SC97412 (Consolidated)

IN THE SUPREME COURT OF MISSOURI

SALLY BOLAND, AS NATURAL DAUGHTER OF DECEDENT CHARLES O'HARA, ET AL.
Plaintiffs/Appellants,

v.

SAINT LUKE'S HEALTH SYSTEM, INC., SAINT LUKE'S HOSPITAL OF CHILLICOTHE F/K/A THE GRAND RIVER HEALTH SYSTEM CORPORATION D/B/A HEDRICK MEDICAL CENTER, AND COMMUNITY HEALTH GROUP,
Defendants/Respondents.

SUBSTITUTE CONSOLIDATED BRIEF OF APPELLANTS

Appeals from the Circuit Court of Livingston County, Missouri
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JURISDICTIONAL STATEMENT

This is the second time the parties to the cases *sub judice* have been before this Court. In 2015 the Court held that Plaintiffs' claims for wrongful death were barred by the Wrongful Death Act's statute of limitations because Defendants' fraudulent concealment did not prevent them from asserting the statute as a defense to the death actions. *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703, 705-707 (Mo. 2015) ("*Boland I*"). After *Boland I* was decided, Plaintiffs filed five new suits against Defendants in the Circuit Court of Livingston County, Missouri, this time for fraudulent nondisclosure that caused them to lose their ability to pursue their claims for wrongful death.

This consolidated appeal arises from the trial court's grant of summary judgments in favor of Defendants, Saint Luke's Health System, Inc., Saint Luke's Hospital of Chillicothe f/k/a The Grand River Health System Corporation, d/b/a Hedrick Medical Center, and Community Health Group in the fraud actions. Plaintiffs timely filed their Notices of Appeal to the Missouri Court of Appeals, Western District. That Court ordered that the appeals be consolidated.

The Court of Appeals handed down its Opinion on June 19, 2018, reversing the judgments of the trial court and remanding the cases for trial (A77). Defendants filed their Motion for Rehearing, or in the Alternative, Application for Transfer to the Missouri Supreme Court, which the Court of Appeals denied. Thereafter, Defendants filed their Application for Transfer with this Court, which this Court granted on December 18, 2018.

This Court has jurisdiction to decide the instant cause "the same as on original appeal." Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

The trial court granted summary judgment to Defendants, in part because of judgments in earlier wrongful death lawsuits filed by Plaintiffs, which the court found were *res judicata* in the cases at bar. The earlier suits were appealed to the Missouri Court of Appeals, Western District, resulting in that Court's Opinion in *Boland v. Saint Luke's Health System, Inc.*, 2013 WL 6170598 (Mo.App.W.D. 2013).[1] That Opinion was later vacated by transfer to this Court. Nonetheless, the Western District's Opinion had a thorough and fair description of the allegations in the earlier cases.[2] Unless otherwise noted, this Statement of Facts will quote much of the Court of Appeals' 2013 Opinion verbatim to describe the allegations in the first suits between these parties, *Id.* *1-*4.

Plaintiffs' Wrongful Death Actions: "The First Suits"

Plaintiffs filed wrongful death actions in 2010 or 2011; all of the suits alleged Plaintiffs' Decedents were intentionally killed by Jennifer Hall ("Hall"), a respiratory therapist employed at the Hedrick Medical Center ("Hedrick") in Chillicothe. Defendants were three corporations affiliated with Hedrick: (1) Saint Luke's Health System, Inc., (2) Saint Luke's Hospital of Chillicothe, f/k/a Grand River Health System Corp. d/b/a Hedrick Medical Center, and (3) Community Health Group. Specifically, Plaintiffs alleged that Hall purposely administered a lethal overdose of succinylcholine and/or insulin and/or other medication that resulted in each of the five deaths that were the subjects of the death actions, and

[1] As will be seen, infra, there have been two Opinions handed down by the Court of Appeals that involve facts related to the instant cause, one issued in 2013, the other in 2018. For ease of reference, the earlier Opinion will be referred to as the "2013 Opinion," the latter as the "2018 Opinion."

[2] Much of the description of the factual background of the wrongful death actions appearing in the Court of Appeals' 2013 Opinion was later incorporated in the Principal Opinion in *Boland I,* 471 S.W.3d at 705-707.

that Defendants 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:

Plaintiff, Sally Boland

Charles O'Hara, father of Plaintiff, Sally Boland ("Boland"), was being treated at Hedrick when he died on February 3, 2002. O'Hara "coded"[3] 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.

Plaintiff, Helen Pittmann

Shirley Eller, sister of Plaintiff, 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. Pittman filed her action on July 14, 2010.

Plaintiff, Sherri Lynn Harper

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

[3] "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. 2013 WL 6170598 *1, n. 5.

Plaintiff, David Gann

Coval Gann, father of Plaintiff, David Gann ("Gann"), died March 30, 2002, after Hall gave him a lethal dose of succinylcholine and/or insulin and/or other medication. Gann filed his action on October 4, 2010.

Plaintiff, Jennirae Littrell

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

In addition to alleging facts specific to each patient, Plaintiffs alleged numerous facts applicable to all deaths. Between January 2002 and May 2002, Hedrick experienced a rash of suspicious deaths, each involving Hall, who had access to the lethal medications. Although Hedrick's doctors, nurses, and administrators knew of the suspicious deaths, Defendants worked systematically to conceal any indication of the spike in deaths as well as their suspicious nature. Defendants intentionally and fraudulently concealed all indications of tortious conduct in the following manners:

— Defendants threatened and coerced employees of Hedrick to conceal information concerning the actions of Hall;

— Defendants failed to request autopsies in order to conceal the true causes of the patients' deaths, when they knew a number of deaths were suspicious;

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

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

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

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

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

— Defendants 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, the suspicious deaths at Hedrick continued. Greenlaw was 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.

Defendants' 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 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' 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, 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.

Plaintiffs also alleged that Defendants failed to notify the families of Defendants' suspicion that Plaintiffs (and other patients) were intentionally harmed or murdered by Defendants' own employee, despite their duty to do so. In support of their assertion that Defendants owed such a duty, Plaintiffs 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."

Plaintiffs allege that instead of reporting the sentinel events to the families, Defendants affirmatively acted to conceal from Plaintiffs the existence of a claim. Plaintiffs 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."

Procedural History

As the Western District's 2013 Opinion noted, each of the Plaintiffs' petitions in the first suits included similar allegations; Ms. Boland's First Amended Petition was representative of those claims. Count I of her Petition alleged that Hall murdered Mr. O'Hara and that Defendants were liable for Hall's conduct under principles of respondeat superior (L.F.2359; A.23).[4] Counts III, IV, and V alleged fault in the hiring and supervision of Hall by Defendants (L.F.2362-2367; A16-31).[5] Counts II, VI, VII, and VIII pled theories of negligent misrepresentation, fraudulent concealment, and conspiracy (L.F.2360-2361; 2367-2373; A24-25; 31-

[4] Because there are five appeals consolidated in the case at bar, Plaintiffs will only cite references to the part of the Legal File relating to Boland in the main text. In the footnotes they will give citations to the record for each of the other Plaintiffs by giving their names and the pages of the Legal File where the corresponding part of that Plaintiff's allegation appears. For example, "Gann 85" refers to page 85 of the Legal File where Gann's pleadings are set out. Thus, for the allegations appearing in Boland's First Amended Petition at page 2359, corresponding references in the other Plaintiffs' pleadings are Gann 85; Harper 4893; Pittman 7057-7058; and Littrell 9335-9336.

[5] Gann 88-93; Harper 4896-4901; Pittman 7061-7066; Littrell 9359-9364.

37).[6] For example, Count VI, denominated "Civil Conspiracy of Fraudulent Concealment," alleged that Defendants had a confidential relationship with O'Hara, that Defendants knew of the problems with Hall, but concealed that information from O'Hara—before his death—and from Ms. Boland after her father died (L.F.2368; A32).[7] Boland also alleged that she did not learn of the role Hall played in killing her father until 2010 and that with reasonable diligence she could not have learned of those circumstances before 2010 because "Defendants concealed the facts of the suspicious deaths occurring before and during Charles O'Hara' admission and death at Hedrick." (*Id.*) Counts VI, VII, and VIII also alleged that Defendants' conduct caused Decedent's death (L.F.2369-2373; A33-37).[8] In Count VIII Boland alleged that the concealment of information about Hall was "material to Decedent's decision to be admitted into the care and treatment of Defendants," and that the concealment thereby caused O'Hara's death (L.F.2371-2373; A35-37).[9]

Defendants moved for judgment on the pleadings, arguing that the death actions were barred by the Wrongful Death Act statute of limitations, R.S.Mo. § 537.100 (2000) (A4), because they were filed more than three years after Decedents died. The trial courts granted the motions in those cases, based on *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958), which held that a defendant's fraud would not avoid the bar of the wrongful death statute of limitations. Plaintiffs appealed to the Missouri Court of Appeals, Western District, which consolidated the appeals.

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[6] Gann 86-88, 94-99; Harper 4894-4896, 4902-4907; Pittman 7058-7060, 7066-7072; Littrell 9337-9339, 9345-9350.

[7] Gann 94-95; Harper 4902-4903; Pittman 7066-7067; Littrell 9345.

[8] Gann 94-99; Harper 4902-4907; Pittman 7066-7072; Littrell 9345-9350.

[9] Gann 97-99; Harper 4905-4906; Pittman 7069-7071; Littrell 9348-9349.

On November 26, 2013, the Western District handed down its unanimous Opinion, reversing the judgments of the trial courts, 2013 WL 6170598. Citing its earlier decision in *Howell v. Murphy*, 844 S.W.2d 42, 46 (Mo.App.W.D. 1992), the Court declined to follow *Frazee*, which *Howell* described as having been superseded by this Court in *O'Grady v. Brown*, 654 S.W.2d 904 (1983).

Plaintiffs' victory was short-lived; on March 25, 2014, this Court ordered transfer; on the same day, the Court ordered transfer in another death case from the Southern District, *viz.*, *State ex rel. Beisly v. Perigo*, 2014 WL 257277 (Mo.App.S.D. 2014). The common issue in *Beisly* and *Boland I* was whether the fraudulent concealment of the circumstances of a death could serve to prevent the running of § 537.100. Both cases were argued in this Court on September 17, 2014. In *Beisly* a Special Judge sat on the Court; in *Boland* all of the regular members heard the arguments. On August 15, 2015, this Court handed down separate opinions in both cases, with identical 4-3 margins.

In *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015) ("*Beisly*"), the Principal Opinion of the Court held that a defendant who fraudulently concealed the circumstances surrounding a decedent's death could be equitably estopped from raising the bar of § 537.100. In *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. 2015) ("*Boland I*"), the Principal Opinion held that fraud would not prevent the bar of the wrongful death statute of limitations on any theory, including equitable estoppel. In short, the Principal Opinions in *Beisly* and *Boland I* were irreconcilable.

At the conclusion of the original Principal Opinion in *Boland I*, the Court said that the effect of its holding "leaves the plaintiffs without a remedy. . . ." (L.F.2398; A39.) In response to that statement, Plaintiffs filed their Motion for Rehearing in which they argued that, while *Boland I* may have left them without a remedy *under the Wrongful Death Act*, they had a claim for the fraud that deprived them of their death actions, based on a 1919 New Hampshire case cited by

Defendants in their Brief in *Boland I, Desmaris v. People's Gaslight Co.,* 79 N.H. 195, 107 A. 491 (1919) (L.F.2733).

On October 27, 2015, this Court overruled the Motion for Rehearing, but on its own motion the Court modified the Principal Opinion to read, "Without commenting on whether the plaintiffs have other viable remedies at law, the conclusion that the plaintiffs are without a remedy *for wrongful death* is a difficult one." 471 S.W.3d at 713 (emphasis added).

Plaintiffs' Claims for Fraudulent Nondisclosure: "The Second Suits"

In October of 2016 Boland and the other Plaintiffs filed new suits for fraudulent nondisclosure (hereafter the "Second Suits") (L.F.2355; A40).[10] There was considerable overlap between the First Amended Petition from the first suit and the fraud petition in the second suit. Boland recounted the circumstances of her father's death and the response by Defendants to the emerging suspicion that Hall was causing people to die (L.F.2287-2288; A43-44).[11] She also alleged that Hedrick tried to cover up Hall's actions L.F.2289-2291; A45-47),[12] another allegation that was part of the first suit. Boland's second suit did *not* allege that the cover-up proximately caused her father's death, something that was part of her original wrongful death claim (L.F.2371-2372; A35-36).[13] But it did claim that the information concealed by Defendants was not within Boland's reasonable reach, that the Defendants represented by silence that Decedent's code blue and death were the consequence of natural causes, rather than Hall's intentional conduct

[10] Gann 9; Harper 4707; Pittman 6982; Littrell 9260.

[11] Gann 12-13; Harper 4710-4711; Pittman 6985-6986; Littrell 9263-9264.

[12] Gann 14-16; Harper 4712-4714; Pittman 6987-6989; Littrell 9265-9267.

[13] Gann 97-99; Harper 4904-4907; Pittman 7069-7071; Littrell 9347-9350.

(L.F. 2293; A49).[14] The second suit averred the purpose behind the post-death cover-up:

> Hedrick Medical Center intended for the persons entitled to bring an action for the wrongful death of the fatal victims of Jennifer Hall, . . . to be unable to learn the true circumstances surrounding the deaths of their Decedents . . . , thereby losing the right to timely file a civil action for the wrongful death of their loved ones . . . .

(L.F.2293; A49).[15]

The second suit also recounted the circumstances of the first action, including Boland's reliance on the mistaken belief that fraud would avoid the bar of the statute of limitations, as held in *Howell, supra,* until it was expressly overruled by *Boland I* (L.F.2294; A50).[16] Boland claimed she was damaged by being deprived of her right to pursue a death action for the loss of her father (*Id.*), and that in addition to the wrongful death damages she could not recover in the first suit, the fraudulent conduct of Defendants in perpetrating the cover-up entitled her to punitive damages (L.F.2295)[17] (in contradistinction to damages for aggravating circumstances arising out of the killing of her father by Hall).[18]

Defendants filed motions for summary judgment in the second suits, arguing that they were barred by *res judicata* since they could have been filed as part of the first suits (L.F. 2422). They also claimed that the suits were barred by statute of limitations (L.F. 2449). On July 10, 2017, the trial court sustained those motions, finding, *inter alia*, that the fraud claim in the first suit was the same as

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[14] Gann 18; Harper 4716; Pittman 6991; Littrell 9269.

[15] Gann 18-19; Harper 4716-4717; Pittman 6991-6992; Littrell 9269-9270.

[16] Gann 19; Harper 4714; Pittman 6992; Littrell 9270.

[17] Gann 20; Harper 4718; Pittman 6993; Littrell 9270-9271.

[18] In an appropriate case, punitive damages can be awarded for fraud, *Luikart v. Miller*, 48 S.W.2d 867, 871 (Mo. *en banc*. 1932).

the death claim because it could have been filed at the same time (L.F.4679; A58).[19] The trial court also held that Plaintiffs' fraud claims were barred by the five-year statute of limitations for fraud, R.S.Mo. §516.120(5) (L.F.4683; A62). Plaintiffs filed their Notices of Appeal to the Missouri Court of Appeals, Western District on July 19, 2017 (L.F.4685).[20]

The Western District consolidated the five appeals on August 24, 2017 and heard arguments in the serene venue of William Woods University on April 11, 2018. The Court of Appeals handed down its unanimous Opinion on June 19, 2018, in which the Court described the appeal as addressing "the peculiar circumstance in which deceit by a tortfeasor is discovered *before* such intentional deceit has harmed the victims of the tortfeasor's wrongdoing." (A64, emphasis in original.) The Court held that the trial court erred in finding that *res judicata* barred Plaintiffs' claims because each Plaintiff's wrongful death action was "unquestionably a separate and independent cause of action" from Plaintiffs' fraud claims. (A71.) The Western District also held that the trial court erred in finding that the statute of limitations for fraud barred Plaintiffs' fraud claims because they did not accrue until *Boland I* held that their death actions were barred by the wrongful death statute of limitations, less than five years before they filed their fraud suits (A74-75).

Defendants filed their timely Motion for Rehearing or, in the Alternative, Application for Transfer to the Supreme Court of Missouri on July 20, 2018, which the Western District denied on August 28, 2018. Thereafter, they filed their Application for Transfer with this Court on September 12, 2018. The Court granted transfer on December 18, 2018.

[19] Gann 2256; Harper 6954; Pittman 9227; Littrell 11505.

[20] Gann 2262; Harper 6960; Pittman 9238; Littrell 11516.

POINTS RELIED ON

I. The trial court erred in entering summary judgment for Defendants on the ground that Plaintiffs' claims were barred by *res judicata* based on its finding that Plaintiffs' fraud claims were the same cause of action as their wrongful death claims because they could have filed their fraud claims when they filed their wrongful death claims. The trial court thereby applied an erroneous legal standard because the fact that two different causes of action may be filed at the same time does not establish that they are the same cause of action; in the *Boland I* litigation, the operative facts out of which Plaintiffs' death actions arose involved the conduct of Defendants' respiratory therapist when she intentionally killed Plaintiffs' Decedents during the period between February and April of 2002; in contrast, the fraud actions arose out of the postmortem acts of hospital administrators who fraudulently concealed the actions of the respiratory therapist for years after the last death at the hospital; the different causes of action arose at different times, involved different subject matter, different acts by different persons, and the evidence necessary to sustain the claims for wrongful death was not the same as the evidence necessary to sustain the claims for fraudulent nondisclosure.

Kimpton v. Spellman, 351 Mo. 674, 173 S.W.2d 886 (1943).

Spath v. Norris, 281 S.W.3d 346 (Mo.App.W.D. 2009).

Collins v. Burg, 996 S.W.2d 512 (Mo.App.E.D. 1999).

Chamberlain v. Mo.-Ark. Coach Lines, Inc., 354 Mo. 461, 189 S.W.2d 538 (1945).

II. The trial court erred in entering summary judgment for Defendants on the ground that the statute of limitations for fraud, § 516.120(5), barred Plaintiffs' fraud claims because in order for the statute of limitations to run, the damage resulting from the fraud must be sustained and discoverable; it is not sufficient that the Plaintiffs' injuries were speculative or contingent on the outcome of other litigation in order for the fraud to be actionable. In the instant cause, for purposes of the running of the statute of limitations, Plaintiffs' damages were not sustained and discoverable until *Boland I* overruled *Howell v. Murphy,* which previously recognized that fraud could prevent the assertion of the statute of limitations for wrongful death. That decision in *Boland I* was less than five years before Plaintiffs commenced their action for fraudulent concealment.

Chemical Workers Basic Union v. Arnold Savings Bank, 411 S.W.2d 159 (Mo. *en banc*. 1966).

Roberts v. BJC Health System, 391 S.W.3d 433 (Mo. 2013).

Schwartz v. Lawson, 797 S.W.2d 828, 832 (Mo.App.W.D. 1990).

37 C.J.S. *Fraud* § 70 (December 2018 Online Update).

R.S.Mo. § 516.120(5) (2016).

ARGUMENT

I. The trial court erred in entering summary judgment for Defendants on the ground that Plaintiffs' claims were barred by *res judicata* based on its finding that Plaintiffs' fraud claims were the same cause of action as their wrongful death claims because they could have filed their fraud claims when they filed their wrongful death claims. The trial court thereby applied an erroneous legal standard because the fact that two different causes of action may be filed at the same time does not establish that they are the same cause of action; in the *Boland I* litigation, the operative facts out of which Plaintiffs' death actions arose involved the conduct of Defendants' respiratory therapist when she intentionally killed Plaintiffs' Decedents during the period between February and April of 2002; in contrast, the fraud actions arose out of the postmortem acts of hospital administrators who fraudulently concealed the actions of the respiratory therapist for years after the last death at the hospital; the different causes of action arose at different times, involved different subject matter, different acts by different persons, and the evidence necessary to sustain the claims for wrongful death was not the same as the evidence necessary to sustain the claims for fraudulent nondisclosure.

A. Standard of Review

This appeal is from the trial court's entry of summary judgments on Plaintiffs' fraud actions. Summary judgment is proper only if there is no genuine issue of material fact, and if the movant is entitled to judgment as a matter of law. *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 452 (Mo. 2011). "It is crucial that

great caution must be exercised in granting summary judgment because it is an extreme and drastic remedy that borders on denial of due process in that the opposing party is denied its day in court." *Zoological Park Subdistrict of the Metropolitan Park Museum District v. Smith,* --S.W.3d--, 2018 WL 5796330 (Mo.App.E.D. 2018); *accord*: *Watson v. McGraw-Hill, Inc.*, 507 S.W.2d 366, 367 (Mo. 1967); *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 499 (Mo. 1991).

Even if the facts are undisputed, it does not follow that summary judgment is appropriate: "[T]he mere fact that a party can recite a list of uncontroverted facts is of no legal import until it can be shown that those facts establish a right to judgment as a matter of law." *Midwest Crane and Rigging, Inc. v. Custom Relocation's Inc.*, 250 S.W.3d 757, 761 (Mo.App.W.D. 2008). In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. *Goerlitz, supra,* 333 S.W.3d at 452. Since the propriety of summary judgment is purely a question of law, this Court reviews the actions of the trial court *de novo, Id.* As the Court held in *The Lamar Company, LLC v. City of Columbia*, 512 S.W.3d 774, 782 (Mo.App.W.D. 2016), this "standard of review requires us to determine whether the trial court properly applied the law to uncontroverted facts to enter judgment as a matter of law—an obvious question of law that is subject to *de novo* review."

B. **The Divisions of *Res Judicata***

"*Res judicata*" is a common law doctrine that means "a thing adjudicated." *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. 2002). The doctrine "precludes relitigation of a claim formerly made." *Id.* Besides "*res judicata,*" the rule has gone by various names over the years, including "estoppel by record," *Howey v. Howey,* 240 S.W. 450, 455 (Mo. *en banc*. 1922); "estoppel by judgment," *Kimpton v. Spellman*, 351 Mo. 674, 173 S.W.2d 886, 891 (1943);

and, more recently, "claim preclusion," *Chesterfield Village, supra*, 64 S.W.3d at 318.[21]

In its simplest formulation *res judicata* means that a judgment on the merits is a bar to litigation on the same matter in a later action, *Taylor v. Larkin*, 12 Mo. 103, 104 (1848). The policies behind the rule include relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudications. *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 534 (Mo. 2002). These policies are optimally promoted when there has been an actual trial. As Professor Currie noted: "The strength of the policy underlying *res judicata* is greatest when an issue has actually been litigated and decided; only then is there the double expenditure of actual relitigation." *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 337 (1978).

But *res judicata* is not limited to issues that were actually litigated in the earlier suit. In *Donnell v. Wright*, 147 Mo. 639, 49 S.W. 874, 875 (1898), this Court embraced the rule propounded by Vice Chancellor Wigram of the English Court of Chancery in *Henderson v. Henderson*, 3 Hare 100, 115 (1843):

> The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject of litigation*, and which the parties, exercising reasonable diligence, might have brought forward at the time.

(Emphasis added.) Later expositions of the rule have reiterated that *res judicata* applies not only to points and issues upon which the court pronounced judgment in the earlier action, "but to every point *properly belonging to the subject matter*

[21] Sometimes *res judicata* includes collateral estoppel, also known as "estoppel by verdict," *Davis' Estate v. Davis*, 574 S.W.2d 477, 479 (Mo.App. 1978); or "issue preclusion," *Sotirescu v. Sotirescu*, 52 S.W.3d 1, 4 (Mo.App.E.D. 2001). The instant cause does not involve collateral estoppel.

of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." *King, supra*, 821 S.W.2d at 501 (emphasis added).

Professor Cleary broke down the rule articulated in *Henderson* and its progeny this way: "The rule . . . falls into two divisions: (a) what was in fact determined in the former action, and (b) what might have been determined in the former action." *Res Judicata Reexamined,* 57 YALE L. J. 339, 342 (1948). As to the latter division, cases after *Donnell* have continued to use the phrase, "might have brought forward," in referring to issues precluded in subsequent litigation, *Roy v. MBW Construction, Inc.,* 489 S.W.3d 299, 304 (Mo.App.W.D. 2016), interchangeably with "could have been raised," *Chesterfield Village, supra,* 64 S.W.3d at 318, or "should have been raised," *Roy, supra*, 489 S.W.3d at 304. There appears to be no difference in the effect of the language utilized to describe the rule, whether "might," "could," or "should" is used, *compare Roy, supra,* 489 S.W.3d at 304, with *Lauber-Clayton, LLC v. Novus Properties Co.*, 407 S.W.3d 612, 618 (Mo.App.E.D. 2013).

The cases before the Court sub judice are second division cases. There was no determination in *Boland I* that Defendants were not guilty of fraudulent nondisclosure; to the contrary the Court determined that fraud was irrelevant to Plaintiffs' claims for wrongful death. Instead, Defendants argue that res judicata bars Plaintiffs' fraud claims because they "might have been determined in the former action." *Res Judicata Reexamined, supra,* 57 YALE L. J. at 342.

C. Limitations on the Rule

The application of *res judicata* to claims that could have been, but were not, asserted in earlier litigation inevitably raises troubling issues. The consequences of a finding of *res judicata*—denying a party his or her day in court—are unquestionably harsh, leading this Court to recognize that, "*Res judicata* in full bloom and vigor has drastic results." *Cantwell v. Johnson*, 236 Mo. 575, 139 S.W. 365, 375 (1911). The inimitable Judge Henry Lamm of this Court said when *res*

judicata is applied, "its potency is remarkable. It, in effect, makes of white, black; of black, white; of the crooked, straight; of the straight, crooked." *North St. Louis Gymnastic Society v. Hagerman*, 252 Mo. 693, 135 S.W. 42, 45 (1911). As will be seen below, in 1907 this Court held in *Womach v. City of St. Joseph*, 201 Mo. 467, 100 S.W. 443, 446-447 (1907), that profligate application of the rule would deprive a litigant of due process of law. There is no reluctance to apply the rule to someone who has already litigated an issue, but what about someone who has not? Professor Currie observed:

> The decision whether to apply *res judicata* to issues not actually litigated should be made in light of the policies underlying that doctrine—the competing interests "of the defendant and of the courts in bringing litigation to a close" and "of the plaintiff in the vindication of a just claim." More specifically, *the reason res judicata is given narrower scope when the second proceeding is on a different cause of action is that otherwise a litigant might suffer unforeseeable effects on unrelated claims*. Not only would this result be unfair, it might not serve the aim of judicial economy. The risk of being bound in a later, unrelated, law suit to an adverse finding on an issue not litigated in a prior suit might induce parties to litigate all possible issues to the utmost in the initial proceeding.

Res Judicata, supra, 45 U. CHI. L. REV. at 341 (emphasis added).

D. The Requirement of Identity of the Cause of Action

As early as 1873, the United States Supreme Court recognized an important limitation on the rule in *Henderson, supra*, 3 Hare at 115. In *Cromwell v. Sac County*, 94 U.S. 351, 358 (1873), the Court discussed the language from *Henderson*, cited above,[22] and noted this limitation:

[22] "The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." 3 Hare at 115.

> There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is, *in a subsequent suit between the same parties upon a different cause of action,* precluded from availing himself of such ground.

(Emphasis added.) This Court found *Cromwell* persuasive in *Garland v. Smith*, 164 Mo. 1, 64 S.W. 188, 193 (*en banc*. 1901), when it held that if a later action between the same parties is on a different claim, "the former judgment only bars those things which were in issue or included in the issue in the former action or suit." Consequently, if an earlier judgment involved a different claim, it will not "bar another cause which might have been joined with the former cause of action, but was not, and, if different proofs are required to sustain two actions, the judgment in one is no bar to the other." *Id.* Similarly, in *Spurlock v. Missouri Pacific Railway Co*., 76 Mo. 67 (1882), this Court held that "a plea of *res judicata* should be supported by proof that the matters in issue and decided in the first suit, are the same as that presented for determination in the second . . . ." In *Scheer v. Trust Co. of St. Louis*, 330 Mo. 149, 49 S.W.2d 135, 168 (1932), the Court held that a judgment is conclusive in a later action between the same parties on the same cause of action of all matters that might have been litigated in the earlier action, "but where the causes of action are *different*, even where the parties are the same, it is only conclusive of matters which were in fact litigated therein. *And it is not conclusive of any fact not necessary to be proved in the former case*." (Emphasis added.)

Later cases clarified that:

> A former judgment is not an absolute bar to a subsequent action, *if the subject matter involved in the two actions is not the same . . . . And not only must there be identical subject matter, but a judgment is not pleadable in bar of a second action unless the two actions are founded upon the same or substantially the same cause of action*.

Kimpton, supra, 173 S.W.2d at 891 (emphasis added); *accord: Dierkes v. Blue Cross and Blue Shield of Missouri*, 991 S.W.2d 662, 667 (Mo. 1999) ("For *res*

judicata to bar this action, the previous claim must have been for the same cause of action as the subsequent, precluded claim"). "[W]here a second action is upon a claim, demand or cause of action different from a prior action, the judgment in the first action does not operate as an estoppel as to matters not litigated in the former action." *Estate of Talley v. American Legion Post 122*, 431 S.W.3d 544, 548 (Mo.App.E.D. 2014).

Claim preclusion cases have enumerated four different aspects—commonly called the "four identities"—which must be present for *res judicata* to apply to later-filed cases, *King, supra,* 821 S.W.2d at 501. These four identities were first articulated by this Court in *Scheurich v. Empire Dist. Electric Co.*, 188 S.W. 114, 117 (Mo. 1916): "(1) Identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and of parties to the action; and (4) identity as to the quality of the person for or against whom the claim is made."

Res judicata does not "operate to preclude later litigation, including those claims that could have been brought, unless the four identities first occur." *Lauber-Clayton, supra*, 407 S.W.3d at 618. Since *res judicata* is an affirmative defense, "the party asserting it *must show* that four identities of both actions have occurred," *State ex rel. J.E. Dunn Construction Co. v. Fairness in Construction Board of City of Kansas City*, 960 S.W.2d 507, 514 (Mo.App.W.D. 1997) (emphasis added).[23]

[23] Similarly, in *Jungeblut v. Maris*, 234 Mo.App. 288, 130 S.W.2d 681, 683-384 (1939), the Court held that, "the one who pleads *res judicata* has the burden of proving that the 'thing adjudged' in the first suit was the 'same thing to be adjudged in the second suit.'"

E. Determining whether the Causes of Action in Two Different Suits are Identical

The most common area of conflict in determining whether an earlier judgment bars later litigation revolves around the second identity, i.e., whether the causes of action in the two cases were identical. "Application and explanation of the rules of claim preclusion depend on defining the scope of the claim or cause of action involved in the first action." C. Wright & A. Miller, 18 FEDERAL PRACTICE AND PROCEDURE §4407 (3d ed. September 2018 Update). Or, as Judge Wolff said in *Chesterfield Village, supra*, "The key question is what is the 'thing'—the claim or cause of action—that has previously been litigated?" 64 S.W.3d at 318. In that connection the phrases, "claim for relief" and "cause of action," are used interchangeably, *Id.* "Separate legal theories are not to be considered as separate claims, even if the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief." *King, supra*, 821 S.W.2d at 501 (internal citations omitted). *Grue v. Hensley*, 357 Mo. 592, 210 S.W.2d 7, 10 (1948), is instructive on this point, when it states that the phrase, "cause of action" does not refer to "the *form* of action in which the claim is asserted, but to the *cause for* action, i.e., the underlying facts combined with the law giving the party a *right* to a remedy of one form or another based thereon."[24] (Emphasis in original.) *Accord: Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 183 (Mo.App.W.D. 2002). And "transaction" means "the aggregate of all the circumstances which constitute the foundation for a claim," including "all the facts and circumstances out of which the injury complained of arose." *Grue, supra*, 210 S.W.2d at 10. *Accord: King, supra*, 821 S.W.2d at 501.

[24] This definition of "cause of action" is substantially similar to what this Court later said in *Chesterfield Village, supra*, 64 S.W.3d at 318: "The definition of a cause of action is nearly the same [as the definition of a claim]: a group of operative facts giving rise to one or more bases for suing."

F. These principles obtain, even when the different causes of action relate to the same subject matter and even when the later suits could have been joined in the earlier suits, if the causes of action are different

The trial court applied an erroneous legal standard in finding that there was an identity of the causes of action in the wrongful death cases and the fraud cases:

> A claim is considered the same "cause of action" as those brought in a previous lawsuit—even if that claim was not explicitly pled in the previous lawsuit—if that claim *could* have been brought in the prior lawsuit. This is because the doctrine of claim preclusion encompasses "the rule against splitting a cause of action, which provides that '[a] cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit.'" *Johnson Controls, Inc. v. Trimmer*, 466 S.W.3d 585, 593 (Mo.App.W.D. 2015) (quoting *King*, 821 S.W.2d at 501).

(L.F. 4679, A58; emphasis in original). Essentially, the trial court ruled that identity of a cause of action is determined by the possibility of joining different claims in the same lawsuit under the permissive joinder rule, Rule 55.06(a), which provides in relevant part that, "A party asserting a claim to relief as an original claim . . . *may join*, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party." (Emphasis added.)[25] Applying that logic, the trial court transmogrified Rule 55.06(a) from a permissive to a mandatory joinder rule.

Plaintiffs are aware that a superficial reading of language in some cases—indicating that a claim is barred if it "could" or "might" have been raised in earlier litigation—arguably suggests that plaintiffs are *required to join all claims* they

[25] "Rule 55.06 provides for permissive joinder and does not require all claims the pleader has to be joined." J. McPherson, 31 MISSOURI PRACTICE: CIVIL RULES HANDBOOK, Rule 55.06 (2018-2019 edition).

knew or should have known about at the time of the first suit, regardless of whether they arose out of different facts or wrongs. While that was the conclusion reached by the trial court below, *it has never been the law*.

Professor Currie acknowledged that a "literal reading" of the rule in second division cases—that *res judicata* applies "to what might have been litigated"—could indicate that "all procedurally joinable matters between the parties at the time of the former action would now be *res judicata*, regardless of how unrelated such matters might be in fact." *Res Judicata Reexamined*, *supra*, 57 YALE. L. J. at 346. But, "[c]ourts have not gone to that length." *Id.* "They have said that what might have been litigated in the first action is *res judicata only to the extent that it constituted a part of the cause of action involved in the first action*. *Id.* (Emphasis added.) Critically, *"[i]f the causes of action are different, it is immaterial then that plaintiff might have joined them under rules governing permissive joinder*. *Id.* (Emphasis added.) Accordingly, "the mere fact that . . . two actions relate to the same subject matter does not necessarily establish that they are on *the same* cause of action." 46 AM.JUR.2d *Judgments* § 459 (Nov. 2018 Update) (emphasis added). And a logical corollary to these statements is that "a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, even though each action *relates* to the same subject matter." *Id.* (Emphasis added.)

This not just a matter of academic interest. In the widely-cited case of *Perry v. Dickerson*, 85 N.Y. 345, 350 (1881), the New York Court of Appeals held that: "A plaintiff having separate demands against a defendant . . . *arising from distinct trespasses or wrongs,* is not required to combine them in one action, although in most cases he *may* do so *at his election*." (Emphasis added.)[26] And while *Perry*

[26] *Perry* went on to hold that a plaintiff who has separate causes of action "may prosecute them separately, subject to the power of the court, in furtherance of

was not binding in Missouri, it was cited favorably by this Court in *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41, 43 (1935), when it considered the meaning of the rule that *res judicata* barred matters that might have been litigated in an earlier suit: "It is not meant by this rule that the plaintiff must join in one action every demand, which, under the rules of law, he might join, but it is only meant that, *where he has but one cause of action, he shall have but the one chance to litigate.*" (Emphasis added.)[27] Thus, in *Stoops v. Stoops*, 363 Mo. 1075, 256 S.W.2d 799, 801 (1953), this Court held that, "With respect to the joinder of claims, or causes of action, R.S.Mo. § 509.060 (1949) [A5], the Civil Code of Missouri is permissive, and a plaintiff is not required to join his several causes of action *even though they arise out of the same transaction*." (Emphasis added.)[28]

In *Grue, supra*, this Court said that there are times when a plaintiff may *choose* to join in one suit "separate claims against the same defendant, but is not required to do so; and others where causes of action overlap or possess certain elements in common, but still differ in essential facts or parties. *These are considered separate causes of action.*" 210 S.W.2d at 11 (emphasis added). That is why, even in those cases that discuss claims that "could," "should," or "might" have been joined in the original action, courts limit the *res judicata* effect to matters "properly belonging to the subject matter of the litigation" in the original action, *Chesterfield Village, supra*, 64 S.W.3d at 318; *Roy, supra*, 489 S.W.3d at 304; *Lauber-Clayton, supra*, 407 S.W.3d at 618.

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justice, and, to prevent undue vexation and costs, to order the actions to be consolidated." *Id.*

[27] *Kelly* was later overruled on other grounds by *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968).

[28] Section 509.060 was enacted as part of the Civil Code of 1943. It is still on the books, but it has been supplanted by Supreme Court Rule 55.06(a) (A7), which retains the permissive language found in § 509.060.

Saying that a matter "properly belong[s] to the subject matter of the litigation" in the first suit is another way of saying that claims preclusion does *not* apply if the matter to be proved in the later suit is "not necessary to be proved in the former case." *Scheer, supra*, 49 S.W.2d at 168. *Res judicata* "applies to all matters that are germane to any cause of action regardless of whether presented or not," *Autenrieth v. Bartley*, 238 Mo.App. 55, 176 S.W.2d 546, 550 (1943). Conversely, the rule does *not* mean that an earlier judgment is conclusive of matters that "were not germane to, implied in, or essentially connected with the actual issues in the [earlier] case. . . ." 50 C.J.S. *Judgments* § 997 (December 2018 Update). Thus, "estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen" in the former litigation. *Drennen v. Wren*, 416 S.W.2d 229, 235 (Mo.App. 1967), *citing* II H. Black, A TREATISE ON THE LAW OF JUDGMENTS §611 at 929 (Second ed. 1902). *Accord*: *Ridgley v. Stillwell*, 27 Mo. 128, 132 (1858), and *North St. Louis Gymnastic Society, supra,* 135 S.W. at 45.

As will be seen below, Missouri courts have frequently refused to preclude successive claims, even when they relate to the same subject matter and even when permissive joinder rules would have allowed the claims to be joined in the earlier action, provided the causes of action were not identical. The ineluctable conclusion from these cases is that the availability of joinder—i.e., the fact that a plaintiff *could have joined* another claim in an earlier suit—is not determinative of whether a cause of action in a later suit is identical to the earlier cause.

G. Employment of the Rule Against Splitting a Cause of Action in Determining Whether Two Causes of Action are Identical

When identity of a cause of action is at issue in determining claim preclusion, the "doctrine takes on the character of the rule against splitting a cause

of action." *King, supra*, 821 S.W.2d at 501. Although the trial court was correct in recognizing that identity of a cause of action can be established by resort to the rule against splitting a cause of action, it erred in the application of that rule, as will be demonstrated, *infra*.

Res judicata prohibits splitting a claim or cause of action, *Chesterfield Village, supra*, 64 S.W.3d at 318. The rule against claim-splitting provides that a cause of action which is single may not be split by a plaintiff and tried piecemeal. *Collins v. Burg*, 996 S.W.2d 512, 515 (Mo.App.E.D. 1999). When a party splits a cause of action by failing to assert it in a prior suit based on that cause, the adjudication on the merits in the first suit is a bar to a second suit on that claim, *Chesterfield Village, supra*, 64 S.W.3d at 318.

The practical effect of the relationship between *res judicata* and the rule against claim-splitting is that when courts are deciding whether there is identity of the cause of action so as to invoke *res judicata*, they frequently rely on principles governing whether plaintiff has asserted a "single claim" as defined in the rule against splitting a cause of action. The Kentucky Supreme Court recognized that reality in *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366, 372 n. 9 (Ky. 2010), when it characterized the rule against splitting causes of action as a "subsidiary of the doctrine of *res judicata*," and went on to state that the rule against claim-splitting is essentially "one aspect to be considered when determining whether there is identity of the causes of action."

Unfortunately, determining whether a second suit is based on the same claim or cause of action litigated in an earlier suit is often difficult. "[T]he mere explication of the doctrine of claim preclusion does not resolve all difficulties which may appear at the point of application." *Delahunty v. Massachusetts Mutual Life Insurance Co.*, 236 Conn. 582, 674 A.2d 1290, 1295 (1996). And this Court has recognized that the rule "is simple and universally recognized in almost

innumerable cases, the only difficulty or conflict being in its application to particular cases." *Norval v. Whitesell*, 605 S.W.2d 789, 791 (Mo. *en banc*. 1980).

Judge Teitelman observed in *Collins, supra*, 996 S.W.2d at 515: "The question of what constitutes a 'single cause of action,' for purposes of the rule against splitting a cause of action, is sometimes fraught with difficulty." This difficulty necessarily means that "there is no hard and fast rule for the determination of that question; rather, it depends on the facts and circumstances of the particular case." *Id. Accord: Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S.W. 109, 111 (Mo.App. 1916).

In *Spath v. Norris,* 281 S.W.3d 346, 350 (Mo.App.W.D. 2009), the Court of Appeals articulated a two-prong test in deciding if a cause of action is a single and cannot be split: "(1) whether the separate actions brought arise out of the same act or transaction, and (2) whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions."[29] This analysis has evolved into the signal measure for deciding if *res judicata* bars a claim not raised in earlier litigation: "[T]he test for determining whether *res judicata* applies is not whether a new suit states a different legal theory, but whether it arises out of the same transaction or occurrence and involves the same parties, subject matter, and evidence." *Williams v. Rape*, 990 S.W.2d 55, 60 (Mo.App.W.D. 1999).

In deciding whether an action arises out of the same act or transaction that was the subject of an earlier lawsuit, courts look at the factual bases for the claims, not the legal theories. *Kesterson v. State Farm Fire & Casualty Co.*, 242 S.W.3d 712, 716 (Mo. 2008). In that regard, the courts are concerned with *ultimate facts*, as opposed to evidentiary details. *Id.* Ultimate facts "are those questions, points or matters of fact in issue essential to [the] decision" in the earlier case. *King,*

[29] Although *Spath* is a Court of Appeals opinion, the two-prong test it recites is substantially the same as one articulated by this Court in *Grue v. Hensley, supra*, 210 S.W.2d at 10, and reiterated in *King, supra*, 821 S.W.2d at 501.

supra, 821 S.W.2d at 502 n.4. On the other hand, even when there is overlap in the facts of the two claims, it does not mean they are the same claim or cause of action:

> Missouri case law in this area leaves no doubt that separate and distinct causes of action can sometimes arise from the same act, transaction or contract. *In such instances a plaintiff may bring separate causes of action separately, even if they arise out of the same transaction, and doing so does not violate the rule against splitting a cause of action*. This is true even where joinder of the two separate causes in one lawsuit would be permissible, subject of course to the power of the court to order consolidation.

Collins, supra, 996 S.W.2d at 516 (internal citations omitted; emphasis added); *accord: Lee v. Guettler,* 391 S.W.2d 311, 313 (Mo. 1965). The fact that two different actions may have arisen out of a single chain of events, involving *separate wrongs*, does not make them one claim or cause of action. *Shores v. Express Lending Services, Inc.*, 998 S.W.2d 122, 128 (Mo.App.E.D. 1999); *accord: Imler v. First Bank of Missouri,* 451 S.W.3d 282, 293 (Mo.App.W.D. 2014) (rule against claim-splitting does not apply to "bringing separate suits on separate causes of action arising out of the same transaction or occurrence").

It is helpful in understanding these rules to examine cases that illustrate how they work in practice. In *Womach v. City of St. Joseph, supra*, plaintiff's wife suffered a broken arm and an injury to her eye, resulting in loss of sight, allegedly caused by defendant's negligently constructed sidewalk which caused her to fall. She sued defendant and lost. Thereafter, husband sued for loss of consortium. The trial court dismissed his claim, based on *res judicata*. On appeal, plaintiff admitted that both cases were founded on the same negligent act, and the issues regarding defendant's liability were common to both, 100 S.W. at 444. But the Court, nonetheless, examined two "identity" issues. The first was whether the parties in the two cases were the same.[30] Obviously, they were not since the husband was

[30] This is the third of the four identities, *Scheurich, supra*, 188 S.W. at 117.

not a party to his wife's action, and on that basis, the Court held that the trial court erred in dismissing husband's case. *Id*. at 445-446.

But that was not the only basis for this Court's reversal of the trial court in *Womach*. Another, independent issue decided by the Court focused on "identity of the cause of demand," *Id*. at 447, i.e., whether the husband's claim was the same as his wife's, since both suits resulted "from the same injury to the wife," and both claims came "into existence at once upon such injury." *Id*. at 448. This Court held the claims were *not* the same, since a "personal injury to the wife gives rise to two causes of action: one in favor of the wife" for her physical injury, and "one in favor of the husband to recover for loss of his wife's services, society, etc." *Id*. Because husband had his own cause of action, separate from that of his wife, dismissing his claim without a trial on the ground of *res judicata* deprived him of his property—*viz*., his "chose in action"—without due process of law, *Id*. at 446-447,[31] for which reason—in addition to the absence of identity of parties—the trial court's judgment was reversed. Thus, plaintiff in *Womach* was allowed to pursue his own cause of action on the basis of two distinct bases found by this Court. Stated another way, *res judicata* failed as a defense in *Womach* precisely because two of the requisite identities did not occur in the two actions.

In the lower courts, Defendants at bar sought to distinguish cases like *Womach* on the ground that they were inapposite because there is no claim of an absence of identity of parties in the cases *sub judice*. Defendants have suggested that since cases like *Womach* also held that the rule against claim-splitting did not apply because there were additional or different parties in the second action, their additional holdings as to a lack of identity of the causes of action are *dicta*. That argument is mistaken. "It is well settled that when a court bases its decision on two or more distinct grounds, each is as authoritative as the other and neither is

[31] Seventy-eight years after this Court decided *Womach*, the United States Supreme Court reaffirmed that "a chose in action is a constitutionally recognized property interest . . . ." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985).

obitur dictum." *Holt v. State*, 494 S.W.2d 657, 659 (Mo.App. 1973). *Accord: Buatte v. Schnuck Markets, Inc.,* 98 S.W.3d 569, 574 n.1 (Mo.App.E.D. *en banc.* 2002). Since all of the identities must occur in former and later actions, a holding by this Court on more than one of the identities is necessarily authoritative as to each ground independently sustaining a lack of *res judicata*.

Although it is over a century old, *Womach* retains its vitality. In *Wendt v. General Accident Insurance Co*., 895 S.W.2d 210 (Mo.App.E.D. *en banc*. 1995), husband and wife were both hurt in a wreck with an uninsured motorist. The wife sued her uninsured motorist carrier for her injuries and loss of consortium caused by her husband's injuries. Husband filed a separate lawsuit (which the trial court refused to consolidate with wife's case) for his injuries and loss of consortium caused by his wife's injuries.[32] Wife's case went to trial first, and the jury found for defendant. Defendant argued that husband's consortium claim was barred by the judgment in his wife's case. Relying on *Womach*—which the Court held continued to be good law—the Eastern District determined that husband's consortium claim was a "separate, distinct and personal legal claim" belonging to husband. 895 S.W.2d at 213-214.[33]

On December 14, 1940, plaintiff, Charles Chamberlain was driving a car in which his wife and other family members were passengers when it collided with the rear of defendant's bus, causing injury to plaintiff and his wife. *Chamberlain v. Missouri-Arkansas Coach Lines, Inc.,* 351 Mo. 203, 173 S.W.2d 57, 58 (1943) ("*Chamberlain I*"). Two days later, on December 16, 1940, plaintiff's wife died. *Id.* On May 14, 1941, Plaintiff filed two separate lawsuits: one for his wife's death,

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[32] Defendant did not serve notice on husband during the pendency of his wife's suit, asking that his consortium claim be consolidated with his wife's action pursuant to Rule 66.01, 895 S.W.2d at 213.

[33] More recently, the Eighth Circuit, applying Missouri law, cited to *Womach* in *Kingman v. Dillard's, Inc*., 721 F.3d 613, 619 (8th Cir. 2013).

Chamberlain I, and one for his own personal injuries, *Chamberlain v. Mo.-Ark. Coach Lines, Inc.*, 354 Mo. 461, 189 S.W.2d 538 (1945) ("*Chamberlain II*"). The death case was tried first, resulting in a $10,000 judgment for plaintiff that was affirmed on appeal, *Chamberlain I, supra*. Defendant then moved to dismiss plaintiff's personal injury suit, arguing that he split his cause of action since both cases arose out of the same accident and husband could have joined his injury action as part of his suit for the death of his wife. The trial court granted that motion, and plaintiff appealed to this Court.

This Court initially noted that the rule against claim-splitting does not apply to "bringing separate suits on separate causes of action arising out of the same transaction or occurrence. *One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible*," subject to the trial court's power to order consolidation. *Chamberlain II, supra,* 189 S.W.2d at 539 (emphasis added). Applying that rule to plaintiff's two actions, the Court held that, "Plaintiff's claim for the wrongful death of his wife is unquestionably a separate and independent cause of action from his claim for his own injuries." *Id.* at 540. In reaching that conclusion, this Court emphasized the importance of the fact that the wrongful death action "arose *at a different time* in this case (when plaintiff's wife died) than did plaintiff's action for his own injuries." *Id.*[34] (Emphasis added.) While the joinder-of-claims statute in effect at the time—

[34] Minnesota applies the same test as Missouri regarding whether separate actions violate the rule against claim-splitting: "The common test for determining whether an action is precluded is to determine whether the same evidence will sustain both actions." *Mach v. Wells Concrete Products Co.*, 866 N.W.2d 921, 925 (Minn. 2015). Congruent with *Chamberlain II*, in Minnesota "[c]laims are not considered the same cause of action if the right to assert the second claim did not arise at the same time as the right to assert the first claim." *Id.* Missouri law is consistent with Minnesota on this point. In *Peper Automobile Co., supra*, the Court held that, "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former *immediately* arise out of one and the same act . . . and the latter out of different acts. . . ." 187 S.W. at 111 (emphasis added).

R.S.Mo. §917 (1939) (A6)—*permitted* plaintiff to bring both claims in the same action, Missouri had "no statute which *requires* compulsory joinder of actions by a plaintiff." *Chamberlain II, supra*, 189 S.W.2d at 540 (emphasis added). Reversing the judgment of the trial court, this Court held that plaintiff had not split his cause of action by bringing two suits. *Id.*

In *State ex rel. Todd v. Romines*, 806 S.W.2d 690 (Mo.App.E.D. 1991), Mark Todd worked for SSI, a business owned by William Pagano. Pagano and SSI took out two $500,00 life insurance policies on Todd. Thereafter, Pagano shot and killed Todd. Todd's widow filed two suits: (1) a wrongful death action against Pagano and SSI for the death of Todd; and (2) an action as the personal representative of Todd's estate against SSI and the insurance companies issuing the life insurance policies, seeking to impose a constructive trust upon the insurance proceeds for the benefit of Todd's estate. The issue in the Court of Appeals was whether the widow split her cause of action. The Court held that she did not, even though it was undisputed that both suits arose from the same act: Pagano shooting Todd. In examining the pertinent legal principles, the Court stated that, "[A] plaintiff may not split a cause of action and try a single claim piecemeal against different defendants one by one. A claimant may, however, bring separate and distinct causes of action separately, even if they arise out of the same transaction." 806 S.W.2d at 692. The Court went on to hold that the rule against claim-splitting was not implicated because, *inter alia*, the evidence necessary to sustain the two claims was not the same:

> The evidence necessary to prevail on both claims is also different. It is likely that the evidence necessary to prove wrongful death will be the same in both cases. The tort action, however, will require proof of damages that the equity action will not. *Similarly, the constructive trust action will involve issues concerning the insurance contracts that are not necessary in the resolution of the wrongful death action*. Thus, we conclude relator's actions are separate . . . .

Id. (emphasis added).

In *Bridges v. Van Enterprises*, 992 S.W.2d 322 (Mo.App.S.D. 1999), plaintiff was the widow of Alfred Bridges. As a result of the negligent operation of a motor vehicle by defendant, Duplisse, Mr. Bridges was seriously injured and lapsed into a coma for two and one-half years before he died. Plaintiff filed an action against Duplisse with one count for her loss of consortium between the date of Mr. Bridges' injury and his death, and another count for the wrongful death of Mr. Bridges. Her husband's employer intervened in the case, seeking subrogation for the disability payments it made as a result of decedent's injuries. The trial court entered judgment approving a settlement between the widow and the tort-feasor in which most of the settlement proceeds were paid to the widow for her pre-death loss of consortium claim. Employer appealed that judgment, arguing that pleading the injuries in separate counts violated the rule against splitting claims.

The Court of Appeals reviewed the familiar test for determining whether two separate claims are, in reality, only one. *Id.* at 326. It held that, "A claimant may bring separate and distinct causes of action even though they arise out of the same transaction." *Id.* The Court also noted that when a spouse is injured and later dies as a result of the negligence of a third party, "a loss of consortium claim allows recovery of damages for services calculated to the time of the injured spouse's death." *Id.* at 325. Of course, the Wrongful Death Act, R.S.Mo. § 537.090 (1994), also allowed for damages for loss of consortium following Mr. Bridges' death, 992 S.W.2d at 325. The Court applied the "different evidence" test to hold that the rule against splitting claims did not apply: "Obviously, evidence of Mr. Bridges' death is required in the wrongful death action, as well as evidence that his death was caused by the accident. Different evidence would also be required with respect to damages." *Id.* But on the claim for loss of consortium before Mr. Bridges died, for "Mrs. Bridges to prevail in her loss of consortium claim, evidence is required of her 'resulting loss of the society and services'" during the two and one-half years before he died. *Id.* at 326. Even though the consortium claim and the death claim both

arose out of the same occurrence—Duplisse's negligent driving that caused Mr. Bridges' injury and ultimate death—they were not the same cause of action.

In *Miller v. SSI Global Security Service*, 892 S.W.2d 732 (Mo.App.E.D. 1994), plaintiff husband was injured in an assault by criminals in the parking lot of National Supermarket. He and his wife sued National for its inadequate security in the parking lot; the case was removed to federal court. That court dismissed plaintiffs' action, holding that their petition failed to state a cause of action. Subsequently, plaintiffs sued SSI, a private security company that contracted with National to provide security in its parking lot; plaintiffs' theory was that they were third-party beneficiaries of the contract between National and SSI. SSI moved for summary judgment, claiming, *inter alia*, that plaintiffs split their cause of action. The trial court granted summary judgment.

On appeal, the Eastern District applied the same two-prong test from *Spath, supra*, and *Grue, supra*, and held that the trial court erred, even though the later case involved the same damages as the federal court case. Both the tort action and the contract claim involved "the same assault and injuries." 892 S.W.2d at 734. But, "the parties, the subject matter and the required proof of the allegations in the petition are different in the two cases." *Id.* It followed that the "contract suit will involve issues concerning the agreement between National and SSI that were not a part of the tort action against National. Thus, the Millers' causes of action are separate and distinct." 892 S.W.2d at 734.

Finally, in *Collins v. Burg, supra*, plaintiff sued defendant in federal court for intentional infliction of emotional distress. Two days after filing that suit, plaintiff demanded defendant vacate premises she owned. Defendant refused, so plaintiff sued defendant in state court for trespass, claiming, *inter alia*, that she was entitled to recover damages for emotional distress caused by the trespass. Eventually, the federal court entered summary judgment against plaintiff, finding that she could not make a prima facie case for intentional infliction of emotional distress. Defendant then moved to dismiss the state court action, claiming that it

violated the rule against splitting a single cause of action, 996 S.W.2d at 515. The trial court granted the motion, finding that the claims in the two suits, "though distinct, arise out of the same facts." *Id.* Plaintiff appealed to the Eastern District of the Court of Appeals.

Judge Teitelman, writing for the Eastern District, reviewed the principles heretofore noted and held that the trespass action did not violate the rule against splitting a single cause of action. This was so because the trespass action did not arise out of the same transaction or set of operative facts as the federal suit, the gravamen of which was that defendant wrongfully intruded into the family affairs of plaintiff "with respect to the living arrangements, medical treatment, care and support of plaintiff's . . . sister (Moody), thereby causing Plaintiff emotional distress." *Id.* at 516. There was no claim for trespass in the federal case. Moreover, the gravamen of the trespass action was distinguishable from the federal case:

> In [the trespass] action, Plaintiff simply alleges that she gave oral and then written notice to Defendant in late December of 1996 to quit occupancy of the premises at 8311 Braddock, and that Defendant has failed to do so. The alleged notice occurred after Moody's death, and *after* the federal lawsuit had already been filed.[35] Yet it was not until after such notice had been given, along with the clear-cut termination of any consent by Plaintiff to Defendant's occupancy that such notice signified, that Defendant could be deemed a trespasser and Plaintiff would have the right to the relief sought (recovery of possession) in her trespass action.

Id. at 517. Thus, the trespass action was based upon facts "fundamentally different from, and independent of, the alleged facts supporting the claim for intentional and negligent infliction of emotional distress raised by Plaintiff in her first lawsuit." *Id.* Even though there was "tangential overlappage regarding the background facts in the two cases," that did not mean there had been a splitting of a single cause of action. *Id.* at 517 n.4. "Since the trespass action did not arise from

[35] The notice was given two days after the federal suit was filed. 996 S.W.2d at 514. The trespass action was filed in state court in June of 1997, while the federal suit was still pending. *Id.*

the same facts as the prior litigation, *but rather arose from different acts and circumstances*, it is a separate and distinct cause of action which may be sued on separately." *Id.* at 517 (emphasis added).

Moreover, even if the trespass case arose out of the same "transaction or constellation of background facts as the first lawsuit," the trespass claim was, "unquestionably, a *separate and distinct* cause of action from the one alleging infliction of emotional distress." *Id.* (emphasis in original). "It is separate and distinct, . . . because the basic subject matter of the two suits is altogether different and so is the evidence necessary to sustain their respective claims for relief." *Id.*

Accordingly, the judgment dismissing plaintiff's claim was reversed.

H. Application of these Rules to Plaintiffs' Death Claims and their Fraud Claims

In order for the judgments in the wrongful death cases to bar the action for fraudulent nondisclosure for covering up the murders of Plaintiffs' Decedents, it is not enough that the two actions relate to the same subject matter, 46 Am.Jur.2d *Judgments, supra*, § 459; *Collins, supra*, 996 S.W.2d at 516. Nor does it matter that there was "tangential overlappage regarding the background facts in the two cases," *Id.* at 517. The judgment in the death action is not a bar to the second action unless the two actions are founded upon the same or substantially the same cause of action, *Kimpton, supra*, 173 S.W.2d at 891. The test for determining whether identity of the cause of action exists is whether the fraud actions arise out of "the same transaction or occurrence and involves the same parties, subject matter, and evidence" as the death cases, *Williams, supra*, 990 S.W.2d at 60. Stated another way, if the fraud action arose from "different acts and circumstances" than the death action, "it is a separate and distinct cause of action which may be sued on separately." *Collins, supra*, 996 S.W.2d at 517. To determine whether the two actions arise out of the same transaction or occurrence and involve the same

subject matter and evidence, it is necessary to briefly review the two claims asserted by Plaintiffs.

1. Plaintiffs' Wrongful Death Claims

The death action filed by Plaintiff, Boland, is representative of the five wrongful death suits filed by Plaintiffs in 2011. In Count I of the First Amended Petition she filed on July 7, 2011 (L.F. 2322), Boland alleged that on February 3, 2002, Hall killed Boland's father by intentionally injecting him with a fatal dose of Succinylcholine and/or insulin (L.F. 2357-2359; A21-23). Counts III, IV, and V alleged negligence or fault by Defendants in hiring Hall or in failing to supervise her after she was hired (L.F.2362-2367; A26-31).

Counts II, VI, VII, and VIII all allege some kind of concealment by Defendants. In Count II, Boland alleges that Defendants negligently failed to disclose what Hall was doing to "pertinent individuals and relevant committees" who could have acted to prevent further harm by her, and this failure caused the death of Decedent (L.F.2360-2361; A24-25). Count VI alleges that Defendants conspired to conceal information from Decedent about Hall's misconduct and that the conspiracy caused his death (L.F.2370; A34). Count VII alleges that Defendants conspired to fraudulently conceal information about Hall's misconduct from patients, which caused Decedent's death (L.F.2370; A34). Count VIII alleges Defendants knew about the inordinate number of deaths and codes at the hospital while Hall was working there, but they failed to inform Decedent of these problems, thereby depriving him of the opportunity to make an informed decision about whether he wanted to be admitted to the hospital; Boland also claims breech of Defendants' duty to inform patients about what was going on caused her father's death (L.F.2371-2372; A35-37).

The thing that gave rise to *all* of the counts of the First Amended Petition in the wrongful death action was *conduct that preceded and caused the death of Decedent*. The *ad damnum* clause of each count sought damages for the *wrongful*

death of Mr. O'Hara (L.F. 2359, A23; L.F. 2362, A26; L.F. 2364, A28; L.F. 2366, A30; L.F. 2367, A31; L.F. 2369,33; L.F. 2370, A34; L.F. 2373, A37). In her First Amended Petition Boland did not seek damages for the loss of her cause of action for the wrongful death of her father (which, of course, had not yet occurred when she filed her First Amended Petition, since *Boland I* had yet to be decided).

In order to recover in a wrongful death action, a plaintiff must plead and prove that the defendant's fault "directly caused or directly contributed to cause the patient's death." *Kiviland v. Columbia Orthopaedic Group, LLP,* 331 S.W.3d 299, 306 (Mo. 2011). Stated differently, "causation is an essential element of a cause of action for wrongful death." *Morton v. Mutchnick*, 904 S.W.2d 14, 16 (Mo.App.W.D. 1995).[36] Consistent with that principle, each count of Boland's wrongful death action—whether the theory of recovery asserted was for battery, or negligent hiring or supervision, or conspiracy to conceal information from Decedent and other patients—alleged that the fault of Defendants caused the death of Boland's father.

The only allegations that concerned fraud *after* Mr. O'Hara's death were found in Paragraph 18 of the First Amended Petition, alleging Defendants "withheld evidence regarding the nature of Decedent's death from *Plaintiff*," (L.F. 2358; A22), and Paragraph 73 in Count VI, which alleged that "Defendants concealed the suspicion [*sic*] activities of Jennifer Hall both prior to *and after* Decedent's admission to Hedrick and death." (L.F. 2368; A32.) (Emphasis added.)

Of course, concealment of Hall's activities from Boland *after* Mr. O'Hara died *could not have caused his death*. In that regard the postmortem concealment was not "germane to any cause of action" for his wrongful death, *Autenrieth, supra*, 176 S.W.2d at 550, because it did not directly cause or directly contribute to cause the patient's death, *Kiviland, supra*, 331 S.W.3d at 306.

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[36] *Morton* was overruled on other grounds by *Estate of Mickels*, 542 S.W.3d 311, 314 (Mo. 2018).

So why did Boland plead facts in her wrongful death case concerning a cover-up *after* Mr. O'Hara died, if the cover-up did not cause his death? The answer lies in the pleading rules Missouri cases require when a potential statute-of-limitations defense is manifest: "If a petition shows on its face that it is barred by the statute of limitations, and if the action is such that the bar may be obviated by some exception in the statute, the facts stated in the petition should show such exception." *Wilbur Waggoner Equipment and Excavating Co. v. Clark Equipment Co.*, 668 S.W.2d 601, 602 (Mo.App.E.D. 1984). *Accord: Bosworth v. Sewell*, 918 S.W.2d 773, 777-778 (Mo. 1996). Boland was not entitled to recover from Defendants for her father's death *because* they covered up the circumstances of his death, but (she believed) the concealment of those circumstances would avoid the affirmative defense of the wrongful death statute of limitations.

Defendants argued in the Western District, and later in this Court, that the special statute of limitations for wrongful death barred Boland's action, regardless of their fraudulent conduct. Thus, in the Respondent's Brief that Saint Luke's Health System, Inc. filed in Case No. WD75364 in *Boland I,* it claimed: "There is no exception for fraudulent concealment in the statute, and therefore, as both circuit judges who granted judgment to Defendants recognized, *Plaintiffs' allegations of fraudulent concealment are immaterial under the statute." Id.* at 8. (Emphasis added.)[37] Similarly, page 15 of the Combined Substitute Brief of Respondents, filed with this Court in *Boland I*, SC93906, argued that: "As both circuit court judges . . . recognized, *the allegations of fraudulent concealment are legally immaterial*, as only the General Assembly may create exceptions to a

[37] This court may take judicial notice of its own records and may take judicial notice of the records of other cases when justice so requires, or where the cases are so closely interwoven, or so clearly interdependent as to invoke a rule of judicial notice in one suit of the proceedings in another suit. *Knorp v. Thompson*, 352 Mo. 44, 175 S.W.2d 889, 894 (1943).

statute of limitations provided for a statutory cause of action." (A81; emphasis added.)

In *Boland I* Plaintiffs disagreed with these arguments, and ultimately so did the Principal Opinion in *Beisley, supra*, but not the Principal Opinion in *Boland I*, which held that "section 537.100 does not provide for delayed accrual or an exception for fraudulent concealment." 471 S.W.3d at 705. In other words, this Court agreed with Defendants that the existence of their fraudulent concealment after Hall worked her depredations was immaterial to operation of the statute of limitations for wrongful death.

A finding that evidence is immaterial has profound consequences at bar. Materiality is concerned with the "fit between the evidence and the case. It looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." 1 MCCORMICK ON EVIDENCE § 185 at 994 (7th ed. 2013). Immaterial matter in a pleading is surplusage and "ordinarily will be disregarded." 71 C.J.S. *Pleading* § 62 (December 2018 Online Update). If, as Defendants claimed (and this Court found) in *Boland I*, fraudulent concealment was immaterial in the wrongful death action—i.e., it was "not a matter in issue"—then it logically follows that the cover-up was not part of the "evidence necessary to sustain" the wrongful death claim, for which reason it was part of a "separate and distinct cause of action." *Collins*, 996 S.W.2d at 517

2. Plaintiffs' Claims for Fraudulent Nondisclosure

In Boland's second suit—the 2016 action for fraudulent nondisclosure—she alleged that Hedrick knew that Boland and other survivors of the nine victims of Hall's reign of death would be unable to learn the truth about the circumstances under which their loved ones died because that information was known solely to Defendants and their agents (L.F. 2291-2293, A47-49). She also alleged that Defendants failed to disclose that information to the survivors of Hall's victims in order to prevent them from pursuing a timely wrongful death action (L.F. 2293,

A49). That conduct had its intended effect: Boland (and the other Plaintiffs) were deprived of the opportunity to timely assert claims for wrongful death and the damages available under § 537.090. Additionally, Boland alleged that Defendants' fraudulent conduct "showed complete indifference to or conscious disregard for the rights of others," including Plaintiffs, thereby warranting imposition of punitive damages against those fraud-feasors (L.F. 2295; A51).

In this regard it is important to recognize a distinction between the very similar concepts of fraudulent *concealment* and fraudulent *nondisclosure*. These phrases are sometimes conflated, but as Judge Martin points out in *Doe v. Ratigan*, 481 S.W.3d 36 (Mo.App.W.D. 2015), they are not the same thing. The former refers to "the allegations necessary to claim that a defendant's fraudulent concealment of his own negligent conduct tolls the statute of limitations for negligence." *Doe, supra*, 481 S.W.3d at 45, *citing Batek v. Curators of the University of Missouri*, 920 S.W.2d 895, 900 (Mo. 1996). It is not an independent cause of action, 481 S.W.3d at 44.

In contrast, what some people refer to as the "tort" of fraudulent concealment is really fraudulent nondisclosure, and even then, there is no tort separate from traditional fraud, *Hess v. Chase Manhattan Bank, USA, NA,* 220 S.W.3d 758, 765 (Mo. 2007). In *Hess* this Court notes the nine essential elements of a fraud claim:

> (1)a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury.

220 S.W.3d at 765. Sometimes, "a party's silence amounts to a representation where the law imposes a duty to speak." *Id.* "[I]n such cases, a party's silence in

the face of a legal duty to speak replaces the first element: the existence of a representation." *Hess, supra,* 220 S.W.3d at 765.[38]

The allegations by Boland and the other Plaintiffs were sufficient to state a cause of action for fraudulent nondisclosure by Defendants. A duty to speak can arise "where there is a relation of trust and confidence between the parties or where one party has superior knowledge or information not within the fair and reasonable reach of the other party." *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. 1993). And, as *Hess* holds, when there is a duty to disclose, a party's silence amounts to a false representation, 220 S.W.3d at 765.

It is a matter of black-letter law that health care providers occupy a relationship of trust and confidence with their patients, 65 C.J.S. *Physicians and Surgeons* § 93 (December 2018 Update). *Accord: Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 670 (Mo. 1993) (health care provider "occupies a position of trust and confidence as regards his patient—a fiduciary position"). Moreover, there is no question that Defendants had superior knowledge of internal complaints about Hall and the reason she was suspended when they learned of her activities.

Although there are no Missouri cases addressing the issue, the majority rule in American jurisprudence is that misrepresentation resulting in the loss of a cause of action will support an action for fraud, Griffin, Anno., *Fraud and Deceit: Liability in Damages for Preventing Bringing of Action Before Its Being Barred*

[38] Missouri Courts antedating and following *Hess* have used the phrase "fraudulent nondisclosure" as a sort of convenient, legal shorthand to distinguish traditional fraud—where the fraud-feasor makes affirmative representations—from fraud where the fraud-feasor remains silent in the face of a duty to speak, *see, e.g., Martin v. McNeill,* 957 S.W.2d 360, 363 (Mo.App.W.D. 1997), and *Richards v. ABN AMRO Mortgage Group, Inc.,* 261 S.W.3d 601, 607 (Mo.App.W.D. 2008). In their Brief Plaintiffs continue the habit of using "fraudulent nondisclosure" as that sort of legal shorthand, meaning no disrespect for this Court's pronouncement in *Hess* that it is not a separate tort.

by Statute of Limitations, 33 A.L.R.3d § 2, 1077, 1082 (1970). Thus, in *Beeck v. Kapalis,* 302 N.W.2d 90, 94 (Iowa 1981), the Supreme Court of Iowa held that, "A person who fraudulently causes a plaintiff to lose an otherwise valid cause of action is liable for damages when the plaintiff's claim is barred by the statute of limitations."[39]

3. The fraud actions did not arise out of the same underlying facts or transaction as the death actions

The gravamen of Plaintiffs' death actions was that Defendants' employee murdered Decedents. Plaintiffs pled different theories of recovery to seek redress for that result, including battery by Hall, negligent hiring of Hall, and the like. They also pled fraudulent concealment that prevented Decedents and their families from avoiding admission into Hedrick Medical Center, but that fraud occurred *before* Hall murdered decedents and caused their deaths. The only fraud alleged *after* Decedents' deaths related to the cover-up that led to their failure to timely file wrongful death actions.

Recall, in *Grue, supra*, this Court defined a cause of action as "the underlying facts combined with the law giving the party a *right* to a remedy of one form or another based thereon." 210 S.W.2d at 10. And transaction was defined as the "aggregate of all the circumstances which constitute the foundation for a claim," including "all the facts and circumstances *out of which the injury complained of arose*." *Id.* (emphasis added). The underlying facts giving the Plaintiffs at bar a remedy for the wrongful deaths of Decedents consisted of the actions of Hall that *caused* their deaths. The facts and circumstance out of which the injury complained of in the death actions arose was Hall's homicidal conduct. The underlying facts giving the Plaintiffs a remedy for fraud was the ongoing

[39] In seeking summary judgment, Defendants did not claim in the trial court that Missouri would not recognize a cause of action for fraudulently causing a plaintiff to lose a cause of action when it was barred by the statute of limitations.

concealment by Defendants of what Hall did until the running of the statute of limitations extinguished their causes of action. Those were the circumstances out of which their loss of the causes of action arose. They were separate and distinct causes of action and transactions.

Was the post-death fraud germane to the death action? It was in *Beisley*, *supra,* 469 S.W.2d at 444, where the Court held that common law maxims precluding one from benefitting from his or her own fraud equitably estopped defendant from raising the wrongful death statute of limitations as a defense. But that was not the law of this case announced in *Boland I,* which held that Defendants' fraudulent concealment would have no bearing on the running of the statute of limitations, 471 S.W.3d at 705. Absent the effect of Defendants' fraudulent concealment alleged by Plaintiffs in their pleadings in *Boland I*—to serve as an avoidance to the affirmative defense of the statute of limitations—Defendants' postmortem deceit had nothing to do with the death actions. Stated another way, as despicable as Defendants' mendacity in the years following the murders was, it did not kill Decedents.

The gravamen of Plaintiffs' fraud actions for Defendants' postmortem deceit and cover-up was fundamentally different from Hall's homicidal conduct, the occurrences that were the subject of the death cases. The deceit that is the subject of the action now before the Court did not kill anyone; it just deprived Plaintiffs of their right to seek justice.

4. The causes of actions for fraud are separate and distinct from the causes of actions for death, and the evidence necessary to sustain those actions is different

Even assuming *arguendo* that in some very broad, general sense the fraud actions could be said to have arisen from the same "transaction" or constellation of background facts as the wrongful death lawsuits, it nonetheless still would be true that the fraud claims are, unquestionably, *separate and distinct* causes of

action from the causes of action for wrongful death, *Collins, supra*, 996 s.w.2d at 517. This is so because for each Plaintiff "the basic subject matter of the two suits is altogether different." *Id*. The basic subject matter of the death cases was that Defendants, acting through their agent, killed Decedents. The basic subject matter of the fraud cases is that after Hall murdered Decedents, Defendants covered up the killings to prevent Plaintiffs from timely filing their wrongful death actions. As in *Chamberlain II*, *supra*, 189 S.W.2d at 540, even though the two claims involved related occurrences, they are separate and distinct causes of action.

Moreover, "the evidence necessary to sustain their respective claims for relief" for wrongful death and fraud is different, *Collins, supra*, 996 S.W.2d at 517. Evidence of the fraud practiced by Defendants after the deaths would not sustain the causes of action for wrongful death, and evidence of the wrongful deaths would not sustain their claim that Defendants defrauded Plaintiffs after Decedents died. This is so because the ultimate facts in the two claims are different.

This Court has defined an ultimate fact as "one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question . . . ." *Abeles v. Wurdack*, 285 S.W.2d at 544, 549 (Mo. 1955). Missouri jury instructions submit ultimate facts rather than evidentiary facts, *Johnson v. Auto Handling Corporation*, 523 S.W.3d 452, 463 (Mo. 2017). A Missouri Approved Instruction for wrongful death would focus on the conduct of Hall or the circumstances of her hiring that resulted in Plaintiffs' right to seek redress for the deaths of Decedents, M.A.I. 22.02. In contrast, an instruction for fraudulent nondisclosure would submit ultimate facts relating to the nondisclosure of Hall's depredations *after* the deaths of Decedents, Plaintiffs' reliance on the nondisclosure, materiality, etc., M.A.I. 23.05.[40] The ultimate facts in the wrongful death actions—i.e., "those

[40] M.A.I. 23.05 hypothesizes traditional fraud involving an affirmative misrepresentation, so it would have to be modified in a case involving nondisclosure in the face of a duty to speak, *see, e.g.*, *Walters v. Maloney,* 758 S.W.2d 489, 497-498 n.4 (Mo.App.S.D. 1988).

questions, points or matters of fact in issue essential" to the decision in the earlier case, *King, supra*, 821 S.W.2d at 502 n.4, necessarily did not focus on nondisclosure since the cover-up was immaterial to the death actions under the holding in *Boland I*.

Finally, the claims for Defendants' fraud that prevented the timely filing of the death actions "did not arise at the same time as the right to assert the [death claims]," *Mach v. Wells Concrete Products Co.*, 866 N.W.2d 921, 925 (Minn. 2015). The distinction between a single claim, that cannot be split, and claims that are distinct, is that the former arises *immediately* out of one and the same act, while several claims arise out of different acts. *Peper Automobile, supra*, 187 S.W. at 111. That is one of the reasons this Court held that the plaintiff's personal injury claim in *Chamberlain II* was separate and distinct from his wrongful death claim, because the death action "arose *at a different time* in this case (when plaintiff's wife died) than did plaintiff's action for his own injuries." 189 S.W.2d at 540.[41]

Plaintiffs' fraud claims *sub judice* did not arise at the same time as their wrongful death claims. *Boland I* holds that the death claims accrued immediately upon the death of Decedents, 471 S.W.3d at 710. But Plaintiffs' claims against Defendants for fraudulently inducing Plaintiffs to not timely file their death claims did not arise until their claims were barred by the statute of limitations, *years* after Decedents' deaths.

[41] Recall that the plaintiff in *Chamberlain II* was injured in the same accident that killed his wife, but his personal injury claim arose immediately upon the occurrence of the accident, while his claim for the wrongful death of his wife did not accrue until two days later, when his wife died, *Chamberlain I, supra*, 173 S.W.2d at 58.

5. *Res Judicata* Should Not Be Used to Perpetuate an Injustice at bar

In this case, Defendants were able to win in *Boland I* because they lied, they cheated, and they concealed the truth. Thus, they profited from their fraud in covering up the homicides their employee committed.

Although Plaintiffs respectfully disagree with the outcome of *Boland I*, they do not doubt that it was the product of the sincere belief of the majority joining in the Principal Opinion as to what the law required. One need not be clairvoyant to perceive the anguish this caused the majority. The Principal Opinion refers to the fact that "despite the harsh result, this Court is obligated to follow the mandate of the statute." 471 S.W.3d at 704. At another point the majority said the result of the Principal Opinion was "distasteful" and that "the conclusion that the plaintiffs are without a remedy is a difficult one." *Id*. at 713. Indeed, the Principal Opinion refers to the result reached as "bad law." *Id*. It is not difficult to imagine the members of the majority holding their noses as they voted to uphold the dismissal of Plaintiffs' death actions, despite the alleged perfidy of Defendants after the killings.

The Court's decision was a consequence of the majority's view of its obligation to apply the plain language of the statute. But is the same thing true of *res judicata*?

A thoughtful exploration of the competing interests at stake appears in *Delahunty, supra,* 674 A.2d at 1295, where the Connecticut Supreme Court said:

> [W]e recognize that a decision whether to apply the doctrine of *res judicata* to claims that have not actually been litigated should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close. . . . * * * The doctrines of preclusion, however, should be flexible and must give way when their mechanical application would frustrate other social policies based on

> values equally or more important than the convenience afforded by finality in legal controversies. . . .[42]

(Emphasis added.) *Delahunty* relied on an earlier opinion by the same court, *State v. Ellis*, 197 Conn. 436, 497 A.2d 989, 990 (1985), where it said:

> *Res judicata*, as a judicial doctrine, *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948), should be applied as necessary to promote its underlying purposes. * * * But by the same token, the internal needs of the judicial system do not outweigh its essential function in providing litigants a legal forum to redress their grievances. "Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong." Cleary, *Res Judicata Reexamined*, 57 YALE L. J. 339, 348 (1948).

The need for flexibility described in *Delahunty* touches on a theme deeply embedded in American claim preclusion jurisprudence. It is a matter of black-letter law that, "The doctrine of *res judicata*, . . . [is] founded upon principles of fundamental fairness. The doctrine . . . is not absolute; a court should not adhere to the doctrine where its application would work an injustice." 46 AM.JUR. 2d *Judgments* § 449 (Nov. 2018 Update). Similarly, in 50 C.J.S. *Judgments, supra,* § 931, the authors note:

> Courts should not apply *res judicata* rigidly or woodenly, but rather must give careful consideration to the case at hand before erecting the doctrine's preclusive bar. Principles of equity and fairness guide the application of the doctrine, and even where all the essential elements of *res judicata* are satisfied, its effect will be denied to avoid injustice. *Res judicata* may never be applied in such fashion as to deprive a party of the opportunity to have a full and fair determination of the issue.

Many cases from other states mirror these concerns: *Mach, supra,* 866 N.W.2d at 926 ("*Res judicata* is not applied rigidly but is a 'flexible doctrine' in which the focus is on whether its application would work an injustice on the party against whom estoppel is urged"); *McBryde Sugar Company, Limited v.*

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[42] *Delahunty* has been cited favorably in Missouri, *Sotirescu, supra*, 52 S.W.3d at 6.

Robinson, 54 Haw. 174, 504 P.2d 1330, 1334 (1973) (same); *Willard v. Whited*, 211 W.Va. 522, 566 S.E.2d 881, 885 (2002) ("*res judicata* is a principle of public policy and should be applied so as to give rather than deny justice"); *Universal Const. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla. *en banc*. 1953) (even where all the requisites of *res judicata* exist, it should not be so "rigidly applied as to defeat the ends of justice"); *F.E.V. v. City of Anaheim*, 15 Cal.App.5th 462, 223 Cal.Rptr.3d 213, 216-217 (2017) (in rare circumstances, "a final judgment may be denied claim preclusive effect when to do so would result in manifest injustice"); *People v. Somerville*, 42 Ill.2d 1, 245 N.E.2d 461, 464 (1969) (Illinois Supreme Court has relaxed strict application of *res judicata* "where fundamental fairness so requires"); *Westmeyer v. Flynn*, 382 Ill.App.3d 952, 889 N.E.2d 671 (2008) (same); *Gloucester Marine Railways Corp. v. Charles Parisi, Inc.,* 36 Mass.App.Ct. 386, 631 N.E.2d 1021, 1025 (1994) (since claim preclusion is "grounded upon considerations of fairness and efficient judicial administration, the doctrine is not applied rigidly where such interests would not be served"). Remarkably, *even Kansas* follows this rule, *Cain v. Jacox*, 302 Kan. 431, 354 P.3d 1196, 1199 (2015) ("When applying [*res judicata*], Kansas courts must be mindful of the equitable principles animating the doctrine," which means it must be "given a flexible, common-sense construction" and "not applied so rigidly as to defeat the ends of justice").

Missouri courts have expressed similar sentiments: "The term "*res adjudicata*" is not a fetish before which all defenses must bow down. * * * [I]t is a doctrine of peace. Nor is it to be applied to the denial of justice . . . ." *E.E. Souther Iron Co. v. Woodruff Realty Co.,* 175 Mo.App. 246, 158 S.W. 69, 72 (1913); *accord: YMCA of St. Louis and St. Louis County v. Sestric*, 362 Mo. 551, 242 S.W.2d 497, 507-508 (*en banc*. 1951) (*res judicata* "not applied at all when obvious injustice would result"). The concern that *res judicata*, promiscuously applied, could close the courts to all inquiry into the truth, led the United States Supreme Court in *Brown v. Felsen*, 442 U.S. 127, 132 (1979), to hold:

> Because *res judicata* may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.

Justice Blackmun could have been talking about the case at bar when he said that *res judicata* may shield "the fraud and the cheat," which is why it is to be "invoked only after careful inquiry." *Brown, supra*, 442 U.S. at 132. In the instant cause the allegation is that Defendants (through their employee) killed nine patients who went to Hedrick Medical Center for professional medical care but received instead the tender mercies of Jennifer Hall. Then, rather than tell the victims' families the truth about what happened to their parents or spouses or siblings, they covered up what Hall did in order to protect the hospital from liability. And in that regard, they enjoyed an unalloyed triumph. They killed, they concealed, they cheated, and they got away with it. Indeed, they used their deceit to boost their profits, since they avoided accountability for the lives shed at their institution by cheating Plaintiffs out of their opportunity to seek justice.

No one who reads *Boland I* should harbor illusions that any member of this Court thought the result was fair. The Principal Opinion gave no pretense that the outcome it reached was just. It found that it was obligated to follow the mandate of § 537.100, "despite the harsh result" it caused. 471 S.W.3d at 704.

But unlike the situation in *Boland I*, there is no statutory compulsion when it comes to *res judicata*. *Res judicata* is a common law doctrine, *Chesterfield, supra,* 64 S.W.3d at 318. Missouri cases recognize that the rule should not be used to effect "the denial of justice," or "to close the courts to all inquiry into the truth." *E.E. Souther Iron Co., supra,* 158 S.W. at 72.

There are two ways that *res judicata* could be employed to deny justice in this case. The first would be to artificially broaden the scope of what was included in the death action. As Plaintiffs noted earlier, "Application and explanation of the rules of claim preclusion depend on defining the scope of the claim or cause of

action involved in the first action." FEDERAL PRACTICE AND PROCEDURE, *supra*, §4407. The broader a court views the scope of the cause of action in the first action, the more likely it is that claim preclusion will apply. That concern was candidly addressed in *Dore v. Kleppe*, 522 F.2d 1369 (5th Cir. 1975). In discussing "the problems of deciding whether the cause of action in one suit is identical to that in another," the Fifth Circuit held that, in "making this decision [as to identity of actions] it should be remembered that *res judicata* is a principle of public policy and should be applied so as to give, rather than deny, justice." *Id.*, at 1374. Plaintiffs believe existing precedent they have cited above establishes realistic parameters for deciding what is the same claim or cause of action in the instant cause; those parameters should not be stretched to the point of injustice in pursuit of finality.

The second way *res judicata* could be misapplied in this case would be to ignore an important qualifier that goes back all the way to *Henderson v. Henderson, supra*, where the Court said that *res judicata* extended to every point that belonged to the subject of litigation, "which the parties, *exercising reasonable diligence,* might have brought forward" in the earlier case. 3 Hare at 115 (emphasis added). Judge Breckenridge, writing for the Western District in *Whiteman v. Del-Jen Construction, Inc.*, 37 S.W.3d 823, 829 (Mo.App.W.D. 2001), defined "reasonable diligence" as "a fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." (Internal quotation marks and citations omitted.)

In the trial court at bar, Plaintiffs argued that they did not fail to exercise a fair degree of diligence expected from someone of ordinary prudence under the circumstances existing when they filed suit for wrongful death (without joining an action for fraud) because in 2010 they had a reasonable basis for believing that *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958), had been superseded by *O'Grady v. Brown,* 654 S.W.2d 904 (Mo. 1983). They based that belief on the Western

District's then 18-year-old Opinion in *Howell v. Murphy*, 844 S.W.2d 42, 46-47 (Mo.App.W.D. 1992), when it said, "we conclude that the reasoning of *Frazee* is superseded by *O'Grady,*" and held that fraud tolled § 537.100 (L.F. 2294; A50).

But *Howell* was not the only decision that questioned the viability of *Frazee*. On November 26, 2013, when the Western District issued the 2013 Opinion in *Boland, supra,* 2013 WL 6170598 at *9, three different judges of that Court unanimously found that the conceptual basis for *Frazee* was "nullified by *O'Grady*" and declined to follow its holding that fraud would not prevent the bar of the statute of limitations.

Finally, on the same day *Boland I* was originally handed down by this Court, in *Beisly* four judges agreed that "application of common law maxims precluding one from benefitting from his or her own fraud and application of the doctrine of equitable estoppel bars [defendant] from asserting the statute of limitations as a defense" in a death action. 469 S.W.3d at 444. Even though the Plaintiffs in *Boland I* also contended that equitable estoppel would preclude Defendants from relying on § 537.100 as a defense, 471 S.W.3d at 703, *Boland I* rejected that argument.

To summarize, six Western District Judges and four Judges sitting on this Court (in *Beisly*) all agreed on a result that would have allowed Plaintiffs to pursue their death claims, in which case Plaintiffs would never have experienced the loss of the death actions which resulted in their fraud actions. Of course, Plaintiffs do not question that *Boland I* is the law of this case and that it precludes recovery for any remedy under the Wrongful Death Act. But, given the belief by ten appellate Judges of this State that there were at least some exceptions to the wrongful death statute of limitations, Plaintiffs would respectfully submit that their failure to file fraud claims as part of their pleadings in *Boland I*—claims that would have been moot had the result in *Boland I* been the same as the results in *Howell* and *Beisly*—does not reflect a lack of reasonable diligence on their part.

Is the failure to anticipate changes in the law emblematic of a lack of reasonable diligence? Consider this Court's post-conviction relief cases. In order for such relief to be granted, the movant must demonstrate that criminal defense counsel failed to "exercise the level of skill and diligence that a reasonably competent counsel would exercise in a similar situation." *Zink v. State*, 278 S.W.3d 170, 176 (Mo. 2009). Missouri Courts have never held that trial counsel was guilty of a lack of reasonable diligence for not anticipating changes in the law: "[C]ounsel's conduct is measured by what the law is at the time of trial. [Citation omitted.] Counsel will generally not be held ineffective for failing to anticipate a change in the law." *Id*. at 191. Stated somewhat differently, counsel is not required to be clairvoyant in anticipating changes to existing law, *Felton v. State*, 753 S.W.2d 34, 35 (Mo.App.E.D. 1988). *Accord: Johnson v. State*, 479 S.W.2d 416, 420 (Mo. 1972) (this Court declines to require clairvoyance by counsel, eschewing the idea "that hindsight should be the standard to determine the competency of counsel"); *Knopke v. Knopke*, 837 S.W.2d 907, 922 (Mo.App.W.D. 1992) (attorney "not required to be clairvoyant in predicting the success of the claims he asserts").

Plaintiffs freely admit that they are not clairvoyant, but they would respectfully submit that their failure to anticipate the overruling of *Howell v. Murphy* was no more lacking in reasonable diligence than is the failure of criminal defense counsel to anticipate changes in the law. Their failure to plead alternative counts for fraudulent concealment does not rise to the level of a lack of reasonable diligence.

This Court should reverse the judgments of the trial court on the ground that *res judicata* bars Plaintiffs' fraud actions.

II. The trial court erred in entering summary judgment for Defendants on the ground that the statute of limitations for fraud, § 516.120(5), barred Plaintiffs' fraud claims because in order for the statute of limitations to run, the damage resulting from the fraud must be sustained and discoverable; it is not sufficient that the Plaintiffs' injuries were speculative or contingent on the outcome of other litigation in order for the fraud to be actionable. In the instant cause, for purposes of the running of the statute of limitations, Plaintiffs' damages were not sustained and discoverable until *Boland I* overruled *Howell v. Murphy*, which previously recognized that fraud could prevent the assertion of the statute of limitations for wrongful death. That decision in *Boland I* was less than five years before Plaintiffs commenced their action for fraudulent concealment.

A. Standard of Review

The trial court also granted summary judgment on the basis that Plaintiffs' claims were barred by the statute of limitations for fraud actions. As was true under Point I, *supra*, in reviewing a summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. *Goerlitz, supra,* 333 S.W.3d at 452. Since the propriety of summary judgment is purely a question of law, this Court reviews the actions of the trial court *de novo, Id.* As the Court held in *The Lamar Company, LLC, supra,* 512 S.W.3d at 782, this "standard of review requires us to determine whether the trial court properly applied the law to uncontroverted facts to enter judgment as a matter of law—an obvious question of law that is subject to *de novo* review."

B. The standard for applying Section 516.120(5)

The trial court found that Plaintiffs' claims were barred by R.S.Mo. § 516.120(5) (2016) (A1), which provides a five-year statute of limitations for: "An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." In *Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo. 1956), this Court read § 516.120(5) *in pari materia* with R.S.Mo. § 516.100 (2016) (A78), which provides in relevant part that "for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment . . . ." In order for a fraud action to accrue under these two statutes, three things must occur:

(1) Damage must be sustained, § 516.100;

(2) The damage must be discovered by the aggrieved party, § 516.120(5); and

(3) The fraud must be discovered within ten years of the facts constituting the fraud, § 516.120(5).

"A cause of action accrues when the right to maintain a suit arises." *Brink v. Kansas City*, 358 Mo. 845, 217 S.W.2d 507, 509 (*en banc*. 1949). When an act is not "legally injurious until certain consequences occur, then the period of limitations runs from the date of consequential injury." *Chemical Workers Basic Union v. Arnold Savings Bank*, 411 S.W.2d 159, 163 (Mo. *en banc*. 1966).

C. Fraud is not actionable without substantial damages

These rules have special force in the case of fraud. Fraud "belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action." *Lammers v. Greulich*, 262 S.W.2d 861, 864 (Mo. 1953). Thus, "[p]roof of

substantial injury and damage is essential to recovery in an action for fraud and deceit." *Id.* (Emphasis added.) "Fraudulent representations, without injury, are not actionable." *Mills v. Keasler*, 395 S.W.2d 111, 118 (Mo. 1965); *accord: City of Harrisonville v McCall Service Stations,* 495 S.W.3d 738, 749 (Mo. 2016). Potential damage that remains a speculative harm is not enough, *Roberts v. BJC Health System*, 391 S.W.3d 433, 438 (Mo. 2013). Evidence that leaves the existence of damages to speculation will not support a cause of action for fraud, *Grosser v. Kandel-Iken Builders, Inc.*, 647 S.W.2d 911, 916 (Mo.App. E.D. 1983). On this latter point, it is a matter of black-letter law that "[s]peculative damages cannot support a cause of action for a fraud. The plaintiffs suing in a fraud claim are required to show that the damages are definite and ascertainable, rather than speculative." 37 C.J.S. *Fraud* § 70 (December 2018 Online Update).

Accordingly, a "contingent injury, where loss may or may not occur, is insufficient to support a recovery for fraud. Under the general rule, recovery in a fraud claim cannot be had for damage that is contingent on the outcome of unsettled disputes, *such as a pending litigation . . . .*" *Id.* (emphasis added). In commenting on the confluence of ripeness and actionability of fraud, Judge Posner, writing in *Midwest Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 526 (7th Cir. 1993), said: "Damages are for people who have been harmed. You cannot seek an award of damages for a fraud, therefore, before the fraud has harmed you." And Missouri cases make clear that the statute of limitations for fraud will not begin to run until damage is sustained. *Cullom v. Crittenton*, 959 S.W.2d 915, 918 (Mo.App.W.D. 1998).

Moreover, it is not enough that substantial damage is sustained; section 516.120(5) also provides that, even after such damages have been sustained so that the tort is complete, the cause is deemed not to have accrued "until the discovery by the aggrieved party. . . of the facts constituting the fraud." (This includes, of course, discovery of substantial injury and damages caused by the fraud, *Lammers, supra*, 262 S.W.2d at 864.) Missouri courts "construe § 516.120(5) to expect a

plaintiff to act with due diligence to discover the facts constituting the fraud." *Schwartz v. Lawson*, 797 S.W.2d 828, 832 (Mo.App.W.D. 1990).

D. Until *Boland I*, Plaintiffs had not suffered substantial, noncontingent damages that were discoverable through the exercise of due diligence

Had the Defendants' cover-up caused Plaintiffs to sustain substantial damages—as opposed to speculative, contingent damages—when they filed their first suit? Recall, this was *before Boland I* overturned *Howell v. Murphy* and said that fraudulent concealment could never avoid the bar of the wrongful death statute of limitations. But what if the Court had come to the opposite conclusion, as in *Beisly*; i.e., what if Plaintiffs had been allowed to assert equitable estoppel so as to avoid the assertion of the wrongful death statute of limitations? Consider this language from the 2018 Opinion of the Western District concerning the colloquy between the Court and counsel at the oral argument in April of 2018:

> As Hospital's counsel admitted at oral argument, had the wrongful death section 537.100 statute of limitation been equitably tolled under the authority of *Howell v. Murphy*, 844 S.W.2d 42 (Mo.App.W.D. 1992), or had Hospital been equitably estopped from asserting the statute of limitation defense pursuant to *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. *banc* 2015), Hospital would argue that *any attempts by Appellants to pursue claims for fraudulent misrepresentation would be subject to dismissal on the basis that Appellants would not have been able to establish that they had suffered any damage as a result of the alleged misrepresentation*.

Slip Opinion WD80928 at 8, n.10 (A71) (emphasis added). Stated another way, Defendants admitted that any damages Plaintiffs may have suffered from the fraud *before the decision in Boland I* were contingent on the outcome of that case. Had Plaintiffs prevailed in *Boland I*, they would have suffered no damages as a result of Defendants' nondisclosure, which means they could not have pursued an action for fraud, *Mills v. Keasler, supra*, 395 S.W.2d at 118 ("Fraudulent representations, without injury, are not actionable").

In the context of the instant causes, the harm proximately caused by Defendants' fraudulent nondisclosure was the loss of Plaintiffs' actions for wrongful death *if* those actions were barred by the statute of limitations. So long as the death actions were still pending, Plaintiffs had the prospect of pursuing redress for the deaths of their Decedents, in which case they would not have suffered any damage because of Defendants' continuing fraudulent nondisclosure. As long as *Howell* provided a potential doorway into the courthouse, the damages Plaintiffs suffered as a result of Defendants' cover-up were always contingent, "where loss may or may not occur," something that was "insufficient to support a recovery for fraud." C.J.S. *Fraud*, *supra*, § 70. If a cause of action does not accrue until "the right to maintain a suit arises," *Brink, supra*, 217 S.W.2d at 509, and if speculative damages that are contingent on the outcome of unsettled disputes, such as pending litigation, are insufficient to support a recovery for fraud, C.J.S. *Fraud*, *supra*, § 70, then it logically follows that no right to maintain a suit for fraud arose when the original death actions were filed in 2010 and 2011. Those rights did not ripen from speculative to substantial damages until *Boland I* closed the door on Plaintiffs' death actions.

Moreover, even if there were damages caused by the nondisclosure before *Boland I* was decided, were they discoverable through the exercise of due diligence, *Schwartz, supra*, 797 S.W.2d at 832? Recall the discussion of reasonable diligence included under Point I, *supra*. When they filed their first suits, were they indolent because they relied on an 18-year-old unanimous Opinion by the Court of Appeals that another unanimous Opinion by three different Judges of the Court found persuasive in the 2013 Opinion?

Plaintiffs would submit that the statute of limitations for fraud never ran because the damages caused by Defendants' cover-up did not occur until 2015, when *Boland I* was decided. And even if they were sustained before *Boland I*, they were not capable of discovery through due diligence until after *Boland I* overruled

Howell. It follows that the trial court erred in granting summary judgment based on the fraud statute of limitations.

CONCLUSION

Plaintiffs would respectfully submit that the summary judgments entered in favor of Defendants should be reversed and these causes remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on the 29th day of January, 2019, the foregoing instrument was filed electronically with the Clerk of this Court, to be served by operation of the Court's electronic filing system upon all attorneys of record.

I further certify that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 18,086, not including the cover, table of contents, table of authorities or appendix.

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