Johnson, supra, as follows:

"A personal representative of an estate is appointed by the probate division of the circuit court in the applicable jurisdiction upon the filing of letters of administration with the court." See RSMo. § 473.110. The probate court requires the opening of an estate to occur within one year of death, and the statute of limitations of the probate code applies to the appointment of a personal representative. RSMo. § 473.070; Kemp, 959 S.W.2d at, 118."

This issue was most recently addressed by the United States District Court for the Eastern District of Missouri in Rapa v. Novartis Pharmaceuticals Corp., 53 F. Supp. 3d 1150 (E.D. Mo. 2014). In that case, plaintiff John Rapa filed a petition against the defendant alleging five tort claims after he developed osteonecrosis of the jaw as a side effect of Aredia, a drug manufactured by the Defendant. Plaintiff Rapa died on December 17, 2009. His attorney moved for the provisional substitution of his wife, Jeanine Rapa, as Plaintiff. This was granted within the year after Mr. Rapa's death. Neither Mrs. Rapa nor anyone else ever applied in the probate court to be appointed the personal representative of the decedent nor did she ever submit to the court a copy of an order appointing her as such.

Defendant later filed a motion to dismiss requesting that the court dismiss the action with prejudice because the decedent's wife lacked standing under Missouri law to prosecute the underlying lawsuit on behalf of her deceased husband. Defendant also relied on the fact that it had been over four years since John Rapa died and his wife still had not been appointed her husband's personal representative.

The court found that under Missouri common law, tort claims did not survive the death of the victim. "However, Missouri's survival statute allows a decedent's tort claim to be pursued by the injured party's personal representative under Section 537.020". "Section 537.020 is the sole method for properly substituting a party in order to continue a tort claim in Missouri". See Sauter, 803 S.W.2d at 55.

The court went on to find as follows:

> "The properly appointed personal representative is the only person who has standing to bring a survival action. Rapa, 53 F.Supp. at 1150. Despite Ms. Rapa's arguments to the contrary, an heirship determination does not make a designated heir the personal representative of an estate and is insufficient to continue a tort claim on behalf of the deceased party".
>
> "A decedent's cause of action can only survive if brought by a personal representative of his estate appointed by a probate court. Johnson, 9 S.W.3d at 609-610. "A personal representative of an estate is appointed by the probate division of the circuit court in the applicable jurisdiction upon filing of letters of administration with the court." *Id*. (Citing MO.REV.STAT. § 473.110). The statute of limitations to apply for appointment as a personal representative in Missouri probate Court is one

year. *Id.* (Citing MO.REV.STAT. § 473.070); *see also* MO.REV.STAT. § 473.020 ("If no application for letters testamentary or of administration is filed by a person entitled to such letters pursuant to section 473.110 within twenty days after the death of decedent, then any interested person may petition … for the issuance of letters testamentary or of administration… The petition must be filed within one year after the death of the decedent.")

The facts in Rapa, supra, are almost identical to those in our case. At no time has anyone been appointed the personal representative of the estate of the decedent. In addition, the one year period for doing so has expired as the decedent died on June 12, 2009. As stated in Rapa, supra:

"At no point did Ms. Rapa apply to be the personal representative of her husband, and the one year time limitation to do so has long since passed. Ms. Rapa lacked standing to bring this claim, so this case must be dismissed. 'Standing is jurisdictional and a lack of standing cannot be waived', under the doctrine of laches or otherwise". See Sauter, 802 S.W.2d at 55.

Here, it is undisputed that no estate was opened and no personal representative of the estate of Joseph Boyd Mickels was appointed within one year of his date of death, to-wit, June 12, 2009. Appellants did not file their application for appointment of personal representative until October 17, 2016. LF, pg 1. This means that no one applied to be appointed personal representative of the decedent's estate until over seven years after the date of the decedent's death. Since no one was appointed personal representative by June

12, 2010, no one can be appointed in the future. As such, the Plaintiffs lack standing to proceed further in this matter and the cause must be dismissed with prejudice[4].

Furthermore, as previously noted, the briefs filed with this Court in the earlier appeal are silent as to the appointment of a personal representative and the opening of an estate of the decedent. It simply was not discussed, briefed or argued. Since this was not an issue raised in the earlier appeal, contrary to Appellants assertion, the Supreme Court did not decide this issue. At page 341 of its Opinion in Mickels, supra, the Court stated as follows:

> "Appellants cannot sue for wrongful death under Section 537.080.1 because Dr. Danrad's alleged negligence did not cause Mr. Mickels' death. However, the allegations in the petition do state a cause of action for negligence that would have been actionable under Section 537.020 if brought by Mr. Mickels' personal representative. Accordingly, the judgment below is vacated, and the case is remanded."

For Appellant to argue that the aforesaid language indicates that our Supreme Court was going to give the Appellants a pass in this matter and not require them to have a duly appointed personal representative within the time constraints of Missouri law is disingenuous. All that our Supreme Court stated was that giving the Appellants the benefit of the doubt, their petition did state a cause of action for a survivorship action "if brought

[4] A lack of standing is jurisdictional and may be raised at any time. See State ex rel Cunningham, supra, at page 475, and Sauter, supra, at page 55.

by Mr. Mickels' personal representative." The action was not brought by the decedent's personal representative nor can it be. Accordingly, this court is required to affirm the decision of the probate court and deny the appointment of a personal representative for Joseph Mickels.

POINT II: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE EVEN IF A PERSONAL REPRESENTATIVE WAS APPOINTED APPELLANT'S MEDICAL NEGLIGENCE SURVIVORSHIP CAUSE OF ACTION WAS FILED OUTSIDE OF THE STATUTE OF LIMITATIONS IN THAT MISSOURI REVISED STATUTE § 516.105 APPLIES TO A SURVIVORSHIP CAUSE OF ACTION AND HERE APPELLANT'S CAUSE OF ACTION WAS NOT FILED WITHIN TWO YEARS OF THE ALLEGED NEGLIGENCE SO EVEN IF A PERSONAL REPRESENTATIVE WAS APPOINTED SUCH APPOINTMENT WOULD BE FUTILE

As previously noted, this standard of review herein is *de novo*. When an appellate court conducts a *de novo* review, "the judgment may be affirmed on an entirely different basis than that presented to the trial court" and "can be affirmed on any theory that is supported by the record." Belton Chopper 58, LLC, 496 S.W.3d at 532. *See also*, ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 387–88 (Mo. 1993) (stating "Because our review is *de novo*, the trial court's order may be affirmed in this Court on an entirely different basis than that posited at trial.") "Whether or not the statute of limitations applies to an action is a question of law that this Court reviews *de*

novo." Drury v. Missouri Youth Soccer Ass'n, Inc., 259 S.W.3d 558, 576 (Mo. Ct. App. 2008) (citing Husch & Eppenberger, LLC v. Eisenberg, 213 S.W.3d 124, 128 (Mo.App. E.D. 2006)). The party asserting the affirmative defense of the statute of limitations has the burden establishing it. *Id.*

Here, the statute of limitations found in MO. REV. STAT. §516.105 bars Appellants claims, even if this Court were to require the probate court to appoint a personal representative.[5] Given that the statute of limitations on the underlying survivorship claim has run, requiring the probate court to appoint a personal representative would be futile. Further, this court can examine the statute of limitations issue as this issue is noted by examining the documents in the record on appeal.

Here, the Appellants filed their original Petition for the death of Joseph Mickels with the Circuit Court of Marion County on June 7, 2012. See Supplemental LF, pg. 2. The allegations of negligence against the Respondent Danrad were set out in Count IV of the Petition. While Count IV of the Petition states that the "Plaintiffs bring this action pursuant to Mo. Rev. Stat. 537.080. et. seq. commonly known as the "Wrongful Death Act of Missouri," as previously noted, this Court determined that the petition stated a cause of action under Section 537.020 and that such an action was allowed to proceed as a "medical

[5] It is undisputed that the sole reason the Appellant is seeking to be appointed as personal representative is so that she may pursue the survivorship claim under Section 537.020.

malpractice action that survived under 537.020.[6]" Mickels, 486 S.W.3d at 331. The main allegation of negligence in Appellant's petition is that Respondent was negligent in his interpretation of the decedent's MRI on December 12, 2008.

The remaining allegations of negligence against the Respondent Danrad are set out in paragraph 58 of the Petition. Those allegations can generally be described as follows:

a. The Defendant failed to properly interpret decedent's MRI of December 12, 2008;

b. The Defendant failed to recommend a further workup;

c. The Defendant failed to properly interpret the decedent's MRI of December 12, 2008;

d. The Defendant failed to possess the adequate skill and ability necessary to properly interpret said film;

e. The Defendant failed to timely diagnose the decedent's condition on December 12, 2008, and did not prescribe further workup;

f. The Defendant failed to obtain the appropriate radiological consult;

g. The Defendant failed to follow-up with the decedent's treating physicians;

h. The Defendant failed to properly consider the decedent's symptoms in his interpretation of the December 12, 2008, MRI;

[6] The statute of limitations argument was not before this Court or the Supreme Court on the earlier appeal and it was not raised, briefed or argued by either party on the earlier appeal.

i. The Defendant failed to, in a timely manner, obtain further information from the decedent's treating physicians concerning the decedent's condition;

j. The Defendant carelessly and negligently interpreted the December 12, 2008 MRI;

k. The Defendant failed to provide further adequate medical and radiological treatment of the decedent following the subject MRI.

These allegations are all for medical negligence. Appellants allege that said actions of Dr. Danrad ultimately resulted in decedent's death on June 12, 2009.

RSMo. § 516.105 (2005) is the Missouri Statute of Limitations concerning medical negligence actions. Defendant Danrad pled Section 516.105 as an affirmative defense in his First Amended Answer. See Supplemental Legal File, pg. 38. Section 516.105 states as follows:

> "All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing healthcare services and all employees of any of the foregoing acting in the course and scope of their employment, for damages, for malpractice, negligence, error or mistake related to healthcare shall be brought within two years from the date of the occurrence of the act of neglect complained of…"

Thus, the Petition must be filed within two years of the date of the occurrence of the act of negligence.

The Statute does contain three exceptions to the aforesaid two year Statute of Limitations. One exception deals with negligently permitting foreign objects to remain within someone's body. Another exception concerns the "negligent failure to inform" the patient of the results of medical tests. The third and final exception is in cases where the person bringing the action is a minor less than 18 years of age.

The Statute of Limitations for medical negligence actions, and the exceptions thereto, was discussed by the Missouri Court of Appeals, Eastern District, in the case of Davidson v. Lazcano, 204 S.W.3d. 213 (Mo. App. E.D. 2006). In that case, the Defendant issued a report on November 7, 1998, interpreting a bone scan which stated that the specimen showed malignant lymphoma. As a result of that scan and report, the Plaintiff underwent radiation treatment. In August of 2000, the Plaintiff decided to seek a second opinion from another physician. The same biopsy specimen from the bone scan was reanalyzed. This time, the reanalysis did not identify any cancer or lymphoma. Plaintiffs filed suit against the Defendant on August 21, 2002, alleging that the Defendant failed to properly interpret the biopsy of the lymph node and "failed to communicate the 'proper result to Plaintiff's treating physician'".

The trial court granted summary judgment holding that the Plaintiff's action was barred by Section 516.105 RSMo. The Court stated at page 216:

> "There are four circumstances that can toll the two year Statute of Limitations under Section 516.105. Section 516.105 contains three exceptions, the "foreign object" exception, the "failure to inform" exception, and the "minor child" exception. Sections 516.105 (1)-(3). In addition, the Supreme Court of Missouri has recognized

a "continuing care" exception to the two year limitations period for medical malpractice actions."

The Plaintiff in Davidson alleged that the "failure to inform" exception applied since the Defendant did not inform the Plaintiff or his physicians of the proper interpretation of the biopsy. The Court of Appeals disagreed. "Where test results have in fact been communicated, regardless of their accuracy, the exception in Section 516.105 (2) has no application." *Id.* at 216

At page 217 of the Opinion, the Court addressed the Plaintiff's argument that the "failure to inform" exception applied when the information supplied was inaccurate.

"The Plaintiffs' incorrectly interpret the statutory phrase 'failure to inform the patient of the results of medical tests' to mean 'failure to inform the patient of the true and accurate test results'. The legislature could have expressly included the words "true and accurate" in the statutory language. It did not. Strictly construing the language as written, the statutory exception does not encompass those situations where a patient is indeed informed of test results, which are later discovered to be erroneous."

The Court concluded its analysis at page 219:

"By its plain language, the 'failure to inform' exception of Section 516.105 (2) applies to toll the Statute of Limitations in those situations where a healthcare provider has negligently failed to inform the patient of the results of medical tests. Where test results have, in fact, been communicated, regardless of their accuracy, the exception in 516.105 has no application."

There is no allegation that the decedent, or his physicians, did not know of Dr. Danrad's report of December 12, 2008. In fact, his report is part of the medical record.

Furthermore, here, a careful reading of Appellant's allegations quickly discloses that the Appellant's sole allegation of negligence against Dr. Danrad is that he failed to properly interpret the MRI of the decedent's brain on December 12, 2008. No foreign body was left in the decedent's person. None of the Plaintiffs or the decedent were under the age of 18. The Defendant did not fail to inform the decedent of the results of the sole medical test that he performed, to-wit, the December 12, 2008 MRI. The Petition also stated in paragraph 23 that on February 17, 2009, the decedent was taken to Hannibal Regional Hospital where further neuroimaging studies diagnosed the malignant brain tumors. Thus, the decedent and the Plaintiffs knew of the existence of the decedent's brain tumors by no later than February 17, 2009. Therefore, none of the four exceptions apply to the action currently before the Court.

Since Defendant's alleged negligent conduct occurred on December 12, 2008, any lawsuit alleging negligence in the Defendant's care and treatment of the decedent should have been brought by December 12, 2010. Instead, this Petition was not filed until June 7, 2012, approximately 1 ½ years too late. Furthermore, even if this case is viewed as accruing on the date of the Decedent's death (June 12, 2009), Plaintiffs' action for medical negligence was still filed after the statute of limitations expired. Utilizing the Decedent's date of death (June 12, 2009) and the two year Statute of Limitations, the case would have been required to be filed by June 12, 2011. Here, as previously noted, this action was not filed until June 7, 2012.

As stated in Herrington v. Denny, 3 F. Supp 584 (Mo. W.D. 1933) at page 595:

"A Court of equity will not make an empty gesture nor enter a decree which would be wholly fruitless of any real relief."

It is abundantly clear that the Appellants filed their petition outside of the applicable statute of limitations. Even if this Court were to assume that equity would allow for a personal representative to now be appointed (which Respondent wholeheartedly rejects) the cause would have to be dismissed because it was clearly filed outside the appropriate statute of limitations.

Moreover, any argument that equity should allow Appellant to avoid the statute of limitations under their argument that this is a new cause of action is without merit. In Caldwell v. Lester E. Cox Medical Centers-South, Inc., 943 S.W.2d 5 (Mo. App. S.D. 1997), the surviving parents of a child filed a petition for wrongful death under RSMo. § 537.080. *Id.* at 7. The child passed away on January 3, 1990 and the wrongful death petition was filed on February 4, 1992. *Id.* On June 22, 1992, an amended petition was filed which pled an action for wrongful death in count I and an action for lost chance of survival in count III. *Id.* The lost chance of survival action was added after the Missouri Supreme Court gave recognition to such an action on April 2, 1992 in Wollen. *Id.* The court noted that the Missouri General Assembly codified the Supreme Court's decision in Section 537.021 on August 28, 1993. *Id.* Thereafter, plaintiff's sought leave to file a third amended petition which asserted causes of action for lost chance of survival in counts II, II, IV, and V. *Id.*

Defendants filed a motion to dismiss the counts for lost chance of survival arguing that the statute of limitations had run. *Id.* Specifically, Defendant argued that the statute of limitations under Section 516.105 applied to the lost chance of survival claims and such claims were barred after two years. *Id.* Plaintiffs argued that the statute of limitations should be three years and that the change of one of the plaintiffs to a "plaintiff ad litem" should relate back to the date of the filing of their original petition. *Id.* at 8. In examining the statute of limitations issue, the Court noted that a "lost chance of survival action is a personal injury action that belongs solely to the injured party." *Id.* (*Citing* Smith v. Tang, 926 S.W.2d 716, 719 (Mo. App. E.D. 1996). The court then noted that, "A personal injury action arising from a medical malpractice claim (§516.105) is barred after two years." *Id.* Alternatively, a wrongful death action is not an action for the injuries to the decedent and is "an action separate and distinct from the action for injuries to the decedent," which is why it has a different limitations period. *Id.* Accordingly, the court noted that the lost chance of survival claim had a two year statute of limitations and since the claim was not filed before January 3, 1992, even in light of the fact that it was a newly created cause of action, it was barred by the statute of limitations. *Id.*

In addition, the plaintiff in Caldwell argued that his change to "plaintiff ad litem" related back to the date of filing the petition. The plaintiff asserted that relation back was authorized under Rule 55.33(c). *Id.* at 8. The court first noted that pursuant to Rule 55.33(c) the change of one of the plaintiffs to a "plaintiff ad litem" did not relate back to the original date of filing as Rule 55.33(c) only applies to amendments changing the party against whom the claim is asserted – it does not apply to the addition of a party. *Id.* The

court noted that a plaintiff in his individual capacity and in his capacity as "plaintiff ad litem" are two legally separate and distinct individuals. *Id.* As such, the "plaintiff ad litem" was a stranger to the action. *Id.* As such, the addition of the "plaintiff ad litem" was tantamount to the filing of a new claim and was not afforded the protection of relation back under Rule 55.33(c). *Id.*

The relation back argument was also addressed by the Court of Appeals for the Eastern District of Missouri in Smith, 926 S.W.2d at 716. In Smith, the plaintiff as personal representative of her father's estate filed a medical malpractice action seeking damages for lost chance of survival. *Id*. at 716. The plaintiff, in her individual capacity, originally filed a lost chance of survival action under the survivorship statute on October 7, 1993. *Id.* at 718. Her father died on October 8, 1991. *Id.* at 717. In April 1995, the Court of Appeals for the Southern District of Missouri entered a permanent writ prohibiting plaintiff from pursuing the lost chance of survival claim in her personal capacity because as an individual she had "no standing" to bring the action. *Id.* at 718. As a result of the writ, plaintiff's original petition was dismissed. *Id.* However, prior to the dismissal, on January 25, 1994, plaintiff was appointed the personal representative of her father's estate. *Id.* By this time, the two year statute of limitations had run. *Id.* Thereafter, on June 2, 1995, plaintiff, in her capacity as personal representative, re-filed her petition for damages for lost chance of survival.

The court in examining the issue noted that plaintiff's claims were brought pursuant to the survivorship statute. *Id.* at 719. The court further noted that the lost chance of survival action is a "personal injury action which belongs solely to the injured party" and

at common law such actions did not survive the death of the injured party. *Id.* However, pursuant to RSMo. §537.020 such actions survive to the personal representative.[7] *Id.* In light of this, the court went on to examine whether the 1995 petition could relate back to the petition filed within the statute of limitations in 1993. On this issue the court held that, "An amendment will relate back to the original petition so as to save the action from the statute of limitations only when the original plaintiff had the legal right to sue and stated a cause of action at the time the suit was filed." *Id.* "Thus, an action filed by an adult child as administrator cannot relate back to an action filed by the same adult child as an individual." *Id.* As such, the plaintiff's 1995 petition was not able to relate back and it was filed outside the statute of limitations. *Id.* at 720.

Here, plaintiff's cause of action suffers this same defect even if she is allowed to be appointed as the personal representative. Appellant in her individual capacity and as a personal representative are also wholly separate and distinct legal entities. See State ex rel. Tang v. Steelman, 897 S.W.2d 202, 203 (Mo. App. S.D. 1995) (stating that a daughter as an individual and as personal representative are legally separate); See also, Singer v. Siedband, 138 S.W.3d 750, 755 (Mo. App. E.D. 2004) (noting that proceeding in a representative capacity is different than proceeding as an individual). Since Appellant in her individual capacity and as a personal representative would be wholly distinct entities,

[7] This is the same statute that the Missouri Supreme Court stated that the action at issue could proceed under and this is the same language the Supreme Court examined in Mickels. Mickels, 486 S.W.3d at 329.

even if Appellant is appointed personal representative, her substitution as a party plaintiff in the circuit court action would not relate back to the filing of a new petition. Accordingly, the cause of action by the personal representative would be filed well beyond the statute of limitations. See also, Henderson v. Fields, 68 S.W.3d 455, 466–67 (Mo. Ct. App. 2001) (noting, "[W]here the original plaintiff has, under the wrongful death statute, a right to institute an action or is a proper and legally authorized party under the strict provisions of the statute to do so, an amendment substituting a proper party or adding additional parties will relate back to the original petition; but where the original party plaintiff has no right to maintain an action, has no standing to sue under the statute and is not a party authorized to sue under the strict wording of the statute, an amendment which adds or substitutes a proper party does not relate back to the original petition so as to save the action from the running of the statute of limitations.") (citing State ex rel. Jewish Hosp. of St. Louis v. Buder, 540 S.W.2d 100, 107 (Mo.App. E.D.1976)). Accordingly, even if Appellant is allowed to be designated as the personal representative for decedent's estate, her action will fail as it will not meet the statute of limitations.

POINT III: THE PROBATE COURT DID NOT ERR IN DENYING APPELLANT'S APPLICATION FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVE BECAUSE EQUITY CANNOT OVERRIDE THE STATUTE'S CREATED BY THE GENERAL ASSEMBLY AND RSMO. § 473.020 IS A SPECIAL STATUTE OF LIMITATIONS THAT WAS CREATED BY THE LEGISLATURE SO IT MUST BE FOLLOWED.

The crux of Appellant's argument is that equity should act in this circumstance to allow them to avoid the time limitations for the appointment of a personal representative that are set forth by the probate code. However, where the legislature has spoken a Court cannot use its equitable powers to avoid the law's pronouncement. In fact, this Court recently addressed this very issue and held that the only remedy for the plaintiff was to seek a change of the statutory language, which must be done by the legislature.

This Court recently evaluated the interplay between equitable principles and statutory limitations periods in Boland v. St. Luke's Health System, Inc., 471 S.W.3d 703 (Mo. banc 2015). In Boland, estates of five patients who allegedly died as a result of a respiratory specialist's intentional conduct brought separate wrongful death actions against the hospital who employed the specialist. *Id.* The trial court, on all five cases, entered judgment on the pleadings finding that the cases were barred by the three year limitations period in Section 537.100. *Id.* The plaintiffs' argued that the actions were not barred as the defendant hospital had intentionally and fraudulently concealed the reason for the patients' deaths. *Id.* at 705. It was alleged that the defendant hospital was aware that the specialist had intentionally administered lethal doses of medications to the decedents, but that the hospital had intentionally covered up its findings. *Id*. at 705-06. It was further alleged that the hospital's cover-up and failure to inform the patients' families was the reason for the families' failure to time file the lawsuits. The court noted that while the "circumstances of the case were tragic and deeply concerning" and that their ruling was a "harsh result", exceptions could not be added to a special statute of limitations and that the Court was bound to follow the mandate of the statute. *Id.* at 705.

This Court in evaluating the limitations issue in Boland examined whether equitable principles would allow for an exception to the statute. In Boland the plaintiffs argued that the "common law equitable maxim" should be used to get around the time limitations of the wrongful death statute. *Id.* at 712. In response, this Court stated:

> It is further noted that, although the result the Plaintiffs argue for is appealing, the method of using a common law equitable maxim to work around the dictates of Section 537.100 is inherently problematic. Equity should not be deployed in a manner that countermands the clear intent and language of the legislature, particularly in regard to a statutorily created cause of action. This Court has previously held that: 'Equity Courts may not disregard a statutory provision, for where the legislature has enacted a statute which governs and determines the rights of the parties under stated circumstances, equity courts equally with Courts of law are bound thereby. *Equity follows the law more circumspectly in the interpretation and application of statute law than otherwise*…. Implicit in the plaintiffs' argument is that all equitable maxims become a part of all statutory schemes unless expressly written out of the law by the legislature. This merely invites the future reexamination by courts of otherwise settled areas of statutory interpretation, and this Court declines to so hold**.** *Id*. (emphasis added).

Furthermore, this is not the first time that this Court has held that equity cannot work around statutes. In Kuenzle v. Mo. State Highway Patrol, 865 S.W.2d 667 (Mo. banc 1993), the petitioner asked the circuit court to use its equitable powers to expunge his arrest

record. Kuenzle, 865 S.W.2d at 668. The circuit court ordered the expungement and the Missouri Court of Appeals for the Western District affirmed the trial court's order. *Id.* The Western District determined that the circuit court possessed equitable powers to expunge the record and that expungement was warranted under a balancing of interest's analysis. *Id.* On transfer, this Court had to decide the question of whether the trial court had equitable authority to expunge the arrest record. *Id.* This Court reversed the lower court's holdings. *Id.*

This Court in evaluating the issues had to look to the statutory provisions concerning expungement found in Chapter 610. *Id.* The Court determined that RSMo. § 610.100 provided for closure of records after thirty days if no charges were brought, but it no longer allowed for expungement. *Id.* The court determined that the statute precluded equitable expungement of the record and stated that, "the legislature made a determination that law enforcement agencies should have the right to view its applicants' closed arrest records. Kuenzle's situation squarely fits within the statute. Where a statute clearly defines the rights of parties, the statute may not be unsettled or ignored." *Id.* at 669. (*Citing* Milgram v. Jiffy Equipment Co., 247 S.W.2d 668, 676 (Mo. 1952)).

This Court went on to note that courts in equity cannot disregard a statutory provision, "for where the Legislature has enacted a statute which governs and determines rights of the parties under stated circumstances, equity courts equally with courts of law are bound thereby." Kuenzle, 865 S.W.2d at 669. The court could not act merely upon its own thoughts of what was right and wrong in a particular circumstance. Accordingly, this

Court held that the lower courts had "*exceeded [their] equitable jurisdiction in disregarding the statute and expunging [the] arrest record.*" *Id.* (emphasis added).

Kuenzle also attempted to argue that the statutes at issue did not eliminate a court's equitable powers. In response, this Court noted that the decision did not turn on whether a court possessed equitable powers of expungement. *Id.* Instead, where the legislature in "plain, positive language" had spoken equity could not ignore and contradict the legislature's mandate. *Id.* If a court disregards the legislature, it is in effect vetoing the legislature's balance of considerations. This is not proper for a court to do.

This Court has repeatedly adhered to the same principle in ruling that the statutes cannot be ignored due to equitable considerations. In Leggett v. Mo. State Life Ins., 342 S.W.2d 833 (Mo. banc), this Court held that a court of equity had no power to exercise discretion in fixing a rate of interest where there was a statute that regulated the matter. Leggett, 342 S.W.2d at 931. The court reiterated the rule that "equity follows the law and that an equity court may not disregard plain provisions of a statute and act upon its own conception of what is right in a particular case where the rights of parties litigant are clearly defined by statute." *Id.* at 931-32. This Court specifically held, "although the Circuit Court was sitting as a court of equity, exercising equity powers and jurisdiction, *it had no power to exercise its discretion in determining the rate of interest, and could not ignore and disregard, but was bound to enforce, the plain provisions of § 408.020…"*. *Id.* at 932. (emphasis added).

In Milgram, 247 S.W.2d at 668, this Court held that a circuit court, even sitting as a court of equity and exercising equitable powers, could not bypass the plain provisions of a

statute (there Section 351.490). Milgram, 247 S.W.2d at 677. The court of equity could not avoid the language of the statute as "established rules and precedents are equally binding upon both law and equity courts; and where the rights of parties litigant are clearly defined by statutes, legal principles and precedents those statutes and legal principles may not be unsettled or ignored." *Id.* at 676. "Not even a court of equity has any discretion as to what the law may be." *Id.*

With this in mind, the special statutory limitations periods in the probate code cannot be ignored under the principles of equity. RSMo. § 473.020 provides that an application for appointment to be Personal Representative of the estate must occur within one year of the date of death. The case law clearly shows this statute is considered to be a "special" statute of limitation. As early as 1897 in Stowe, supra, and as recently as 2015, in Boland, supra, this Court has consistently held that it is bound by the cold, clear words of the statute and that if the scope of that statute is to be enlarged, the remedy is legislative and not judicial. If the Missouri legislature wants to provide for exceptions to the time limit for appointing a Personal Representative, as is argued by Appellants in this case, the legislature can clearly provide for that exception. That has not been done in regard to RSMo. § 473.020 and this Court is required to follow the terms of that statute even though the Court may find those terms disturbing. "It is this Court's role to interpret the law, not rewrite it." Boland, 417 S.W.3d at 712. Furthermore, "exceptions to statutes of limitations are matters of public policy for the General Assembly; exceptions are to be strictly construed and not enlarged by courts upon considerations of hardship." *Id. (Citing* Hunter v. Hunter, 361 S.W.2d 100, 103 (Mo. 1951)).

RSMo. § 473.020 states as follows: "The Petition must be filed within one year after the date of death of the Decedent…". This statue is a "special statute" limiting the time within which someone may petition the Court to be appointed Personal Representative of a Decedent's estate. The Eastern District even refers to RSMo. 473.020 as a "statute of limitation". Mickels, 2017 WL 3597203 (Mo. App. E.D. 2017). *State* ex rel Bier v. Bigger, 178 S.W.2d 347 (Mo. banc 1944) is controlling. In that case it was alleged that an undertaker (O'Donnell) had fraudulently concealed the will of the decedent and had himself appointed as the administrator of the estate as though the decedent had died intestate. At that time, Section 532 of the Revised Statues of the State of Missouri (1939) provided that a will had to be admitted to probate within one year from the date of the first publication of the notice of granting letters testamentary or of administration. In that case, the decedent died on December 17, 1941. The first publication of the appointment of O'Donnell as personal representative occurred on January 9, 1942. The relator did not file his Application for Probate of Will and to be appointed personal representative until September 15, 1943. The Probate Court Judge rejected probate of the subject will and dismissed the Relator's Application for Letters Testamentary. The Court held at page 351:

"Section 532 is a special statute limiting the time for probating wills and it does not expressly or impliedly authorize the time to be extended for any reason." It goes without saying that RSMo. 473.020 is also a "special statute" limiting the time for the appointment of a Personal Representative.

In Bier, supra, this Court discusses and analyzes in detail the difference between a "general" statute of limitations and a "special" statute of limitations. The Court stated:

"This Court has uniformly held that where a statute of limitations is a special one, not included in the general chapter on limitations, the running thereof cannot be tolled because of fraud, concealment, or any other reason not provided in the statute itself." Stowe v. Stowe, 140 Mo. 594, 41 S.W. 951, 953 (Mo. 1897). It is important to note that Stowe was a *suit in equity* alleging that a testator had been fraudulently induced to execute a will and praying that the devisees be declared to hold the property in trust for Plaintiff to the extent of his interest as an heir. Plaintiff alleged that he was an infant at the time the will was probated and that he brought the suit as soon as he discovered the fraud, which was more than five years after he attained his majority. The trial Court sustained a demurrer to the petition and the case was affirmed by this Court, on the ground that the petition showed on its face that the action was barred by the special statute of limitations for contesting a will. That statute provided that a will might be contested within five years after probate "saving to infants…a like period of five years after their respective disabilities are removed." (citations omitted) The opinion says: "No other exceptions whatever are engrafted on the statute, and it is not the duty or the right of the Courts to write new provisions into this statute. The infancy of Plaintiff does not change the law. The express provision in his behalf of five years excludes all other exceptions. Moreover, it is a special statute of limitations upon the sole topic of wills and their contests, and it must be held to be exclusive of other statutes of limitation." *Id.* at 954.

In Frazee v. Partney, 314 S.W.2d 915 (Mo. 1958), it was determined that Missouri's wrongful death statute is a special statute of limitations. In Frazee, supra, the Plaintiff sought to file an action for the wrongful death of his wife and daughter in a non-contact

motor vehicle accident. He alleged that he was ran off the road at night by an unknown motor vehicle. Plaintiff did not learn the name of the driver of the other motor vehicle until March of 1956 after the highway patrol's investigation lead to an inmate in the Department of Corrections at Potosi. The injuries and deaths of the wife and daughter occurred on October 10, 1954, and the suits for wrongful death were not filed until September 21, 1956. Plaintiff alleged in his petition that the Defendant "fraudulently, intentionally, deliberately, willfully, maliciously, and of his spite absented himself and concealed his identity from the Plaintiffs and all other persons from and after the 10th day of October, 1954, until the 23rd day of March, 1956." The trial Court held that the then one year statute of limitation on wrongful death actions was not tolled and the petition was dismissed. At page 919 of its Opinion, the Court cites Bier, supra, above. The Court held as follows:

"We must and do hold that the limitation of one year specifically provided in Section 537.100 was not tolled or the period extended by the Defendant's conduct, even attributing to it the full effect of Plaintiff's contentions."

This line of reasoning has most recently been adopted by this Court in Boland v. St. Luke's Health System, Inc., 471 S.W.3d 703 (Mo. banc 2015). In that case, the Plaintiffs argued that their wrongful death claims were not barred by the special statute of limitations as the Defendants intentionally and fraudulently concealed the tortious nature of the Decedent's deaths. In this tragic case, it was determined that Jennifer Hall, a former respiratory therapist for the hospital, had intentionally administered lethal doses of insulin and other medications that resulted in the death of at least nine patients and serious injuries to other patients. It was conclusively shown that the hospital and numerous administrators

and employees of the hospital strongly suspected Jennifer Hall of these actions but yet did not notify the public. Finally, the Joint Commission on Accreditation of Healthcare Organizations investigated the events at the hospital and identified a number of "sentinel" events. The Plaintiffs were still not notified of the circumstances surrounding the deaths of their family members.

The Court found that wrongful death in Missouri is statutory and has no common law antecedent. See Sanders v. Ahmed, 364 S.W.3d 195, 203. (Mo. banc 2012). The Court noted that in Chapter 516, the general statutes of limitation chapter, that there is an exception for fraudulent concealment. Section 516.280 provides that "if any person, by absconding or concealing himself, or by any other improper act, prevents the commencement of an action, such action may be commenced within the time herein limited, and after the commencement of such action shall have ceased to be so prevented." The Court also quoted the following portion of RSMo. 516.300:

> The provisions of Section 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. In short, Section 516.300 states that the general statutes of limitation and exceptions found in Chapter 516 are not applicable to causes of action that contain their own special statutes of limitation.

Plaintiff in Boland, supra, argued for the reversal of Frazee, supra. The Court then did an analysis of that case as well as other cases cited by the parties in their brief. At page 708 of its Opinion, the Court quoted the following language from Frazee:

> This Court has uniformly held that where a statute of limitations is a special one, not included in the general chapter on limitations, the running thereof cannot be tolled because of fraud, concealment, or any other reason not provided in the statute itself… No other exceptions whatever are engrafted on that statute, and it is not the duty or the right of the Courts to write new provisions into the statute.

Further quoting Frazee, supra, the Court stated: "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."

This Court reviewed numerous cases where a special statute of limitations was upheld even though there was concealment or fraud that precluded the Plaintiffs from acting within the time constraints. Repeatedly, this Court concluded that the matter was for the legislature to determine the policy of the state and for the Court to interpret the same. Citing Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. banc 1968) at page 313:

> "This argument is appealing and has some force, so far as justice is concerned; in that respect, the conclusion we reach is distasteful to us. But, the legislative branch of the government has determined the policy of the state and clearly fixed the time when the limitation period begins to run against actions for malpractice. This argument addressed to the Court properly should be addressed to the General Assembly. Our function is to interpret the law, it is not to disregard the law as written by the General Assembly."

CONCLUSION

In conclusion, this Court should affirm the decision of the Circuit Court of Marion County, Probate Division. Appellants are clearly outside of the statutory time to not only request the opening of an estate but they are out of time to request the appointment of a personal representative for decedent. Without a personal representative, the underlying survivorship action cannot proceed as it does not meet the requisites of RSMo. § 537.020 and 537.021. Moreover, this Court should affirm the decision of the trial court as even if a personal representative is appointed, Appellant's survivorship claim was not timely filed and it is barred by the statute of limitations found in RSMo.§ 516.105. Furthermore, the appointment of a personal representative cannot related back to filing of the original wrongful death action under Rule 55.33, so the action is further time barred.

Respectfully submitted,

By /s/ John B. Morthland_____

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06©, this brief contains the information required by Rule 55.03, complies with the limitations in Rule 8406(b) and Local Rule 360, and contains 15,396 words as determined using the word count program in Microsoft Word.

/s/ John B. Morthland

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Court's electronic filing system on this 17th day of October, 2017.

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With a paper copy mailed, via first class U.S. mail to:

Honorable John J. Jackson
Judge of the Associate Circuit of Marion County
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906 Broadway, Room 105
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/s/ John B. Morthland